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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 74,812

PATRICK ALLEN YOUNG,
Respondent.

_____ /

RESPONDENT'S BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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PATRICK ALLEN YOUNG,

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RESPONDENT'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Patrick Allen Young was the appellant in the district court and the defendant in the circuit court. He will be referred to herein as the respondent or by his proper name. The State of Florida was the prosecution below and will be referred to in this brief as the state. The record on appeal will be referred to in this brief by use of the symbol "R" and the transcript of the plea and sentencing hearing by use of the symbol "T," each followed by the appropriate page number in parentheses. All emphasis is supplied unless otherwise indicated.

11. STATEMENT OF THE CASE AND FACTS

Patrick Allen Young was released from his Department of Health and Rehabilitative Services (HRS) commitment program on July 9, 1987 [T 13]. At that time he was placed on a juvenile "aftercare" program (a post-commitment status) for a period of thirty days. During this time, Young was required to report to an HRS counselor once a week and to perform any additional post-commitment sanctions the court had ordered [T 13]. On August 16, 1987 (more than thirty days after he was released from his commitment program), Young was alleged to have committed two separate acts of grand theft of a motor vehicle [R 23-24].

Young entered a plea of guilty to some of the counts charged in the information [R 23-24] and was sentenced pursuant to section 39.111, Florida Statutes (1987) as an adult [T 10]. Over Young's objections, the trial court scored the aftercare program as "legal constraint" on Young's guidelines scoresheet. This additional six points brought Young's total score into the presumptive guidelines range of 2 1/2 to 3 1/2 years in prison [R 37]. Without those points, the guidelines sentence would have been community control or 12-30 months incarceration.

On direct appeal, the First District Court of Appeal held that the trial court erred in scoring points for legal constraint due to Young's status in the juvenile aftercare program. Young v. State, 549 So.2d 819 (Fla. 1st DCA 1989). (See Appendix A). The court certified that its opinion was in express conflict with Butler v. State, 543 So.2d 432 (Fla. 2d

DCA 1989), conferring upon this Court discretionary jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

111. SUMMARY OF ARGUMENT

The district court correctly reversed Young's sentence as his aftercare program should not have been scored as legal constraint under the guidelines. Rule 3.701(d)(6) of the Florida Rules of Criminal Procedure defines precisely what is meant by the term "legal status at time of offense." That rule includes many possible forms of legal constraint such as parole, probation, community control, escapees, fugitives, and others. Juvenile aftercare is not one of those programs included within the definition of legal constraint. For this reason the trial court erred in scoring this aftercare as legal constraint and the district court correctly reversed that ruling.

IV. ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED BY SCORING YOUNG'S
JUVENILE AFTERCARE STATUS AS LEGAL CONSTRAINT
UNDER FLORIDA RULE OF CRIMINAL PROCEDURE
3.701(D)(6).

The issue before this Court is whether juvenile aftercare, under the direction of the Department of Health and Rehabilitative Services (HRS), constitutes "legal constraint" as defined by Florida Rule of Criminal Procedure 3.701(d)(6). Rule **3.701(d)(6)** specifically delineates what is intended to be regarded as "legal constraint" for purposes of the sentencing guidelines:

6. Legal status at time of arrest is defined as follows: Offenders on parole, probation, or community control; in custody serving a sentence; escapees; fugitives who have fled to avoid prosecution or who have failed to appear for a criminal judicial proceeding or who have violated conditions of a supersedeas bond; and offenders in pretrial intervention or diversion programs.

This definition is exclusive. If this Court or the legislature wishes to extend the scope it may do so pursuant to appropriate procedures. However, for the time being, juvenile aftercare is conspicuously absent from the rule.

The sentencing guidelines, as adopted by the legislature in section 921.0015, Florida Statutes (1987), are substantive in nature. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987); Smith v. State, 537 So.2d 982 (Fla. 1988). Penal statutes are to be strictly construed, State v. Waters, 436 So.2d 66 (Fla. 1983); Earnest v. State, 351 So.2d 957 (Fla. 1977); Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927).

Essentially, any attempt to read more into a criminal/penal statute or rule must necessarily fail.

The First District Court of Appeal in this case based its ruling on its prior decision in Ellison v. State, 547 So.2d 1003 (Fla. 1st DCA 1989). In Ellison, the district court reasoned that because the definition of legal status in rule **3.701(d)(6)** was exhaustive, no other form of legal status may be considered constraint for purposes of scoring points on the sentencing guidelines scoresheet. "It is a general principle of statutory construction that the mention of one thing implies the exclusion of another: *expressio unius est exclusio alterius.*" *Id.* at 1917.

The state hopes to avoid this well-established rule of statutory construction in favor of the "analogy" approach taken by the second district in Butler v. State, 543 So.2d 432 (Fla. 2d DCA 1989). In Butler, the defendant had been furloughed when he committed a robbery. The trial court scored the furlough as a legal constraint and the second district affirmed, reasoning that because there was testimony that "a furlough is basically the same as community control", it may be scored as legal constraint on the guidelines scoresheet. *Id.* at 433.

As a preliminary matter respondent would note that in this case, unlike Butler, there was no testimony or evidence of any sort that juvenile post-commitment aftercare is analogous to community control or any other adult legal status. The only reference on the record to aftercare as a legal constraint

comes from the prosecutor who told the trial court that after-care is "tantamount to a kind of consecutive probation in the juvenile system" [T11]. This self-serving statement by the prosecutor is of no evidentiary value and cannot be used as a basis for ruling that aftercare is analogous probation.

However, the reasoning in Butler fails for a far more significant reason. As the state concedes, the second district ignored the principle of "expressio unius" [brief of petitioner at 6]. While the state would prefer to overlook this basic, well-established rule, this Court is not empowered to do so. Nor was the second district in Butler. Given the necessarily strict construction of rule 3.701(d)(6), there can be little doubt that this definition of legal status is exclusive, and that juvenile aftercare is not any part of the list, either by letter or by analogy.

The state also correctly concedes that juvenile aftercare is not specifically enumerated under rule 3.701(d)(6) [brief of petitioner at 7]. This should conclude any discussion of the matter. **As** this Court stated in Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927):

The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms.

(quoted in Wershaw v. State, 343 So.2d 605 (Fla. 1977) and Earnest v. State, 351 So.2d 957 (Fla. 1977)).


Accordingly, the district court in this case correctly reversed Young's sentence as it was based on points which were improperly scored as legal constraint on his guidelines score-sheet. Juvenile aftercare **may** not be considered legal constraint until the legislature, by statutes or this Court, by appropriate rule-making procedures, decides that it is legal constraint.

V. CONCLUSION

For the foregoing reasons, the respondent, Patrick Allen Young, respectfully requests this Court to approve the decision of the First District Court of Appeal and disapprove, to the extent that it conflicts with the decision below, the second districts opinion in Butler.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on the Merits has been furnished by hand-delivery to Gypsy Bailey, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Patrick Allen Young, #111178, Apalachee Correctional Institution, Post Office Box 699, Sneads, Florida, 32460, on this 29th day of November, 1989.



LAWRENCE M. KORN