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IN THE SUPREME COURT OF FLORIDA

DENO S. GREEN,

Petitioner,

v. CASE NO. 90,696

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL
AND THE NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The State is in agreement with Petitioner's version of the case and facts.

SUMMARY OF ARGUMENT

In accordance with section 921.001(5), Florida Statutes (Supp.1994), the district court properly affirmed Petitioner's guidelines sentence in excess of the statutory maximum penalty otherwise authorized by section 775.082, Florida Statutes (1995). Petitioner fails to raise a tenable constitutional challenge to this legislation. First, section 921.001(5) does not operate to amend section 775.082 by implication. The two sections operate harmoniously, and, in fact must be read together in order to determine whether a departure sentence, or a sentence in excess of the statutory maximum penalty, may be imposed. Secondly, there is no merit to Petitioner's claim that section 921.001(5) violates the notice requirement of the constitution. One is charged with knowledge of all statutes. A defendant can determine his potential sentence by preparing a guidelines scoresheet and considering all statutes relevant to his offense, including section 921.001(5).

Petitioner also fails to establish any ambiguity in the language of section 921.001(5). This Court must assume the legislature intended the plain and obvious meaning of the words used in the statute. Even if this Court looks beyond the literal language of the statute to the legislation which created it, it is clear that the district court construed the statute in the only

manner consistent with its legislative intent. For these reasons, Petitioner's arguments should be rejected and the decision below should be affirmed in all respects.

ARGUMENT

THE TRIAL COURT PROPERLY SENTENCED PETITIONER TO A GUIDELINES SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM FOR A THIRD DEGREE FELONY IN ACCORDANCE WITH SECTION 921.001(5).

Prior to January 1, 1994, trial court judges could not sentence defendants in excess of the statutory maximum penalty:

> Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to all other statutory provisions. The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review...

§ 921.001(5), Fla.Stat. (1993) (emphasis added) Thereafter, the legislature amended section 921.001(5) so that only departure sentencee would be required to remain within the relevant minimum and maximum sentencing limitations. Ch. 93-406, § 5, at 2920, Laws of Fla.

The preamble to chapter 93-406, reads in pertinent part: "An act... amending s. 921.001, F.S.;...providing that a departure sentence must be within any relevant statutory maximum sentence;..." Ch. 93-406, at 2911 (emphasis added) The amended section 921.001(5) currently reads as follows:

> Sentences imposed by trial court judges under the 1994 revised sentencing guidelines on or after January 1, 1994, must be within the 1994 guidelines

> unless there is a departure sentence with written findings. If **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. f a departure sentence, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s. 775.082....

§ 921.001(5), Fla.Stat. (Supp.1994)(emphasis added)[1]

Petitioner was properly sentenced under the guidelines to a sentence which exceeds the statutory maximum for a third degree felony. Petitioner fails to raise **a** tenable challenge to the constitutionality of the amended section 921.001(5). Furthermore, the language of the statute is clear, and the district court properly gave effect to its plain meaning.

Petitioner challenges the decision of the district court on several grounds. Petitioner first argues that the 1994 amendment of section 921.001(5), resulted in an amendment by implication of Florida Statute section 775.082, which delineates the maximum penalties to be imposed for crimes. This argument fails because section 921.001(5) does not intend to revise the subject matter of section 775.082, nor is there "an irreconcilable repugnancy between the two, so that there is no way the former rule can operate

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'Section 921.0014(2), Florida Statutes, contains almost identical language, and **was** also created by chapter 93-406. Ch. 93-406, §12, at 2940, Laws. of Fla.

without conflicting with the latter." State v. .R.M., 388 So.2d 1227, 1229 (Fla. 1980) To the contrary, the language of section 921.001(5) indicates that the two statutes must operate together in order to determine whether a departure sentence, or a sentence in excess of the statutory maximum penalty, may be imposed. Where the statutes complement each other and may be read in pari materia, there is no conflict or repugnancy. Id.

Petitioner next argues that section 921.001(5) violates the notice requirement of our state and federal constitutions. This argument is based upon the premise that section 921.001(5) provides for a maximum sentence which is open ended and subject to the discretion of the trial court. (Petitioner's Merit Brief, p. 7) The statute in fact clearly states that a sentence which exceeds the statutory maximum penalty must be within the sentencing guidelines. Hence, this statute cannot be said to deprive Petitioner of adequate notice of the authorized punishment for his crime. The Fourth District Court of Appeal comprehensively addressed this issue in Myers v. State, 696 So.2d 893 (Fla. 4th DCA 1997):

> Because every defendant is presumed to know the law and has actual knowledge of one's own criminal history, not to mention the facts of the primary and additional sentencing offenses, there is no possible claim of lack of notice as to the

> guidelines maximum that will be imposed for these offenses.. .One is charged with knowledge of all the Florida Statutes, not merely the one that favors a party in litigation. We take express note of section 775.082(8), which provides in part that "a reference to this section constitutes a general reference under the doctrine of incorporation by reference." This provision should alert the reader to the likelihood that section 775.082 has been incorporated into other statutes...The mere fact that section 775.082 itself does not expressly refer to sections 921.001(5) or 921.0014(2) does not render any of these statutes indefinite or unclear.

Id. at 898-899; See also Gardner v. State, 661 So.2d 1274, 1276 (Fla. 5th DCA 1995) On this point, Respondent requests that this Honorable Court adopt the reasoning of the district courts cited above.

Petitioner ultimately argues that section 921.001(5) contains inherent ambiguities that must be resolved in his favor. Because the language of this section is clear and unambiguous, Petitioner's final argument also fails. Statutory language should be interpreted according to its common usage, Zuckerman v. Alter, 615 So.2d 661, 663 (Fla. 1993), and this Court must assume the legislature intended the plain and obvious meaning of the words used in the statute. Leisure Resorts, Inc. v. Frank Rooney, Inc., 654 So.2d 911, 914 (Fla. 1995) Furthermore, a provision within a statute must be read within the context of the entire section, with

no single provision being read in isolation. Acosta v. Richter, 671 So.2d 149, 154 (Fla. 1996) Petitioner has overlooked these precepts, and has disengaged one sentence from the whole of section 921.001(5) in order to interpret it in an oblique manner which thwarts the plain meaning of the statute.

The sentence in question reads as follows: *"If 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."* According to Petitioner, this "plain" language indicates that a trial court may impose "a sentence that departs from the guidelines and exceeds the statutory maximum established in section 775.082." (Petitioner's Merit Brief, p. 7) (emphasis added)[2] This strained construction entirely disregards the next sentence in section 921.001(5) which states: *"If a departure sentence, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s.* 775.082."

It is clear from the wording of the statute, that the legislature is only concerned that departure sentences remain within the maximum sentencing limitations delineated in section

[2]The State notes that Petitioner claims the language of section 921.001(5) is both plain and ambiguous.

775.082. It is another common maxim of statutory construction that the mention of one thing implies the exclusion of another. P.W. Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988) Thus, where a departure sentence must remain within any relevant maximum sentence limitation, a guidelines sentence must not, and trial courts are free to use the full recommended guidelines range, notwithstanding the ordinary statutory maximum sentence.

In addition to the literal and usual meaning of words, consideration must also be given to their effect on the objectives and purposes of a statute. Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Administrative Hearings, 686 So.2d 1349, 1354 (Fla. 1997) The obligation of the Supreme Court 'is to honor the obvious legislative intent and policy behind an enactment, even where that intent requires an interpretation that exceeds the literal language of the statute." Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099, 1102 (Fla. 1989) Beyond the plain language of section 921.001(5), this Court should consider the preamble to chapter 93-406, which indicates that section 921.001 was amended for the purpose of "providing that a departure sentence must be within any relevant statutory maximum sentence." Ch. 93-406, at 2911, Laws of Fla. This legislation deleted the language previously contained in

section 921.001(5) which stated: "Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute." Ch. 93-406, § 5, at 2940, Laws of Fla. (emphasis added)

Because it is clear that the legislature intended that only departure sentences should be encumbered by the sentencing limitations contained in section 775.082, the State disagrees with that portion of the Fourth District Court of Appeal's decision in Myers v. State, which holds that the statutory maximum sentences provided in section 775.082 may be exceeded only up to the initial guidelines sentencing point total, but not up to the permitted 25% increase. Myers. v. State, 696 So.2d 893 (Fla. 4th DCA 1997)[3] It is evident that the recommended sentence under the guidelines includes the 25% variance range under section 921.0014(2). Section 921.001(5) directs that "the sentence under the guidelines must be imposed" if it exceeds the statutory maximum, but states that a departure sentence must be within the maximum. This suggests that by "departure," the legislature anticipated that even with a 25% upward variation, the guidelines sentence did not exceed the statutory maximum. After all, a departure sentence is one beyond

[3]Myers is currently pending review before this Court in State v. Myers, Case No. 91,251.

25% over the median number of prison months.* See §§ 921.0014 (2) & 921.0016(1) (c), Florida Statutes.

The plain meaning of section 921.001(5), as it is written, coupled with the legislative intent behind its amendment, as evidenced by chapter 93-406, Laws of Florida, defeat Petitioner's contention that the statute is ambiguous. Petitioner complains, however, that the district court "rewrote the statute" in order to support its reasoning. (Petitioner's Merit Brief, p. 10) Far from rewriting the statute, the district court simply reversed the articles 'the" and "a" within a sentence, stating that "[i]t would appear, from a grammatical standpoint, that the articles in the foregoing sentence are misplaced in the printed statute." Green v. State, 691 So.2d 502, 504 (Fla. 5th DCA 1997) It has long been established that courts may transpose words or phrases in accord with legislative intent. State ex rel Givens v. Holland, 147 Fla. 396, 2 So.2d 735 (1941) Where the text of a statute is clear, a court may properly effectuate that intent by supplying words or

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*The State disagrees that the Senate Staff Analysis, to which Appellant refers, supports the conclusion of the Fourth District Court of Appeal in Myers. The Staff Analysis appropriately indicates that a state prison sentence that varies upward or downward by more than 25% is a departure sentence. This is consistent with the opinion of the lower court in the instant case wherein it noted that where a sentence does not deviate from the recommended sentence by more than 25%, it is not a departure sentence.

correcting clerical errors. City of Opa Locka v. Trustees of Plumbing Industry Promotion Fund, 193 So.2d 29 (Fla. 3rd DCA 1966) (substituting "on" for "or" and inserting the word "of")

In sum, Petitioner has unsuccessfully challenged the constitutionality of section 921.001(5), Florida Statutes, (Supp.1994) and has failed to establish ambiguity within the language of the statute. Accordingly, this Court should affirm the decision of the Fifth District Court of Appeal, which properly interpreted section 921.001(5).

CONCLUSION

Based on the foregoing argument and authorities, Respondent respectfully requests that this Honorable Court affirm the judgment and sentence in all respects.

Respectfully submitted,

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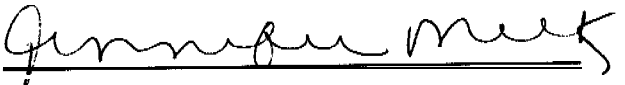

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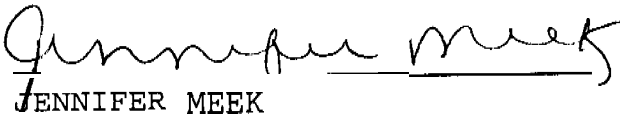
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the above merits brief has been delivered to Assistant Public Defender Dee Ball, counsel for Petitioner, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this 25th day of November, 1997.



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