FILED
SID J. WHITE
APR 24 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER ROBERTS,

Petitioner,

v. CASE NO. 87,660

STATE OF FLORIDA,

Respondent.

/

INITIAL BRIEF OF PETITIONER ON THE MERITS

GLEN P. GIFFORD
Assistant Public Defender
Second Judicial Circuit
Fla. Bar No. 0664261
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER ROBERTS,	)	
Petitioner,	)	
v.	)	CASE NO. 87,660
STATE OF FLORIDA,	)	
Respondent.	)	

INITIAL BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

This case is before the Court on discretionary review from the First District Court of Appeal, which certified the following question of great public importance:

> IF THE TRIAL COURT IMPOSES A SPLIT SENTENCE, MAY THE INCARCERATIVE PORTION OF THE SENTENCE DEVIATE MORE THAN 25 PERCENT FROM THE RECOMMENDED GUIDELINES PRISON SENTENCE IF THE TRIAL COURT OTHERWISE COMPLIES WITH THE APPLICABLE STATUTES AND RULES IN IMPOSING THE DEPARTURE SENTENCE?

Roberts v. State, 21 Fla. L. Weekly D646 (1st DCA Mar. 11, 1996).

This Court has jurisdiction under Article V, Section 3(b)(4), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

STATEMENT OF THE CASE AND FACTS

The facts as found by the district court are as follows:

> On November 21, 1994, Mr. Roberts entered a plea of nolo contendere to an information charging burglary of a dwelling with an assault committed in the course of the offense. There was no agreement as to a sentence. The trial court departed from the applicable 1994 sentencing guidelines range of 34.5 months to 57.5 months, imposing a departure sentence of 72 months in state prison followed by 24 months on probation. Contemporaneously, the trial court filed written reasons for the departure sentence.

Roberts v. State, 21 Fla. L.Weekly D646 (1st DCA Mar. 11, 1996).

On direct appeal, Roberts attacked the reasons for departure and the imposition of a departure sentence as part of a split sentence. The district affirmed, but as to the second issue certified a question of great public importance:

> IF THE TRIAL COURT IMPOSES A SPLIT SENTENCE, MAY THE INCARCERATIVE PORTION OF THE SENTENCE DEVIATE MORE THAN 25 PERCENT FROM THE RECOMMENDED GUIDELINES PRISON SENTENCE IF THE TRIAL COURT OTHERWISE COMPLIES WITH THE APPLICABLE STATUTES AND RULES IN IMPOSING THE DEPARTURE SENTENCE?

Roberts invoked the discretionary jurisdiction of this Court. This brief follows.

SUMMARY OF THE ARGUMENT

Petitioner received a sentence outside the applicable guideline range as part of a split sentence. Florida Rule of Criminal Procedure 3.702(d)(19) unambiguously limits the incarcerative portion of a split sentence to a 25 percent deviation from the presumptive guideline sentence. Construed according to its plain meaning, the rule prohibits the sanction imposed here, a combination of incarceration outside the guideline range and probation.

A "plain meaning" construction of the provision is consistent with companion provisions, follows accepted rules of statutory construction, and is supportable from a policy perspective. Previous constructions of a similarly worded committee note are of little relevance, because the provision is part of a new system of rules superseding the old, and because, on close analysis, little if any precedent supports the former construction.

The certified question, which posits the validity of the combined sanction, should be answered in the negative. This answer compels the conclusion that petitioner's sentence was unlawful. Since the length of the prison term was affirmed by the district court and petitioner has served much if not all of the sentence, the appropriate, remaining remedy is to vacate the probation.

ARGUMENT

IMPOSITION OF A SENTENCE OUTSIDE THE GUIDELINES AS PART OF A SPLIT SENTENCE VIOLATES FLORIDA RULE OF CRIMINAL PROCEDURE 3.702(d)19, WHICH PROVIDES THAT IF A SPLIT SENTENCE IS IMPOSED, THE INCARCERATIVE PORTION CANNOT DEVIATE MORE THAN 25 PERCENT FROM THE RECOMMENDED GUIDELINE SENTENCE.

The trial court imposed a sentence of 72 months of incarceration, which deviated more than 25 percent from the recommended guideline sentence. The court also imposed two years of probation, creating a split sentence. The district court affirmed the combined sanction, but certified the following question of great public importance:

> IF THE TRIAL COURT IMPOSES A SPLIT SENTENCE, MAY THE INCARCERATIVE PORTION OF THE SENTENCE DEVIATE MORE THAN 25 PERCENT FROM THE RECOMMENDED GUIDELINES PRISON SENTENCE IF THE TRIAL COURT OTHERWISE COMPLIES WITH THE APPLICABLE STATUTES AND RULES IN IMPOSING THE DEPARTURE SENTENCE?

The question must be answered in the negative. Imposition of incarceration outside the guidelines as part of a split sentence violates the following, underlined portion of Florida Rule of Criminal Procedure 3.702(d)(19):

> (19) The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall be within the guidelines sentence unless a departure is ordered.
>
> If a split sentence is imposed, the incarcerative portion of the sentence must not deviate more than 25 percent from the recommended guidelines prison sentence. The total sanction (incarceration and community

> control or probation) shall not exceed the term provided by general law or the guidelines recommended sentence where the provisions of subsection 921.001(5) apply.

(emphasis added).

Under all pertinent principles of statutory construction, the underlined language forbids the sanction imposed in this case.

In construing court rules, principles of statutory construction apply. Syndicate Properties, Inc. v. Hotel Floridian Co., 94 Fla. 899, 114 So. 441 (1927); Rowe v. State, 394 So. 2d 1059 (Fla. 1st DCA 1981). The polestar of statutory construction is the plain meaning of the language used. Acosta v. Richter, 21 Fla. L. Weekly S29, S31 (Jan. 18, 1996). Statutory language which is clear and unambiguous and conveys a clear message is given its ordinary meaning by the courts. In re McCollam, 612 So. 2d 572 (Fla. 1993). Unambiguous language presents no opportunity for judicial construction, "however wise it may seem to alter the plain language." State v. Jett, 626 So. 2d 691, 693 (Fla. 1993).

The meaning of the emphasized portion of Rule 3.702(d)(19) is clear and unambiguous: if the court imposes a split sentence, it may not impose a departure. The district court was of the same view:

> On its face, Florida Rule of Criminal Procedure 3.702(d)(19) may be read as a flat prohibition against imposition of a departure

> sentence where the incarcerative portion of a probationary split sentence falls outside the guidelines range.

21 Fla. L. Weekly at D647. The obvious corollary is that if the court imposes a departure sentence, it may not add probation or community control to make it a split sentence. In the face of such a clearly drafted provision, no resort to more subtle rules of statutory construction are required. In any event, application of these rules yields the same result.

As stated above, principles of statutory construction apply in construing court rules. Section 775.021(1), Florida Statutes, requires strict construction or, in the case of an ambiguity, construction most favorably to the accused. This rule favors the construction advanced herein, for if construed either strictly according to its terms, or most favorably to petitioner, the provision would preclude the combination of departure and probation.

The omission of the qualifying term, "unless a departure is ordered," from the sentence at issue here also favors this construction, particularly in light of its use in the preceding sentence. Law makers are presumed to know the meaning of the words they use, and to express their intention in the precise language employed. Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Assoc., Inc., 581 So. 2d 1301, 1302 (Fla. 1991). Where lawmakers use a term in one

section of a statute but omit it another, it should not be implied where it is excluded. Leisure Resorts, Inc., v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995). Accord, In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1137 (Fla. 1990). Doubt as to legislative intent is resolved against supplying missing words. Special Disability Trust Fund v. Motor and Compressor Co., 446 So. 2d 224, 226 (Fla. 1st DCA 1984). All these principles counsel against the construction adopted by the district court.

Additionally, no conflict arises from consideration of Rule 3.702(d)(19) in pari materia with the remainder of the 1994 guidelines rule, 3.702, or the applicable statutes, sections 921.001-921.0017, Florida Statutes (1994 Supp.) These rules and statutes generally require that a trial judge provide written departure reasons upon imposition of a sentence deviating from the presumptive sentence by more than 25 percent. Concerning combined sanctions of incarceration and community control or probation, section 921.0016(1)(d), Florida Statutes, provides that imposition of a split sentence "does not by itself constitute a departure from the sentencing guidelines." The underlined portion of Rule 3.702(d)(19) leaves this principle unaltered. It limits trial court discretion in a different manner, authorizing imposition of either a departure or a split

sentence but not both.

An alternative construction, permitting denature with written reasons on the incarcerative portion of a split sentence, renders the underlined portion of Rule 3.702(d)(19) superfluous. Statutes should be construed to give effect to both in mutually consistent fields of operation. State v.Brown, 530 So. 2d 51, 52 (Fla. 1988); Winters v. State, 522 So. 2d 816, 817 (Fla. 1988). The construction of the underlined portion of Rule 3.702(d)(19) adopted by the district court merely duplicates Rule 3.702(d)(18), in which the concept of a departure as applying to incarceration is already crystal clear. If Rule 3.702(d)(19) is interpreted, contrary to its terms, to permit a departure within a split sentence, it will be denied a reasonable field of operation.

Contrary to the views of the district court, the plain terms of the rule are also supportable from a public policy perspective. The rule reflects a judgment that an offender who qualifies for prison under the guidelines should receive the extra punishment of either a longer prison term or a term of probation following prison, but not both. The rule may also reflect a judgment that the people of Florida should not pay both for extra incarceration of an offender and for extended supervision following release. Finally, in precluding the combination of a downward departure and probation, the rule may reflect a

policy choice that offenders deemed deserving of split sentences should get a substantial taste of punishment, a prison term within the guidelines, before commencing probation. These considerations buttress the plain meaning of the language; thus, no "unreasonable or ridiculous conclusion" results from applying its clear meaning. See McCollam, supra, 612 So.2d at 573.

The district court nonetheless approved the combination of split and departure sentence. It concluded that the underlined portion of Rule 3.702(d)(19) restates the substance of the commission note to Florida Rule of Criminal Procedure 3.701(d)(12), which was interpreted to permit a departure as part of a split sentence if other portions of the rule are followed.

There are several compelling reasons why this perspective is wrong. First, the legislature in adopting the 1994 guidelines dictated a fresh start in interpretation of its provisions. Rule 3.702(b) provides that existing caselaw in conflict with the amended rule is superseded. Quoting from page 7 of the state's answer brief in this case in the district court,

> Simply put, this rule means that any statutory modification of the guidelines procedure supersedes any contrary caselaw.

Thus, the fact that a committee note was interpreted one way under the old guidelines does not compel the same construction of a similarly worded rule provision under the new, when reason counsels a different construction.

Second, the commission notes are, in the words of this Court, "an explanatory gloss," not part of the rule itself. Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 576 So. 2d 1307, 1308 (Fla. 1991). Language merely explaining the interpretation of a discarded set of rules should not bind courts to the same interpretation of a provision in a revised system. The elevation of the principle contained in Rule 3.702(d)(19) to the status of a rule provision gives it greater force and calls into play the rules of statutory construction enunciated above.

Finally, in all but one of the opinions cited by the panel below, the courts merely noted the existence of a departure as part of a split sentence without passing on whether the combination of the two was an authorized sanction. Of the precedent cited in the opinion below, the sole case in which an appellate court squarely addressed the issue was State v. Rice, 464 So. 2d 684 (Fla. 5th DCA 1985). There the court rejected the state's argument that the trial court violated the committee note to Rule 3.701(d)(12) in imposing a downward departure as part of a split sentence, on authority of MacFarland v. State, 462 So. 2d 496 (Fla. 5th DCA 1984). In MacFarland, the same court approved an upward departure as part of a split sentence. MacFarland arose, however, when Committee Note (d)(12) to Rule 3.701 contained no language restricting the incarcerative portion of

split sentences to the guideline range. 462 So. 2d at 497 & n.1. Thus, the decision in Rice is a poor foundation for the construction of Rule 3.702(d)(19) adopted by the district court.

In summary, Rule 3.702(d)(19) unambiguously limits the incarcerative portion of a split sentence to a 25 percent deviation from the presumptive guideline sentence. It should be construed according to its plain meaning. This construction is consistent with companion provisions, is supportable from a policy perspective, and gives the provision a reasonable field of operation. Previous constructions of a similarly worded committee note are of little relevance, because the provision is part of a new system of rules superseding the old and because, on close analysis, little if any caselaw supports the former construction.

Under this construction of the pertinent portion of Rule 3.702(d)(19), petitioner was improperly sentenced to both a departure and a split sentence. Since the departure was upheld by the district court and Roberts has served much if not all of the sentence, the appropriate, remaining remedy is to vacate the probation.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court, vacate his sentence and remand with directions to delete the term of probation.

Respectfully submitted,

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
Fla. Bar No. 0664261
301 S. Monroe St., Suite 401
Tallahassee, FL 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Trisha E. Meggs, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 24th day of April, 1996.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER ROBERTS,	:	
	:	
Petitioner,	:	
	:	
vs.	:	CASE NO. 87,660
	:	
THE STATE OF FLORIDA,	:	
	:	
Respondent,	:	
	:	
	:	

A P P E N D I X

the time suggested in the sentencing guidelines, it must provide written reasons contemporaneously with the sentence. *Ree v. State*, 565 So. 2d 1329 (Fla. 1990); *Pope v. State*, 561 So. 2d 554 (Fla. 1990); *Schummer v. State*, 657 So. 2d 3 (Fla. 1st DCA 1995); *State v. Howell*, 572 So. 2d 1009 (Fla. 1st DCA 1991). If a trial court gives its reasons in its oral pronouncement and later commits them to written form, it commits reversible error. *State v. Colbert*, 660 So. 2d 701 (Fla. 1995). In the instant case, the trial court failed to issue reasons until February 28, 1995, after the state had filed a notice of appeal. Because the court failed to issue reasons at the time of the sentencing order, the sentence is vacated, and we remand for resentencing within the guidelines.

We recognize that this opinion fails to give effect to the well-reasoned decision of the trial court, and is fundamentally unfair to appellee in this case.[4] We also recognize that the supreme court has recently answered a certified question as to upward departure sentences in *State v. Colbert, supra*. We feel, however, we cannot ignore the plight of appellee in this situation of a downward departure. It seems inequitable that a defendant would be required to spend a greater amount of time incarcerated as a result of an inadvertent error of an officer of the state, the trial judge. We, therefore, certify the following question to be one of great public importance:

> MAY A *DOWNWARD DEPARTURE* SENTENCE BE AFFIRMED WHERE THE TRIAL COURT ORALLY PRONOUNCED VALID REASONS FOR DEPARTURE AT THE TIME OF SENTENCING, BUT INADVERTENTLY FAILED TO ENTER CONTEMPORANEOUS WRITTEN REASONS?

(VAN NORTWICK, J., concurs; MINER, J., concurs in result only.)

---

[1]While we are not the first court to criticize *Ree* and its progeny, we feel we must do so here because of the inequitable result it causes in this case. See Justice Wells' concurring opinion in *Colbert v. State, supra*.

[2]Appellee committed the underlying offenses for the violation of probation prior to January 1, 1994, and therefore is not subject to the 1994 sentencing guidelines rules pursuant to 3.702, but rather 3.701(d)(11) which states:

> Departures from the recommended or permitted guideline sentence should be avoided unless there are circumstances or factors that reasonably justify aggravating or mitigating the sentence. Any sentence outside the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction or the instant offenses for which convictions have not been obtained.

[3]We would note that the state does not challenge the reasons stated for the downward departure, but only the fact that the written reasons were not entered at the time of the sentencing.

[4]Just as the striking of well-thought-out reasons for upward departures orally announced by a trial court would appear to be fundamentally unfair to the citizens of the state of Florida.

* * *

Criminal law—Sentencing—Guidelines—No merit to argument that under Rule of Criminal Procedure 3.702, probationary split departure sentence was error because incarcerative portion of sentence deviated more than 25 percent from the recommended guidelines prison sentence—If the trial court imposes a split sentence, the incarcerative portion of the sentence may deviate more than 25 percent from the recommended guidelines prison sentence if the trial court otherwise complies with the applicable statutes and rules in imposing the departure sentence—Question certified

CHRISTOPHER ROBERTS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 95-557. Opinion filed March 11, 1996. An appeal from the Circuit Court for Baker County. Nath C. Doughtie, Judge. Counsel: Nancy A. Daniels, Public Defender; Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Trisha E. Meggs and Amelia L. Beisner, Assistant Attorneys General, Tallahassee, for Appellee.

(BENTON, J.) Christopher Roberts appeals his sentence for burglary of a dwelling in the course of which he committed an assault, all in violation of section 810.02(a), Florida Statutes (1993). On appeal, he argues that the trial court erred in imposing a probationary split departure sentence because the incarcerative portion of the sentence deviated more than 25 percent from the recommended guidelines prison sentence. We affirm, but certify a question to the Florida Supreme Court as a matter of great public importance.

On November 21, 1994, Mr. Roberts entered a plea of nolo contendere to an information charging burglary of a dwelling with an assault committed in the course of the offense. There was no agreement as to a sentence. The trial court departed from the applicable 1994 sentencing guidelines range of 34.5 months to 57.5 months, imposing a departure sentence of 72 months in state prison followed by 24 months on probation. Contemporaneously, the trial court filed written reasons[1] for the departure sentence.[2]

On appeal, Mr. Roberts contends that under Florida Rule of Criminal Procedure 3.702 a court cannot order incarceration in excess of the 1994 guidelines range if it imposes a split sentence. Florida Rule of Criminal Procedure 3.702(d)(19) states:

> The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall be within the guidelines sentence unless a departure is ordered.
>
> *If a split sentence is imposed, the incarcerative portion of the sentence must not deviate more than 25 percent from the recommended guidelines prison sentence.* The total sanction (incarceration and community control or probation) shall not exceed the term provided by general law or the guidelines recommended sentence where the provisions of subsection 921.001(5) apply.

(Emphasis added.) The first sentence of subdivision (d)(19) states that a sentence shall be imposed or suspended "for each separate count, as convicted." There is no exception to this requirement.

The second sentence of subdivision (d)(19) mandates that the "total sentence" for each count on which a defendant is convicted not exceed the guidelines "unless a departure is ordered." The third sentence of subdivision (d)(19), starting a new paragraph dealing with split sentences, contains no exception to the requirement that "the incarcerative portion of the sentence must not deviate more than 25 percent from the recommended guidelines prison sentence." The fourth sentence, stating that the "total sanction . . . shall not exceed the term provided by general law[,]" also contains no exception.

Florida Rule of Criminal Procedure 3.702(d)(19) restates the substance of commission note to subdivision (d)(12) of Florida Rule of Criminal Procedure 3.701 (the former sentencing guidelines), which provides:

> The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall not exceed the guideline sentence, unless the provisions of subdivision (d)(11) are complied with.
>
> *If a split sentence is imposed (i.e. a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guideline range nor exceed the maximum of the range.* The total sanction (incarceration and probation) shall not exceed the term provided by general law.

(Emphasis added.) In *State v. Rice*, 464 So. 2d 684 (Fla. 5th DCA 1985), the court stated:

> The State does not argue the power of the trial court to depart from a presumptive sentence by reducing it, but contends only that the sentence imposed is a split sentence and that it therefore violates Committee Note (d)(12) to Florida Rule of Criminal Procedure 3.701 because the incarcerative portion of the sentence is less than the minimum of the guideline range. At the time of sentencing, Committee Note (d)(12) read as follows:[3]
>
> The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall not exceed the guideline sentence, unless the provisions of

---

[1]The second paragraph of this committee note has since been amended to read:

> If a split sentence is imposed ... the incarceration portion imposed shall not be less than the minimum of the guideline nor exceed the maximum of the range. The total sanction (incarceration and probation) shall not exceed the term provided by general law

While the amended section does not apply retroactively, it would not change the result in this case.

paragraph 11 are complied with.

If a split sentence is imposed (i.e., a combination of state prison and probation supervision), *the incarcerative portion imposed shall not be less than the minimum of the guideline range*, and the total sanction imposed cannot exceed the maximum guideline range. (Emphasis added).

The transcript of the sentencing hearing and the notation on the scoresheet clearly indicate[] that this was a departure sentence. Under the above-mentioned version of paragraph (d)(12) this court has previously approved a departure sentence where the combined period of incarceration and probation exceeded the guideline sentence. *MacFarland v. State*, 462 So.2d 496 (Fla. 5th DCA 1984). Given a proper case for departure, there is no reason for a different result where the departure is in the nature of a reduction of sentence rather than an enhancement. In other words, note (d)(12) does not control where the judge properly departs from the guidelines.

Id. at 686 & n.3. Also addressing commission note (d)(12) to Florida Rule of Criminal Procedure 3.701, the Second District stated:

When sentencing pursuant to the guidelines, a trial judge may impose a split sentence, but if he does, the incarcerative portion must not be less than the minimum guidelines range. Comm.Note (d)(12) Fla.R.Crim.P. 3.701. *The trial judge may, of course, depart from this requirement if he provides a valid written reason for doing so. State v. McCall*, 573 So.2d 362 (Fla. 5th DCA 1990).

State v. Waldo, 582 So. 2d 820, 821 (Fla. 2d DCA 1991) (emphasis added); *see also Baggett v. State*, 637 So. 2d 303, 304 (Fla. 1st DCA 1994) (stating that "no written reasons were required" since the maximum of the guidelines range was 27 years and the split sentence imposed was 25 years incarceration plus 10 years probation).

While "[e]xisting caselaw construing the application of sentencing guidelines that is in conflict with the provisions of this rule . . . is superseded by the operation of this rule[,]" Fla. R. Crim. P. 3.702(b), existing caselaw[3] construes language substantially the same as Florida Rule of Criminal Procedure 3.702(d)(19). Neither provision evinces any public policy reason why trial courts should not be permitted to specify incarcerative portions of probationary split sentences longer or shorter than guidelines recommendations so long as the sentencing court complies with other applicable statutes and rules in imposing the departure sentence.

Pertinent Florida caselaw seems to require a construction[4] of the third sentence of subdivision (d)(19) that makes an exception for departure sentences. On its face, Florida Rule of Criminal Procedure 3.702(d)(19) may be read as a flat prohibition against imposition of a departure sentence where the incarcerative portion of a probationary split sentence falls outside the guidelines range. But the cases infer an exception which is not stated in the third sentence, and which need not (and in fact cannot) be read into either of the other sentences which lack the clause "unless a departure is ordered."

Accordingly we affirm the sentence but certify the following question to the Florida Supreme Court as being of great public importance.

IF THE TRIAL COURT IMPOSES A SPLIT SENTENCE, MAY THE INCARCERATIVE PORTION OF THE SENTENCE DEVIATE MORE THAN 25 PERCENT FROM THE RECOMMENDED GUIDELINES PRISON SENTENCE IF THE TRIAL COURT OTHERWISE COMPLIES WITH THE APPLICABLE STATUTES AND RULES IN IMPOSING THE DEPARTURE SENTENCE?

(BOOTH and WOLF, JJ., CONCUR.)

---

[1]Mr. Roberts assails these reasons as insufficient arguing that the trial court abused its discretion in departing in any manner whatsoever from the sentencing guidelines. We find no merit in this argument.

[2]Under the 1994 Guidelines, a departure sentence is "[a] state prison sentence which varies upward or downward from the recommended guidelines prison sentence by more than 25 percent . . . ." § 921.0016(1)(c), Fla. Stat. (1993); Fla. R. Crim. P. 3.702(d)(18). Here the "recommended guidelines prison sentence" was 46 months. (R. at 14, 57.)

[3]*Cecil v. State*, 596 So. 2d 461, 462 (Fla. 1st DCA 1992) (reversing a split sentence "for failure to provide written reasons for departure" where the incarcerative portion imposed by the trial court exceeded the maximum of the guidelines range); *Fullwood v. State*, 558 So. 2d 168, 170 (Fla. 5th DCA 1990) ("Since the incarcerative portions of counts II and III exceed the maximum of the recommended range and no written reasons for departure were given, the sentence in count II is reversed and the cause remanded for resentencing."); *State v. Whitten*, 524 So. 2d 1114 (Fla. 4th DCA 1988) (reversing a split sentence "which included an incarceration period of less than the recommended minimum for the crimes" and remanding for resentencing with directions that "upon remand the trial court must give a written reason for such departure"); *State v. Martin*, 502 So. 2d 1371, 1372 (Fla. 2d DCA 1987) (holding that "the trial court's failure to submit written, clear and convincing reasons for departure was error" because the incarcerative portion of the split sentence was less than the statutory maximum (fifteen years) which was less than the recommended guidelines (life imprisonment)).

[4]In discussing qualifying phrases in sentences with more than one antecedent, this court has stated:

> We are aided by the statutory rule of construction known as the doctrine of last antecedent, under which " 'relative and qualifying words, phrases, and clauses are to be applied to the words or phrase *immediately* preceding, and are not to be construed as extending to or including others more remote' [citations omitted]." *McKenzie Tank Lines, Inc. v. McCauley*, 418 So.2d 1177, 1179-1180 (Fla. 1st DCA 1982).

Kirksey v. State, 433 So. 2d 1236, 1241 (Fla. 1st DCA 1983), *review denied*, 446 So. 2d 100 (Fla. 1984). *See also Ross v. State*, 664 So. 2d 1004, 1009 (Fla. 4th DCA 1995); *Brown v. Brown*, 432 So. 2d 704, 710-11 (Fla. 3d DCA 1983), *review dismissed*, 458 So. 2d 271 (Fla. 1984). This problem can be avoided altogether.

> The difficult problems of interpretation involved in the rule of reddendo singula singulis may be almost entirely eliminated by careful drafting. If sentences are short and contain a single subject and object this problem will be resolved.

Sutherland Statutory Construction § 47.26 (5th Ed. 1992). Here, subdivision (d)(19) contains four short sentences. Each lays down a separate requirement. Only one makes exception for departure sentences.

> On the other hand, the phrase "unless a departure is ordered" is a proviso. Courts have adopted the rule that the proviso will be applied according to the general legislative intent and will limit a single section or the entire act depending on what the legislature intended or what meaning is otherwise indicated. Although the form and the location of the proviso may be some indication of the legislative intent, form alone will not control. No presumption concerning the scope of its application arises from the location of the proviso.

Id. at § 47.09 (footnotes omitted).

* * *

Workers' compensation—Permanent total disability—Conclusion that claimant was not PTD as of her date of maximum medical improvement was a reasonable interpretation of treating physician's internally inconsistent testimony, and was therefore supported by the evidence—No error in ruling that PTD benefits should have commenced on date that claimant was administratively accepted as PTD—Attendant care—Error to conclude that law in effect at time of claimant's injury did not permit award of attendant care to assist with household services—Error to conclude that amendment to section 440.13(2)(f), Florida Statutes, adding language describing attendant care as "beyond the scope of household duties" could be applied to preclude an award for such services after the effective date of the statute without regard to the date of claimant's injury—Claim for attendant care was properly denied where much of the care sought was for non-compensable "quality of life choices," and evidence was not sufficiently specific to permit determination of how many hours of care were compensable

FRANCIE DIANA, Appellant, v. HLS COMPANIES and CNA INSURANCE COMPANIES, Appellees. 1st District. Case No. 94-4203. Opinion filed March 11, 1996. An appeal from an order of the Judge of Compensation Claims. John R. Tomlinson, Jr., Judge. Counsel: Barbara E. Schnepper of Barbara E. Schnepper, P.A., Miami, for Appellant. Jacqueline M. Gregory of Kelley, Kronenberg, Kelley, Gilmartin & Fichtel, P.A., Miami Lakes, for Appellees.

(DAVIS, J.) Francie Diana (the claimant) appeals the decision of the Judge of Compensation Claims (JCC) determining that she was not entitled to receive permanent total disability benefits earlier than the date upon which the employer and carrier (e/c) administratively accepted her as permanently totally disabled (PTD); denying her claim for an adjustment to her average weekly wage to account for asserted fringe benefits of rent and utility costs; and denying a claim for attendant care. We affirm.

The claimant, Ms. Diana, was injured on May 11, 1990. She fell on some muddy steps coming out of a trailer at her job site.