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JAN 4 1995

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CHARLES HOWARD CIPSON,

Petitioner,

v.

CASE NO. 80,367

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Appellant/Petitioner, CHARLES HOWARD GIPSON, was the defendant before the trial court and the Appellee/Respondent, the State of Florida, was the prosecution. The parties will be referred to by their proper names or as they appeared before the trial court.

### SUMMARY OF THE ARGUMENT

The sentence imposed was appropriate and was not an upward departure sentence. The habitual offender (HFO) sentence is an alternative option the legislature has made available to meet the broad spectrum of sentencing needs. The HFO sentence is designed to deal with the "career criminal." The legislature has made it a priority to sentence HFO's to extended terms of incarceration. It is on this rationale that Wood, infra, is unsound. **The** guidelines are inapplicable to HFO sentences. A guidelines sentence imposed consecutively to an HFO sentence enforces the legislative intent of extended terms for HFOs. The Second District Court's decision in Boomer is correct and is supported by the Florida Supreme Court's decision in Skeens, infra.

## ARGUMENT

### ISSUE

THE DEFENDANT'S GUIDELINE SENTENCE WAS NOT AN UPWARD DEPARTURE SENTENCE BECAUSE HABITUAL FELONY OFFENDER SENTENCES ARE REMOVED FROM THE SENTENCING GUIDELINES AND IT IS THE LEGISLATIVE INTENT THAT HABITUAL FELONY OFFENDERS SERVE EXTENDED PERIODS OF INCARCERATION SO THAT IMPOSING A GUIDELINES SENTENCE CONSECUTIVELY TO A HABITUAL OFFENDER SENTENCE EFFECTUATES THE LEGISLATIVE INTENT.

The instant case involves the identical issue pending before this Honorable Court in Boomer v. State, 596 So. 2d 730 (Fla. 2d DCA 1992), [Florida Supreme Court Case #79,638, oral argument scheduled, February 5, 1993].

The trial court did not err in imposing a guidelines sentence to run consecutively to **the** non-guidelines habitual offender sentence. The HFO sentence is an alternative option that the legislature has made available to meet the broad spectrum of sentencing needs. As opposed to the ordinary guidelines sentence, the HFO sentence is designed to deal with the "career criminal." Section 775.0841, Florida Statutes (1991) expresses the legislative findings and intent regarding the sentencing of career criminals:

The Legislature hereby finds that a substantial and disproportionate number of serious crimes is committed in Florida by a relatively small number of multiple and repeat felony offenders, commonly known as career criminals. The Legislature further finds that priority should be given to the investigation, apprehension, and prosecution of career criminals in the use of law enforcement

resources and to the incarceration of career criminals in the use of available prison space. The Legislature intends to initiate and support increased efforts by state and local law enforcement agencies and state attorneys' offices to investigate, apprehend, and prosecute career criminals and to incarcerate them for extended terms.

As is readily apparent, the Florida Legislature has expressed its intent to "crack down" on career criminals on its finding that a substantial and disproportionate number of crimes are committed by career criminals. It is the legislative intent, therefore, that criminals meeting the definition of an HFO be incarcerated for extended terms for the protection of the public.

It is on the preceding rationale that Wood v. State, 593 So.2d 557 (Fla. 5th DCA 1992) is unsound. In 1988, section 775.084, Florida Statutes, was amended by the legislature adding a new subsection which expressly removed HFO sentences from the sentencing guidelines. The statute was further **amended** in 1989, but the language of new subsection (4)(e) was retained. **The** effect of the 1988 amendment was to remove HFO sentences from the sentencing guidelines. Owens v. State, 560 So.2d 1260,1261 (Fla. 1st DCA 1990). **See also** Bateman v. State, 566 So.2d 358 (Fla. 4th DCA 1990); State v. Davis, 559 So.2d 1279 (2d DCA 1990), receded from on other grounds, 597 So.2d 309 (Fla. 2d DCA 1992); King v. State, 557 So.2d 899 (5th DCA), review denied, 564 So.2d 1086 (Fla. 1990). The 1988 amendment became effective on October 1, 1988. West v. State, 571 So.2d 89 (Fla. 2d DCA 1990); Owen, 560 So.2d at 1261.



As the legislature specifically made HFO sentences exempt from the guidelines, it can be inferred that the intent is for a guidelines sentence to run consecutively to an HFO sentence. Otherwise, the HFO defendant would not be subject to the extended term of incarceration intended by the legislature. This interpretation is supported by section 921.16 (1), Florida Statutes (1991) which provides that "[s]entences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless **the** court directs that two or more sentences be served concurrently." That probationary terms for two offenses were concurrent does not mandate concurrent sentences when probation is violated. Ellis v. State, 406 So.2d 76,78 (Fla. 2d DCA 1981).

The record indicates the defendant is well-deserving of his consecutive sentences because of his conduct subsequent to originally being placed on probation. It is the defendant's conduct in light of events subsequent to the initial probation that allows the trial court to impose any sentence it might have originally imposed. As the Fifth Circuit has stated:

[w]hen a greater sentence is imposed upon the revocation of probation, it can be based upon the defendant's subsequent conduct demonstrating his lack of amenability to reform.

Williams v. Wainwright, 650 F.2d 58,61 (5th Cir. 1981). The Florida Supreme Court has concurred in Scott v. State, 326 So.2d 165,166 (Fla.), cert. denied, 429 U.S. 836 (1976); see also State v. Payne, 404 So.2d 1055 (Fla. 1981).

The uniform set of standards established to guide trial judges and reduce subjectivity in sentencing is in contrast with the purposes of HFO sentencing, which provides the trial judge with a completely different sentencing structure to meet different sentencing needs. Those sentencing needs are the extended incarceration of repeat felony offenders committing substantial and disproportionate numbers of crimes. These criminals continue to commit crimes despite previous sentences under the guidelines or they have failed to reform despite being given the grace of probation.

The soundness of the Second District Court's decision in Boomer v. State, 596 So.2d 730 (Fla. 2d DCA 1992) is supported by this court's decision in Skeens v. State, 556 So.2d 1113 (Fla. 1990). In Skeens, the defendant **pled** guilty to being a felon in possession of a firearm and carrying a concealed firearm. The trial court sentenced him to two years community control to be followed by ten years probation on the first charge, and time served on the second. On appeal, Skeens argued that stacking community control and probation was improper because the clear legislative intent underlying chapters 921 and 948 is that these types of sentences are alternative dispositions and could not be imposed in tandem. This court rejected Skeens' argument, noting that "[p]robation, community control, and incarceration are alternative options that the legislature has made available to meet the broad spectrum of sentencing needs. Each involves different procedures and restrictions. We see no reason why pro-

bation and community control cannot be stacked to meet individualized sentencing circumstances." *Id.* at 1113, 1114.

As in Skeens, guidelines probation, guidelines community control, guidelines incarceration, HFO probation, and HFO incarceration are alternative options that the legislature and the courts, through decisional law, have made available to meet the broad spectrum of sentencing needs. Each is somewhat different from the other. Recognizing this fact, it was not improper to order that the defendant's guidelines sentence be served consecutively to his non-guidelines HFO sentence. It more closely follows the intent of the legislature regarding the treatment of those criminals designated habitual offenders. By statute and **case** law, the trial court clearly has the discretion to order concurrent or consecutive sentences. §775.021(4)(a), Florida Statutes. Mandatory non-guidelines sentences take precedence. Fla. R. Crim. P. 3.701(d)(9). Imposing the guidelines sentences to run consecutive to the HFO sentence was **not** improper. *See also, Ricardo v. State*, 17 F.L.W. D2481 (Fla. 2 DCA Case #91-02760, Opinion filed October 28, 1992) [A non-guidelines sentence (habitual offender sentence) is not to be considered when calculating the maximum guidelines sentence.]

CONCLUSION

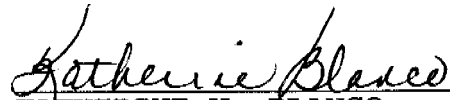
Based upon the foregoing facts, arguments and authorities,  
the decision of the Second District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the  
foregoing has been furnished by U.S. mail to Cecilia Traina,  
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OF COUNSEL FOR RESPONDENT