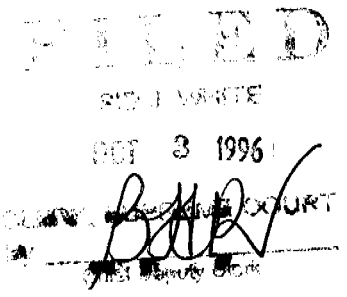
ORIGINAL

IN THE SUPREME COURT OF FLORIDA



LARRY WAYNE HALL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 88,740

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DEE BALL
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0564011
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

LARRY WAYNE HALL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 88,740
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

STATEMENT OF CASE AND FACTS

On March 31, 1994, around 6:45 p.m., a man entered Hungry Howie's Pizza in Seminole County and ordered a submarine sandwich. When advised that the order would take ten minutes, the man left. He returned around 7:05, asked for the sandwich, pointed a silver revolver at an employee, and demanded money. The employee handed the man approximately $200.00. R. 2. The man was subsequently identified as Larry W. Hall (Petitioner).

Approximately seven and a half hours later, Petitioner entered a Goodings supermarket in Seminole County. He picked up four wine coolers and approached the cashier. When the cashier stated that he could not sell alcohol after 2:00 a.m., Petitioner pointed a silver revolver at the cashier, and said, "Open the register and give me all your money." The cashier gave Petitioner approximately $213.00, and Petitioner left in a white Ford pickup. R. 34-35. Less

than 15 minutes after the robbery at Goodings, Petitioner approached Michell Lee, ordered her from her car, and fled in her 1994 Pontiac Sunbird. R. 43-44.

On April 2, the Pontiac Sunbird was involved in an armed robbery at Shoney's restaurant in Orange County. Two suspects were chased to a McDonald's where the Sunbird was abandoned. One suspect was arrested; Petitioner escaped in another vehicle. R. 36-37. Petitioner drove to Flagler County where he committed additional offenses of attempted second-degree murder, armed burglary of a dwelling, two counts of aggravated assault on a law enforcement officer, possession of a firearm by a convicted felon, and possession of drug paraphernalia. Hall v. State, 21 Fla. L. Weekly D1805 (Fla. 5th DCA August 9, 1996). Petitioner was sentenced in Flagler County on February 2, 1995.[1]

On September 6, 1995, Petitioner appeared for sentencing on the Seminole County charges. He scored 123.2 points for a guidelines range of 71.4 to 119 months. The trial court sentenced Petitioner to incarceration for 156 months with 132 months mandatory minimum. All sentences are consecutive to the sentences imposed in Flagler County. R. 118, 120. The trial court cited two reasons for the departure: (1) the offenses involved multiple victims, and (2) the primary offense is Level 7 and Petitioner had convictions of one or more offenses that scored or would have scored Level 8 or higher. R. 115.

The Fifth District Court of Appeal affirmed the judgment and sentence, but certified the following question:

---

[1] Copies of the scoresheet and sentences are attached to Petitioner's Request for Judicial Notice filed contemporaneously herewith.

> Is there any limit upon a trial judge's right to impose a departure sentence under the guidelines based solely on an unscorable criminal offense committed after the crime being sentenced for, such as not departing beyond the permissible sentencing range, had the later offense been scored?

Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

A departure from the sentencing guidelines based upon unscorable offenses should be limited to the permissible range if the offenses are scored. This Court should extend the rationale of Puffinberger v. State, 581 So. 2d 897 (Fla. 1991) to adult convictions for offenses subsequent to the offense for which the defendant is before the court.

To the extent that a trial court departs from the recommended sentence based upon offenses committed after the primary offense, the departure constitutes multiple punishment. Where one of those offenses is reversed on appeal, the departure constitutes punishment for an offense for which there is no conviction.

ARGUMENT

POINT I

A DEPARTURE FROM THE SENTENCING GUIDELINES BASED UPON UNSCORABLE OFFENSES SHOULD BE LIMITED TO THE PERMISSIBLE RANGE IF THE OFFENSES ARE SCORED.

Petitioner scored a total of 123.2 points for a range of 71.4 to 119 months. Had the Flagler County convictions been scored, the scoresheet would reflect the following additional offenses:

Possession of a firearm by a convicted felon, F2, L5	3.6
Attempted second degree murder, F2, L10	8.0
Burglary, FPBL, L8	6.0
Aggravated assault of a law enforcement officer, F2, L6 (two counts)	8.0
Misdemeanor possession of drug paraphernalia	0.2
	25.8

Petitioner's total score would have been 149.0 for a range of 90.75 to 151.25 months.

The stated purpose of the guidelines is to impose a penalty commensurate with the severity of the primary offense and the circumstances surrounding the primary offense. § 921.001(4)(a), Fla. Stat. (1995). The recommended sentence contains a mitigation-

aggravation factor of 25 percent, and departures are expressly discouraged unless reasonably justified. § 921.0016, Fla. Stat. (1995). As pointed out by the Fifth District Court of Appeal,

> It is somewhat anomalous to exclude later criminal convictions from scoring but to allow them to be considered in rendering a departure sentence which greatly exceeds the permissible sentencing guidelines bracket, if the scoring had been allowed. [Citation omitted.]

Haye v. State, 615 So. 2d 762 (Fla. 5th DCA 1993), quoting Wichael v. State, 567 So. 2d 549 (Fla. 5th DCA 1990). After Haye and Wichael, the legislature expressly approved departures where a defendant has been convicted of one or more offenses that would have scored at an offense Level 8 or higher. § 921.0016, Fla. Stat. (1995). Before the revision to the guidelines, appellate courts routinely reviewed the extent of departure sentences under an abuse of discretion standard. See, e.g., Albritton v. State, 476 So. 2d 158 (Fla. 1985). With the revision, the legislature has given trial judges unbridled discretion to thwart the purpose of the guidelines and impose a disproportionate sentence.

In Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), the Court held that cruel and unusual punishment includes disproportionate sentences. This Court has recognized that Solem guarantees proportionality and acts as a minimum standard in both capital and noncapital sentences. Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied., ___ U.S. ___, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994). Reposing total discretion in the trial judge by prohibiting appellate review defeats the guarantee of proportionality. If proportionality is to be maintained, there must be a limit to the trial judge's discretion.

The Fifth District suggests a solution in its certified question: the trial court may not depart beyond the permissible sentencing range had the later offense been scored. This Court

approved a similar procedure in Puffinberger v. State, 581 So. 2d 897 (Fla. 1991) where it held that prior juvenile offenses may be the basis for a departure only if the departure is no greater than that which the defendant would have received if the record had been scored. The Fourth District has extended Puffinberger to prior unscorable adult convictions. Freeman v. State, 663 So. 2d 675 (Fla. 4th DCA 1995). There is no logical reason not to extend Puffinberger to offenses committed after the primary offense at sentencing. Adopting the Puffinberger rationale places a limit on the trial judge's discretion and still honors the legislative requirement of no appellate review of the extent of departure.

POINT II

THE DEPARTURE SENTENCE VIOLATES THE DOUBLE JEOPARDY GUARANTEE OF THE FIFTH AMENDMENT.

The Fifth Amendment to the United States Constitution provides three basic protections: it protects against a second prosecution after an acquittal; it protects against a second prosecution after a conviction; and it protects against multiple punishment for the same offense. Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984). Petitioner was sentenced in Flagler County for the offenses committed in that county. He was sentenced in Seminole County for the offenses committed in that county; however, the trial judge departed from the guidelines because of the Flagler offenses. The primary offense in Flagler County was attempted second-degree murder, and the conviction was reversed on appeal. Hall v. State, supra. To the extent that the departure is based upon the conviction for attempted second-degree murder, it punishes for an offense for which there is no conviction.

CONCLUSION

Based upon the authorities cited and argument presented, this Court should adopt the suggested approach of the Fifth District Court of Appeal and hold that based upon unscorable offenses committed after the primary offense, a trial court may only depart to the extent of the permissible range had the offense been scored.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

FOR: DEE BALL
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0564011
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to; Mr. Larry Wayne Hall, #873728 (U-14), Polk Correctional Institution, 3876 Evans Road, Box 50, Polk City, FL 33868-9213, this 1st day of October, 1996.

FOR: DEE BALL
ASSISTANT PUBLIC DEFENDER