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IN THE SUPREME COURT OF FLORIDA

ROBERT F. WILKINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 90, 864

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

REPLY BRIEF OF PETITIONER

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SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES

Article I, section 17, of the Florida Constitution

Chapter 93-406, sec. 5, Laws of Florida

Chapter 95-184, section 16, Laws of Florida

Section 775.021 (1), Florida Statutes

Section 775.082, Florida Statutes

Section 775.082 (3)(d), Florida Statutes

Section 775.082 (8). Florida Statutes (1995)

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ARGUMENT

IN RESPONSE TO RESPONDENT'S ASSERTION THAT THE TRIAL COURT PROPERLY SENTENCED PETITIONER

Respondent initially argues that under section 921 .001 (5), Florida Statutes, as amended in 1994, the Petitioner was properly sentenced to an eighty-five month term of incarceration for the instant third degree felony offense of vehicular homicide. (Respondent's brief pgs. 4-5) Specifically, Respondent contends that section 921 .001 (5), as amended in 1994, does not amount to an unconstitutional amendment by implication of section 775.082, Florida Statutes. (Respondent's brief pg. 5) In support of this contention, Respondent argues that ". . .the language of section 921 .001 (5) indicates that the two statutes must operate together in order to determine whether . . .a sentence in excess of the statutory maximum penalty. . .may be imposed. " (Respondent's brief pg. 5) Citing the decision of ***State v. J.R.M.,*** 388 So.2d 1227, 1229 (Fla. 1980), Respondent further argues that "[w]here the statutes complement each other and may be read ***inpari materia***, there is no conflict or repugnancy. " (Respondent's Brief pgs. 5-6)

Petitioner would respond that the present co-existence of sections 775.082 and 921.001 (5) has yielded conflicting alternative sentencing schemes throughout Florida. This is directly due to the differing interpretations by the district courts of the legislature's amendment to section 921.001(5) concerning what is a "proper recommended guidelines sentence" in conjunction with the applicable statutory maximum. Consequently, because of such confusion and nonconformity among the district ***courts*** in ***how the two sections operate together, they*** can hardly be described as either compatible or complementary with each other. As noted in

Petitioner's initial brief, the Fourth District Court of Appeal has interpreted the "recommended" guidelines sentencing range under 921 .001 (5) differently from the Fifth and Third District Courts. See Myers v. ***State, 696*** So.2d 893 (Fla. 4th DCA 1997); ***Martinez v. Sate,*** 692 So.2d 199 (Fla. 3d DCA 1997); and Green ***v. State,*** 691 So.2d 502 (Fla. 5th DCA 1997). Thus, the very fact that there is disagreement among the District Courts as to how to "harmonize" section 921 .001 (5) (as amended by Chapter 93-406, section 5, Laws of Florida) and 775.082 speaks volumes as to the unconstitutional conflict and irreconcilable repugnancy between the two sections resulting in an amendment by implication.

Respondent next argues that section 921.001 (5) does not violate the state and federal prohibitions against indefinite punishment citing to the due process analysis addressed in Myers, ***supru.*** (Respondent's brief pgs. 6-7) Petitioner would respond, however, that the due process analysis applied by the Fourth District Court in Myers is circular. Simply by the Fourth District stating that ". . .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 . . . " does not explain how there is sufficient due process notice ***if there exists an ambiguity in the statute(s) at issue.*** This is particularly true where the Fourth District goes on to specifically find that it disagrees with the Third and Fifth District's ***interpretation*** of what the "recommended" sentence is under section 921 .001 (5) and by how much a sentencing court may exceed the applicable statutory maximum. ***Id.***, 896-900. In fact, the Fourth District even acknowledges in ***Myers*** that the Fifth District has "effectually rewritten" section 921.001 (5) in ***Green, supru. See Myers, supru, 900.***

Petitioner again submits, therefore, that the differing interpretations by the appellate

courts as to the "maximum wandering" term of incarceration addressed under section 921 .001 (5) creates more than just an "anomaly" with section 775.082 as described by the Fourth District in Myers. *Id.,* 897. Rather, section 921 .001 (5), as amended in 1994, created a due process constitutional train wreck resulting from the section's ambiguity as to when it requires that the statutory maximum in section 775.082 *must* be exceeded by the recommended guidelines sentence. There is further ambiguity in the legislature's amendment to section 921 .001 (5) concerning the extent of *the "wandering limit"* to which a statutory maximum may be exceeded, upon the sentencing court being required to impose a guidelines sentence in excess of the statutory maximum. This additionally creates an unconstitutional due process violation against indefinite sentencing limits directly prohibited under Article I, Section 17, of the Florida Constitution. It should similarly be noted that section 775.082 (8), Florida Statutes (1995), cited to by the Fourth District in Myers, which states that a reference to section 775.082 constitutes a "general reference under the doctrine of incorporation by reference," is inapplicable to *the* case *sub judice*. This is because the instant offense occurred in 1994 and subsection (8) to section 775.082 was enacted in Chapter 95-184, sec. 16, Laws of Florida, to be applicable to offenses occurring on or after July 1, 1995. *Id., 899.*

Finally, Respondent asserts that section 921.001 (5) is not ambiguous and, thus, not capable of differing interpretations. (Respondent's brief pgs. 7-12) The beginning point of Respondent's argument on this point is that the language of section 921.001 (5) is "clear and unambiguous. " Respondent cites to the provision in section 921.001 (5), that "[i]f a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by section 775.082, the sentence under the guidelines must be imposed, absent a

departure. "

Respondent specifically maintains that the additional wording in section 921.001 (5) that ". . . a departure sentence . . .must be within any relevant maximum sentence limitations provided in section 775.082" indicates the legislature is only concerned that ***departure*** sentences remain within the maximum sentencing limitations delineated in section 774.082. (Respondent's brief pgs. 8-9) This argument simply begs the question. It does not explain ***when does the "guidelines sentence" exceed the applicable statutory maximum and what is the maximum permitted "recommended" guidelines sentence in excess of the applicable statutory maximum.*** As noted above and in Petitioner's initial brief, there is enough apparent ambiguity in the statutory language of section 921 .001 (5) to cause the Fourth District to disagree with the Third and Fifth Districts as to what the legislature meant by the term "recommended sentence under the guidelines" and whether the sentencing court is limited to only a specific recommended sentence or the "entire" recommended sentencing range when the sentence imposed exceeds the applicable statutory maximum.

Most importantly, it is illogical that the legislature would "require" a sentencing court to impose a "recommended guidelines sentence, " when that sentence exceeds the applicable statutory maximum, if the same statutory maximum is also included as a possible "recommended guidelines sentence. " Certainly, Respondent does not appear to dispute that the legislature intended a "recommended guidelines range" instead of a "single recommended guidelines sentence" to be available to a sentencing court. (Respondent's brief pg. 9) Consequently, the problem of ambiguity occurs in determining when the legislature intended the "recommended guidelines sentencing range" to take effect ***in place*** of the statutory

maximum permitted incarceration under section 775.082.

Although Respondent additionally argues that the "plain meaning of section 921,001 (5)" does not require applying the mandatory statutory construction principles of section 775.021 (1), Florida Statutes, to the ambiguities inherent in the language of section 921 .001 (5), the very decisions presently before this Court in ***Green, supra,*** and in Myers, ***supra,*** refute this argument. (Respondent's brief pgs. 10-11) Nor is Petitioner's applying the mandated strict construction to the statutory language of section 921 .001 (5) "rewriting" the statute as maintained by the Respondent. This is because Respondent is merely looking to the actual, but ambiguous, language of section 921 .001 (5) and applying a statutory construction which is most beneficial to the Petitioner instead of the Respondent in accordance with the dictates of section 775.021 (1). Thus, one is left with the only option of construing the meaning of section 921 .001 (5) to require that the entire "recommended guidelines sentencing range" must exceed the applicable statutory maximum before the trial court must impose a sentence for an offense beyond the statutory maximum designated for that offense. Moreover, petitioner submits that such an interpretation of section 921 .001 (5) would appear to most closely reflect the purpose behind the legislature's enactment of Chapter 93-406, sec. 5, Laws of Florida. In essence, ***requiring*** sentencing ***courts*** to impose a ***higher guidelines sentence,*** when the guidelines sentence exceeds the applicable statutory maximum, logically implies that the particular guidelines sentence ***would not*** encompass the very statutory maximum it exceeds.

Petitioner would, in summary, request that this court declare section 921 .001 (1) unconstitutional based on the aforementioned arguments presented and presented in the Petitioner's initial brief and remand this cause for resentencing within the applicable statutory

maximum. Alternatively, due to the ambiguities in the meaning of the language used in section 921.001 (5), Florida Statutes, Petitioner requests that this Court apply, under section 775.021 (1), Florida Statutes, a statutory construction to section 921 .001 (5), Florida Statutes, which is the most favorable to the Petitioner, i.e., that ***the entire recommended guidelines sentencing range*** must exceed the applicable statutory maximum before a sentence in excess of the same statutory maximum may be imposed.

CONCLUSION

Based on the arguments and authorities cited herein and in Petitioner's initial brief, Petitioner respectfully requests that this Honorable Court reverse the decision of the District Court of Appeal, Fifth District, and remand this case for resentencing within the statutory maximum designated in section 775.082 (3)(d), Florida Statutes, for a third degree felony.

Respectfully submitted,

JAMES B. GIBSON
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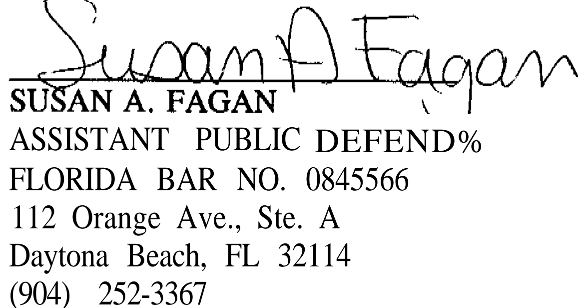
SEVENTH JUDICIAL CIRCUIT



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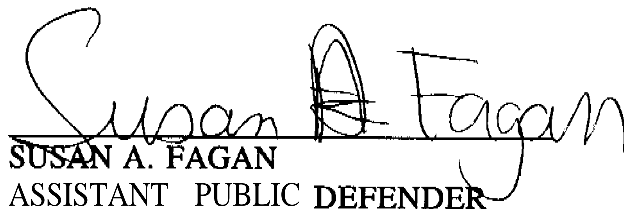
CERTIFICATE OF SERVICE

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 Blvd., 5th FL, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Robert F. Wilkins, DOC No. 441285 B-2-09-lower, Washington C.I., 4455 Sam Mitchell Drive, Chipley , Fl. on this 24th day of November, 1997.



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