IN THE SUPREME COURT OF FLORIDA

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CHRISTOPHER ROBERTS, :

Petitioner, :

v. : CASE NO. 87,660

STATE OF FLORIDA, :

Respondent. :

_____/

REPLY BRIEF OF PETITIONER

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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.

In the battle for the high ground of the plain meaning of the disputed portion of Rule 3.702(d)(19), respondent marshals a separate paragraph of the provision as well as other parts of Rule 3.702 and sections of statutes. (AB3-6)[1] This is in fact *in pari materia* construction, a specialized device necessary only upon failure of a much more basic rule of construction, the plain meaning of the passage itself. In re McCollam, 612 So. 2d 572 (Fla. 1993). Let's look at the passage again:

If a split sentence is imposed, the

[1] Herein, citations to the initial and answer briefs are designated (IB[page number]) and (AB[page number]).

> incarcerative portion of the sentence must not deviate more that 25 percent from the recommended guidelines prison sentence.

Rule 3.702(d)(19). The plain meaning of this sentence could not be clearer. The court may impose either a split sentence or a sentence deviating from the guidelines, but not both. The state's invocation of extraneous material is not a search for plain meaning, and is not necessary when the plain meaning is close at hand. In any event, for reasons explained in the initial brief, other rules of statutory construction favor the position of petitioner. (IB6-8)

The result urged by petitioner is not, as the state argues, absurd. It reflects a policy of permitting either the extraordinary sanction of a departure sentence or a prison sentence plus probation, but not both. Probation, deemed a matter of grace, is hardly that when it follows a long stretch in prison. The state's scenario of an even longer prison term in lieu of a split sentence (AB8) is misleading, for the extent of departure is largely unreviewable.[2] For purpose of this argument, it matters not whether an offender receives a 5- or 15-year

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[2] Recently, this Court, among others, has expressed discomfort with the exemption from review of the extent of departure sentences. See Barr v. State, 21 Fla. L.Weekly S208 (May 16, 1996) (while not determinative, departure far exceeded sentence that could have been imposed if defendant convicted of uncharged offenses relied upon for departure). Petitioner maintains that legislation making the extent of departure unreviewable unconstitutionally invades the province of the judiciary.

departure sentence followed by probation. Either would be unlawful.

Respondent's reliance on State v. Rice, 464 So. 2d 684 (Fla. 5th DCA 1985), is misplaced. As explained in the initial brief, Rice rests on McFarland v. State, 462 So. 2d 496 (Fla. 5th DCA 1984), which was decided before Rule 3.701 included the language relied upon by respondent as similar to that at issue here. In none of the other cases cited by respondent (AB8) were the validity of both a split sentence and a departure sentence at issue. Thus, to petitioner's knowledge, no Florida appellate court has expressly construed either the disputed language in Rule 3.702(d)(19) or similar language in Rule 3.701(d)(12).

Finally, the state's concluding paragraph suggesting what criminals should really want (AB9-10) is inappropriate. The Attorney General just can't resist giving his quarry advice. In reply, some offenders who prefer incarceration to probation are astute enough to realize that probation is just a setup for a longer prison term later. As to the massive prison-building and humanity-warehousing program currently burdening Florida's taxpayers, that is not at issue in these proceedings. The Attorney General should reserve comment thereon for the appropriate forum, such as a courtroom defense of its validity, or an election.

The state's mention of the 85 percent rule does, however,

call into question whether petitioner will have served more than a guideline sentence by the time of a decision in this Court. Accordingly, if this Court answers the certified question in the negative, his sentence should be vacated and the case remanded to the trial court to either reduce the incarcerative sanction to the guideline range or delete the probation.

CONCLUSION

Based on the arguments contained herein and in the initial brief, petitioner requests that this Honorable Court answer the certified question in the negative, quash the decision of the district court and remand with directions to reduce the incarcerative sanction or delete the probation.

Respectfully submitted,

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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 6th day of June, 1996.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER