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IN THE SUPREME COURT OF FLORIDA

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By _____
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CHARLES WILLIAM FLOYD, :

Petitioner, :

v. :

STATE OF FLORIDA, :

Respondent. :

CASE NO. 92,602
First DCA No. 96-4571

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. SECTION 921.001(5), FLORIDA STATUTES, FAILS THE DUE PROCESS REQUIREMENTS OF NOTICE AND DEFINITENESS BECAUSE IT REQUIRES MORE THAN PERSONS OF ORDINARY INTELLIGENCE CAN MANAGE IN ATTEMPTING TO ASCERTAIN THE POTENTIAL SENTENCE FOR A CRIMINAL ACT.

Respondent argues that "[a] defendant is not deprived of notice of the criminal penalty merely because he must add."
(Answer Brief at 11) If it were only so easy. To correctly calculate a scoresheet, the would-be offender must not only add but must subtract, multiply and, if she wants to convert months into years, divide. In addition, particularly in the wake of § 921.001(5), Florida Statutes, to determine sentence exposure she must also correctly anticipate, find, read and determine how to

apply pertinent caselaw. This is beyond the ken of most segments of our population, and certainly outside the capacity of persons of ordinary intelligence who are not lawyers, paralegals or experienced pro se litigants.

Respondent cites to United States v. Bolton, 82 F. 3d 427 (10th Cir. 1996). Bolton was an unpublished opinion, to which citations are discouraged by the court that issued it. The state has not attached a copy of the opinion to its brief, as suggested by the court of appeal. To the extent that the focus in Bolton is the federal guidelines, it is inapplicable. Too, there is no indication in Bolton that the defendant argued that the guidelines fail due process because persons of ordinary intelligence cannot apply them, the argument here. Finally, the focus in Bolton is whether the guidelines provide fair warning at sentencing, not whether they give the potential offender adequate notice of the possible penalties. To petitioner's knowledge, the latter is the proper test of the constitutional sufficiency of notice of potential punishments. See Page 7 of initial brief.

II. THE VARIETY OF APPELLATE INTERPRETATIONS
OF § 921.001(5), FLORIDA STATUTES (1995),
DEMONSTRATES ITS AMBIGUITY AND COMPELS A
CONSTRUCTION MOST FAVORABLE TO THE ACCUSED.

The state asserts that the term "recommended sentence" as used in the guidelines statute is not vague because "[t]he legislature has explained, in great detail, how to calculate the recommended sentence and when and to what extent the trial court could increase or decrease it." (Answer Brief at page 20). In reply, detail should not be confused with clarity. The court in Myers v. State, 696 So. 2d 893 (Fla. 4th DCA 1997), devoted many pages of its opinion to the discernment of meaning from the legislature's detailed lack of clarity on the precise meaning of "recommended sentence." In Green v. State, 691 So. 2d 502 (Fla. 5th DCA 1997), the Fifth DCA agreed with the Myers definition of "recommended sentence," but reached a different conclusion on the operation of § 921.001(5). The First DCA, on the other hand, disagrees with the Myers construction of "recommended sentence," leading to yet another interpretation of § 921.001(5). Floyd v. State, 23 Fla. L.Weekly D651 (1st DCA Feb. 26, 1998). See initial brief at pages 11-13.

The rule of lenity in § 775.021(1), Florida Statutes, exists to point the way out of this sort of confusion. It compels

adoption of the Myers construction.

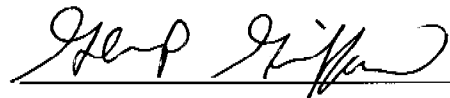
CONCLUSION

Based on the arguments contained herein and in the initial brief, petitioner requests that this Honorable Court quash the decision of the First District Court of Appeal and remand with directions to resentence him to no more than 5.09 years in prison.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Charmaine M. Millsaps, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, this 26th day of May, 1998.

Respectfully submitted
& Served,



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