IN THE SUPREME COURT OF FLORIDA

CHARLES BARR, :

Petitioner, :

v. : CASE NO. 85,864

STATE OF FLORIDA, :

Respondent. :

_____/

PETITIONER'S REPLY BRIEF

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I SUMMARY OF ARGUMENT

Petitioner Barr's maximum permitted guidelines sentence for his conviction of armed robbery with a firearm was 12 years in prison. On the basis of the relatively trivial additional conduct of reckless driving, as a result of which no one and nothing was injured, except the car which he had stolen, the trial court imposed sentence of 25 years in prison. The trial court erred in departing on the basis of conduct which could have been prosecuted separately but was not. The state's distinction of the offense of reckless driving from the conduct of reckless driving is specious and should be rejected.

II ARGUMENT

ISSUE PRESENTED

A DEPARTURE FROM SENTENCING GUIDELINES IS INVALID WHEN IT IS BASED ON CRIMINALLY PUNISHABLE CONDUCT FOR WHICH NO CONVICTION WAS OBTAINED.

Petitioner denies that he created a great risk of danger to many people. Even assuming arguendo that he did, he did so by reckless driving, yet he was not prosecuted for reckless driving or fleeing and eluding. The state argues that departure was not based on reckless driving, but on creating a risk of danger to others (State's Brief (SB), p. 7). That is, the state argues that the offense of reckless driving (of which petitioner was not convicted) is legally severable from the reckless conduct on which it is based. This is a specious argument and should be rejected. It is belied, inter alia, by the definition of reckless driving:

> [driving a vehicle] in willful or wanton disregard for the safety of persons or property.

§316.192(1), Fla.Stat. (1993). That is, reckless driving does not exist in the absence of disregard for the safety of others. Moreover, this court should further note, as did Judge Ervin's dissent, that the statute makes no mention of the number of persons whose safety is threatened. Barr v. State, 655 So.2d 1175, 1179 (Fla. 1st DCA 1995) (Ervin, J., dissenting).

The state's argument is further refuted by Judge Ervin's lucid dissent. The cases which permit disregard for the safety of others as a reason to depart involve offensive conduct which

could not be charged as a separate offense. Typically, such conduct involved shooting in the presence of others, e.g., Webster v. State, 500 So.2d 285 (Fla. 1st DCA 1986), a factor not present here. This court approved the reason in theory in Scurry v. State, 489 So.2d 25 (Fla. 1986), but found it not to have been proved by the facts of the case. When the conduct can be charged as a separate offense, it must be charged separately rather than used as a reason for departure. Barr, 655 So.2d at 1178-79 (Ervin, J., dissenting).

Further, the state and the district court majority relied on cases which predated or did not mention Williams and Tyner, the leading cases of this court on the issue. State v. Tyner, 506 So.2d 405 (Fla. 1987); Williams v. State, 500 So.2d 501 (Fla.1986). As Judge Ervin succinctly put it:

> Because Garcia was decided prior to Williams and Tyner, and because Campos and Miller do not refer to these two supreme court decisions, I consider the better course is to follow Felts, which clearly applied the precedent established in the two supreme court decisions.

Miller v. State, 549 So.2d 1106 (Fla. 2d DCA 1989), reversed on other grounds, 573 So.2d 337 (Fla. 1991); Felts v. State, 537 So.2d 995 (Fla. 1st DCA 1988), app'd, 549 So.2d 1373 (Fla. 1989); Campos v. State, 515 So.2d 1358 (Fla. 4th DCA 1987).

Section 921.0016, Florida Statutes (1993), codified "substantial risk of death or great bodily harm to many persons" as a valid reason for departure. This statute is applicable to offenses committed after January 1, 1994 and,

thus, is inapplicable in the instant case, as the state acknowledges. The state argues, nevertheless, that this statute represents a codification of prior caselaw, and the reasoning applies equally to offenses committed prior to 1994 (SB-6).

Petitioner does not necessarily disagree that the statute codifies prior caselaw. Prior caselaw, however, placed limitations on the use of this factor, for it applied only when the conduct could not be charged as a separate offense. The state now argues for no limitation, rather, that intonation of the magic words "flagrant disregard for safety of others" makes the departure unreviewable by the appellate courts. Petitioner strongly disagrees with this conclusion.

To the contrary, even if it were applicable here, section 921.0016 does not appear to abrogate the general principle that departures are to be limited to extraordinary cases. That is, if reasons were approved which either per se or as applied permitted departure in relatively ordinary cases, then the overriding goal of fair and and more-or-less equal sentences for equally situated defendants would be destroyed. The issue of whether a particular defendant received a sentence similar to that of other similarly-situated defendants or one vastly greater, would become a matter of caprice, and this is not an acceptable public policy.

In Wemett v. State, 567 So.2d 882, 886 (Fla. 1990), this court wrote:

> The general rule in sentencing is to sentence within the guidelines; departure from

> the guidelines is the exception to the rule. The exception of upward departure is intended to apply when extraordinary circumstances exist to "reasonably justify aggravating. . .the sentence." (cites omitted; emphasis added)

Contrary to the state's argument, the risk of danger to others cannot be separated from the conduct - reckless driving - which created the danger, assuming arguendo that such danger existed.

The law of Florida is clear - a departure from the sentencing guidelines cannot be based on conduct which constitutes a crime, but for which no conviction has been obtained. State v. Varner, 616 So.2d 988 (Fla. 1993); Tyner, supra.

Lest the court forget, for the crime of armed robbery with a firearm, Barr's recommended guideline sentence was 7 - 9 years, with a permitted range of 5-1/2 - 12 years. For the additional offensive conduct of reckless driving, the trial court more than doubled the maximum permitted sentence and almost tripled the maximum recommended sentence in imposing sentence of 25 years in prison. This doubling or tripling was for conduct which resulted in no actual damage or injury to anyone or anything except the car he had stolen. That is, Barr's sentence doubled or tripled because of far, far lesser additional conduct than his actual conviction.

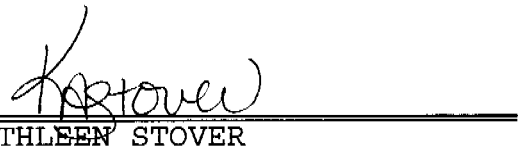
While it is beyond the power of this court to so rule, this case amply illustrates the desirability of placing limitations on the amount of departure. That is, relatively trivial additional conduct should not be grounds for doubling a sen-

tence or more. What this court can do, however, is prohibit a departure sentence on the basis of reckless driving, an offense of which Barr was not convicted, and had it been separately charged, would have resulted in a sentence of less than one year.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court reverse his sentence because the only reason given for departure was invalid, and remand for resentencing within the guidelines.

Respectfully submitted,
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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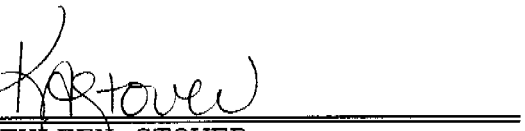
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sonya Roebuck Horbelt, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Charles Barr, inmate no. 311442, Holmes Correctional Institution, P.O. Box 190, Bonifay, Florida 32425, this 19 day of January, 1996.



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