IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER ROBERTS,

Petitioner,

v. CASE NO. 87,660

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON MERITS

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PRELIMINARY STATEMENT

Petitioner, Christopher Roberts, was the defendant in the trial court; this brief will refer to Petitioner as such, Defendant, or by proper name. Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State.

The symbol "R" will refer to the record on appeal and the symbol "T" will refer to the transcript of trial court proceedings. Each symbol is followed by the appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

This case passes upon a question certified to be of great public importance by the Florida First District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as being generally accepted by the record.

SUMMARY OF ARGUMENT

Petitioner argues that under Fla. R. Crim. P. 3.702(d)(19), the trial court may impose a departure sentence **or** a split sentence, but not both. Petitioner's argument is without merit. The court may depart from the sentencing guidelines in the incarcerative portion of a split sentence, as long as the total sentence is within the statutory maximum. However, if the incarcerative portion varies more than twenty-five percent from the recommended guidelines sentence then the trial court must provided written reasons for its departure from the guidelines. The length of the non-incarcerative portion of the split sentence is immaterial. Therefore, this Court should answer the certified question in the affirmative.

ARGUMENT

ISSUE

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?

Petitioner was convicted for burglary of a dwelling in which he committed an assault, which was a first degree felony punishable by life in prison. (R-18). Petitioner's recommended sentence under the sentencing guidelines was 46 months in state prison, and his permissible sentencing range was 34.5 to 57.5 months in state prison. (R-14). The trial court departed from the sentencing guidelines, and imposed a probationary split sentence of six years (72 months) in prison followed by two years of probation.[1] (R-20). Because the incarcerative portion of the sentence exceeded the sentencing guidelines range, the trial court filed written reasons for the departure sentence. (R-15-16). The District Court found that the departure reasons were valid, and affirmed petitioner's sentence. Roberts v. State, No. 95-557 (Fla. 1st DCA March 11,

[1] Poore v. State, 531 So. 2d 161, 162-163 (Fla. 1988).

1996). However, the District court certified the following question as 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, at 8.

Petitioner contends that Fla. R. Crim. P. 3.702(d)(19) requires that the court impose either a departure sentence **or** a split sentence, but not both. The State respectfully disagrees. Rule 3.702(d)(19) provides that:

> 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.

The plain language of Rule 3.702(d)(19) does not require that the court impose either a departure sentence **or** a split sentence as petitioner claims. Instead, it means that if the incarcerative portion of a split sentence varies more than twenty-five percent

from the recommended sentence, the court must provide written reasons for its departure.

It is very clear that under the 1994 guidelines, a state prison sentence which varies upward or downward by more than twenty-five percent from the recommended sentence is a departure sentence. § 921.0016(1)(c), Fla. Stat. (1993); Fla. R. Crim. P. 3.702(d)(18). The first paragraph of Rule 3.702(d)(19) requires that the total sentence be with the guidelines unless the court is imposing a departure sentence. The second paragraph states that when the court imposes a split sentence, the total sanction shall not exceed the term provided by general law or the maximum guideline sentence under Section 921.001(5), Florida Statutes (1993).[2] Therefore, the second paragraph clarifies that under the rule, when a court imposes a split sentence, only incarcerative portion, not the total sentence, must be within the guidelines range. Thus, the first sentence of the second paragraph merely restates the general principle that a sentence cannot vary more than twenty-five percent from the recommended guidelines sentence unless the court imposes a departure sentence.

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[2]Section 921.001(5) provides that "[i]f a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure."

Hence, Rule 3.702(d)(19) does not limit the court to imposing either a departure sentence **or** a split sentence, but not both; instead, it means that split sentences still have to comply with the guidelines unless a departure sentence is imposed. To hold otherwise, would allow the trial court in this case to impose a departure sentence of eight years to life in state prison, but would preclude it from imposing a departure sentence of six years incarceration followed by two years of probation. Such a result is absurd. This Court must avoid absurd results. Dorsey v. State, 402 So. 2d 1178, 1183 (Fla. 1981) (citation omitted) ("In Florida it is a well-settled principle that statutes must be construed so as to avoid absurd results."); State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). Therefore, under Rule 3.702(d)(19), the court may impose a split sentence where the incarcerative portion of that sentence exceeds the recommended guidelines, so long as the court files valid written departure reasons, and the combined sentence of the incarceration and probation does not exceed the statutory maximum.

This is consistent with prior case law which held that a trial court could depart from the guidelines on the incarcerative portion of a split sentence as long as the trial court followed the proper

procedures for imposing a departure sentence.[3] Under the former sentencing guidelines the commission note to Fla. R. Crim. P. 3.701(d)(12) is similar to Rule 3.702(d)(19). The commission note to Rule 3.701(d)(12) provided that:

> The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall not exceed the guidelines 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.

In State v. Rice, 464 So. 2d 684 (Fla. 5th DCA 1985), the trial court imposed a split sentence downwardly departing from the sentencing guidelines. Id. at 686. The State, in Rice, argued that the trial court could not depart on a split sentence because the committee note to Rule 3.701(d)(12) stated that the incarcerative portion of the sentence shall not be less than the

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[3]The State recognizes that Fla. R. Crim. P. 3.702(b) provides that existing case law which is in conflict with the 1994 Sentencing Guidelines has been superseded. However, the commission note to Fla. R. Crim. P. 3.701(d)(12) is substantially similar to Rule 3.702(d)(19). Therefore, the courts' interpretation of the commission note to Rule 3.701(d)(12) should be helpful in this Court's analysis of Rule 3.702(d)(19). Moreover, the prior case law is not in conflict with the 1994 Sentencing Guidelines.

minimum of the guideline range. Id. at 686. The Rice court held that "[u]nder 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." Id. Therefore, finding that the trial court's departure reasons were valid, the Fifth District affirmed Rice's sentence. Id. at 687. Likewise, in State v. Waldo, 582 So. 2d 820 (Fla. 2d DCA 1991), the court stated that:

> 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 guideline 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**.

Id. at 821 (emphasis added). See also Baggett v. State, 637 So. 2d 303 (Fla. 1st DCA 1994) (Baggett's maximum guidelines range was 27 years, and thus his split sentence of 25 years' incarceration plus 10 years of probation was within the guidelines, the total punishment did not exceed the statutory maximum of life in prison, and written departure reasons were not required.). Likewise, this Court should interpret Rule 3.702(d)(19) as the courts interpreted the commission note to Rule 3.701(d)(12) under the former guidelines.

To summarize, the plain meaning of Rule 3.702(d)(19) requires that the trial court provide written departure reasons if the incarcerative portion of a split sentence varies more than twenty-five percent from the recommended sentence. Then, regardless of whether the trial court imposes a guidelines prison term or departure sentence, the total sentence, the combination of the period of incarceration **and** the probation or community control, must not exceed the statutory maximum. Accordingly, the District Court properly affirmed petitioner's sentence because the trial court validly departed from the sentencing guidelines, filing written departure reasons, and because petitioner's total combined sentence was within the statutory maximum. Therefore, this Court should answer the certified question in the affirmative, and affirm petitioner's sentence.

It should also be noted that the argument of petitioner's counsel that a judge may only impose either a departure sentence **or** a split sentence is **not** in the interest of petitioner or other similarly situated criminals. The trial court's reasons for departure were valid, and it could have imposed incarceration up to the statutory limits. Instead, the trial court imposed less than the maximum incarceration sentence and followed it with a period of probation, i.e., a probationary split sentence. There may be

criminals who prefer incarceration to probation, but such is presumably rare now that there is adequate room to house criminals for the full period of their sentence and they must as a matter of law serve at least eight-five percent of any prison term.

CONCLUSION

For the reasons set forth herein, the State respectfully request that this Court answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to U.S. Mail to Glen P. Gifford, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 14th day of May, 1996.

Trisha E. Meggs
Assistant Attorney General

[A:\ROBERTS2.BA --- 5/13/96,10:42 am]

Appendix

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 95-557

CHRISTOPHER ROBERTS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed March 11, 1996.

An appeal from the Circuit Court for Baker County.
Nath C. Doughtie, Judge.

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

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[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.)

> 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]
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> ---
>
> [3]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.
>
> ---
>
> > 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 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.

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[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)).

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

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[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).

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.