IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 92,769

EMANUEL O'NEAL,

Respondent.

****
ON PETITION FOR CERTIORARI REVIEW
****

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution and Respondent, EMANUEL O'NEAL, was the defendant in the criminal trial conducted in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the appellant and Petitioner the appellee in the appeal heard by the Fourth District Court of Appeal for the State of Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as "the State."

Reference to the record on appeal will be by the symbol "R;" reference to the transcripts will be by the symbol "T;" reference to any supplemental record or transcripts will be by the symbols "SR[vol.]" or ST[vol.];" reference to the appendix will be by the symbol "A;" and reference to Respondent's Answer Brief will be by the symbols "AB;" all to be followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the statement of the case and facts as they are stated in the initial brief on the merits.

SUMMARY OF THE ARGUMENT

POINT I: Florida Statutes Section 921.001(5) is constitutional on its face. It provides adequate notice and does not run afoul of the constitutional prohibition against the delegation of powers or against cruel or unusual punishment. The judges of the Fourth District Court of Appeal implicitly recognized this when they declined to address this point in their written opinion. This Honorable Court should also decline Respondent's invitation to strike the statute down on these grounds.

POINT II: As used in Florida Statutes Sections 921.001(5) and 921.0014(2), the term "recommended sentence" is not limited to a single fixed number; rather, it includes any sentence within the recommended range of plus or minus twenty five percent. Therefore, contrary to the Fourth District's position and to Respondent's position, the guidelines do authorize a trial court to increase the initial calculation of "State Prison Months" by up to twenty five percent even when this initial calculation of "State Prison Months" is greater than the statutory maximum. This Honorable Court should quash the Fourth District's opinion, insofar as it addresses this ground, and should reimpose Respondent's original sentence.

ARGUMENT

Respondent has taken the liberty of not only restating but renumbering Petitioner's point on appeal. Therefore, for the convenience of this Court, Petitioner will follow suit by addressing the sole issue raised in Petitioner's initial brief under the heading Point II and by addressing the new issue raised by Respondent's answer brief under the heading Point I.

> POINT I: SECTION 921.001(5) IS CONSTITUTIONAL ON ITS FACE. (Restated).
>
> SUBPOINT A: APPELLANT HAD NOTICE; THUS, THERE WAS NO DUE PROCESS VIOLATION. (Restated).

Respondent was properly sentenced by the trial court to twenty years in state prison even though this sentence was in excess of the statutory maximum of five years for a third degree felony which was prescribed by Florida Statutes Section 775.082. The law and statutory language is clear: a statutory maximum can be exceeded when the sentencing guidelines calculate a range beyond the stated statutory maximum. § 921.001(5), Fla. Stat.; Fla. R. Crim. P. 3.702.

Respondent argues that there is insufficient notice of the possible imposition of a sentencing penalty in excess of the statutory maximum set forth in Section 775.082(3)(d). In other words, Appellant argues that Florida Statutes Section 921.001(5) is unconstitutional because a "lay person" is unable to fathom

the complexities of the sentencing guidelines system, and as a result has no notice that Section 921.001(5) could apply to them. This argument is without merit. The maxim that ignorance of the law is no excuse is a foundational covenant of our justice system. Respondent is presumed by law to have knowledge of those statutes and rules. See State v. Ginn, 660 So. 2d 1118, 1120 (Fla. 4th DCA 1995) (All persons are presumed to know the contents of the criminal statutes.); State v. Hart, 668 So. 2d 589, 592 (Fla. 1996) (All defendants facing imposition of probation are on constructive notice of conditions contained in the Rules of Criminal Procedure and same satisfies the requirements of procedural due process.)

Not only is ignorance of the law no excuse, but Respondent, and others like him, are clearly put on notice that their sentence may exceed the statutory maximum of five years provided for in Section 775.082 (3)(d). First, the 1995 version of Section 775.082(8) expressly provides in pertinent part that "a reference to this section constitutes a general reference under the doctrine of incorporation by reference." This alerts the reader to the possibility that Section 775.082 has been incorporated by reference into other statutes. This is further supported by the fact that the comments appended to Section 775.082 refer to Section 921.001 as a connected statute.

If the reader then turns to Section 921.001(5), the reader

will discover that Section 921.001(5) specifically references Section 775.082. That is, Section 921.001(5) explicitly states that "[i]f a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by Sec. 775.082, the sentence under the guidelines must be imposed, absent a departure." Clearly, the reader is on notice that Section 921.001(5) must be read in tandem with Section 775.082.

It must be further noted that Section 921.001(5) falls within Chapter 921, one of the most important chapters in Florida criminal law since it deals with guidelines sentencing. Chapter 921 is clearly labeled "Sentence." This should put a person concerned about sentencing for a crime on alert that they should review it to determine if there is any special provision which might affect a sentence. Section 921.001(4)(b)(2) provides that "[t]he 1994 guidelines apply to sentencing for all felonies, except capital felonies." Thus, the State contends that Respondent, as well as any one else committing a felony, was given notice that the sentencing guidelines applied to all felonies. Since Section 921.001(5) is part of the sentencing guidelines, Respondent was also on notice of the possibility that his sentence might exceed the statutory maximum.

Not only are the Sentencing Guidelines and their penalties well documented in Florida's statutes and rules of criminal procedure, they are well documented by case law. Other courts

have previously dealt with the very issues now raised by the Respondent and in a manner contrary to Respondent's position. For example, in Gardner v. State, 661 So. 2d 1274, 1276 (Fla. 5th DCA 1995), the Fifth District rejected the defendant's lack of notice argument, stating that the wording of Section 921.001(5) was clear.

In Myers v. State, 696 So. 2d 893, 898-99 (Fla. 4th DCA), rev. granted, 703 So. 2d 477 (Fla. 1997), the Fourth District stated with regard to this identical issue that:

> 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.
>
> We expressly reject defendant's contention that, because there is nothing in section 775.082 that would give him notice to "check" chapter 921, he lacked notice of the precise penalty imposed on him. 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.

Although Respondent views the court's opinion in Gardner, 661 So. 2d at 1274, as glib and superficial, the opinion of that court and of the Fourth District in Myers is correctly reasoned. Respondent has, as does any defendant charged under Florida

Statutes Section 893.13, the ability to calculate the potential sentence range as prescribed by the Florida Statutes and the Florida Rules of Criminal Procedure. It is clear that the Florida Statutes and the Florida Rules of Criminal Procedure adequately provide notice to aspiring criminals regarding the potential penalty for their criminal actions. Section 921.001(5) is constitutional on its face. This Court should decline the invitation to strike it down.

SUBPOINT B: THERE WAS NO IMPROPER DELEGATION OF THE POWER TO PROMULGATE SENTENCING GUIDELINES. (Restated).

Respondent alleges that the Florida Legislature unconstitutionally delegated the authority to set the maximum penalties for certain offenses to the Sentencing Guidelines Commission. The United States Supreme Court addressed this identical issue when reviewing a challenge to the propriety of a delegation by Congress to the Federal Sentencing Commission. The Court found that although Congress could not properly delegate its legislative power, it could obtain assistance of its "coordinate Branches," and that Congress had properly done so in the creation and empowering of the Sentencing Commission to establish sentencing guidelines for every federal criminal offense. Mistretta v. United States, 488 U.S. 361 (1989).

The U.S. Supreme Court in Mistretta, supra, specifically recognized that:

> . . . the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach to such cooperative ventures: 'In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination.' ***So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'***
>
> Applying this "intelligible principle" test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. . . . ***'The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function.' Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'"*** [Citations Omitted] at 487 U.S. 372.

The Florida Legislature has sought to invoke this same "intelligible principle" doctrine as set forth by the United Supreme Court in Mistretta, supra. The structure and delegated power of the Florida Sentencing Commission so closely mirrors

that of the Federal Sentencing Commission that it clearly does not violate the nondelegation doctrine. See, Art. I, §1, U.S. Const.; Art. II, §3, Fla. Const. Rather than improperly delegating legislative power, the Florida Legislature properly established a Sentencing Guideline Commission, then, upon completion by the Commission of its assigned task, the 1994 Sentencing Guidelines, including Section 921.001(5), were enacted, not by the Commission, but by an act of the Legislature. Smith v. State, 537 So. 2d 982 (Fla. 1989); Gardner, 661 So. 2d at 1274.

Contrary to Respondent's contentions, the Sentencing Commission can not "award" a life sentence or, for that matter, any other kind of sentence. The Sentencing Commission can only recommend possible guidelines for sentencing calculations. In Tory v. State, 686 So. 2d 689 (Fla. 4th DCA 1996), the Fourth District stated that:

> the crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislative intent.

Here, the legislature set out stringent guidelines for the commission to follow in recommending sentencing provisions. Section 921.001(4)(a) states the purpose of the guidelines and principles that they should embody, while Section 921.001(3)(a)

and Section 921.001(4)(d) refer to factors that the commission should consider. Section 921.001(9)(a) calls for the commission to conduct certain research on sentencing. It is evident that the legislature provided sufficient guidance to the commission to prevent an unconstitutional delegation of legislative power.

Not only did the legislature provide sufficient guidance, they also made sure that neither the Commission nor the Court could make these recommendations law. It is true that the Commission may make recommendations concerning the guidelines, and that once the Commission has made its recommendations, the Supreme Court may accept the recommendations or further refine them before, if it so chooses, presenting them to the Florida Legislature. However, only the Florida Legislature can adopt, enact, or create new guidelines which would become part of Florida's statutory law under Section 921.001. This is made evident by Section 921.001(4)(c) which provides:

> The commission shall, no later than October 1 of each year, make a recommendation to the members of the Supreme Court, the President of the Senate, the Speaker of the house of Representatives, and the chairs of the relevant substantive committees of both houses on the need for changes in the guidelines. Upon receipt of such recommendation, the Supreme Court may revise the statewide sentencing guidelines to conform them with all or part of the commission recommendation. Such revision shall be submitted by the Supreme Court to the President of the Senate, the Speaker of the House of Representatives, and the chairs of the relevant substantive committees of

> both houses no later than December 1 of each year following the receipt of the recommendations of the commission. ***However, such revision is effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised.*** . . .

In Smith, 537 So. 2d at 982, the Florida Supreme Court upheld the validity of the sentencing guidelines generally against an allegation that the legislature had improperly delegated authority to the Commission. Furthermore, in Gardner, 661 So. 2d at 1276, the court specifically held that Section 921.001(5) itself does not improperly vest the Sentencing Guidelines Commission with rulemaking authority. Respondent's argument that there is a violation or potential violation of the separation of powers by the Sentencing Guideline Committee through the "setting [of] maximum penalties" must fail.

SUBPOINT C: SECTION 921.001(5) DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND/OR UNUSUAL PUNISHMENT EITHER FACIALLY OR AS APPLIED. (Restated).

Respondent contends that Section 921.001(5) violates the tenets against cruel and/or unusual punishment inherent in the Florida and Federal Constitutions, both facially and as applied to his case. However, the constitutionality of Section 921.001(5) as it was applied to Respondent was not preserved for appeal. It is well settled that the constitutionality of a statute as applied must first be raised in the trial court in order to be

preserved for appellate review. State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993); Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla 1982).

Respondent raised, on appeal for the first time, the constitutionality of Section 921.001(5) as it was applied to him. Unfortunately, Respondent never objected to the application of Section 921.001(5) to his case at the sentencing hearing, or even in a motion for correction of sentencing error. As a result, Respondent waived the constitutionality of Section 921.001(5) as applied in his case.

In addition, it is apparent that Section 921.001(5) does not violate the tenets against cruel and/or unusual punishment on its face. Respondent argues that Section 921.001(5) eliminates the statutory maximum provided by Section 775.082 which acts as a safeguard against disproportional punishment, and that as a result, Section 921.001(5) is facially unconstitutional. Respondent is in error.

It is a long standing principle when it comes to analyzing sentencing statutes for violations of the tenets against cruel and/or unusual punishment that "[t]he length of the sentence actually imposed is a matter of legislative prerogative" with which the courts are reluctant to interfere. Hale v. State, 630 So. 2d 521, 525 (Fla. 1993), cert. denied, 513 U.S. 909 (1994). The legislature has the right and duty to establish penalties for

crimes, and there is no question that they may establish new statutory maximums and minimums. Smith v. State, 537 So. 2d 982 (Fla. 1989)(Court found sentencing guidelines in general to be constitutional as enacted by the legislature).

The sentences are not automatically disproportional to the crime in cases where the recommended sentence exceeds the statutory maximum. The primary purpose of sentencing is to punish the offender. See Fla. R. Crim. P. 3.701(b)(2). The sentencing guidelines were developed to allow trial courts to consider, on a case by case basis, circumstances which would be a valid basis for a subjective determination of the length of a particular defendant's sentence within the parameters of the sentencing guideline range. Specifically, Section 921.001(4)(a)(4) provides that: "[t]he severity of the sentence increases with the length and nature of the offender's prior record." The court in Bloodworth v. State, 504 So. 2d 495(Fla 1st DCA 1987), also acknowledged that the defendant's criminal background was a justification for imposing a lengthy sentence under the sentencing guidelines. Calculation of the recommended sentence range pursuant to the sentencing guidelines is merely a more up to date method of ensuring that a defendant's punishment remains proportional to his crime.

Even if the traditional statutory maximum is superseded by the recommended guidelines sentence, that does not mean that

there is no longer any limiting factor in a guidelines sentence. The law mandates that a trial court must calculate a recommended sentence and a recommended range of plus or minus twenty-five percent (25%) and must sentence a defendant within that range. § 921.001(5), Fla. Stat.; § 921.0014(2), Fla. Stat.; Fla. R. Crim. P. 3.702(d)(16). As a result, the top of the recommended guidelines range has now become the limiting factor as well as the new maximum. For this reason, as well as for the other reasons cited above, it is clear that Section 921.001(5) is facially constitutional.

As previously argued, Respondent has waived the constitutionality of Section 921.001(5) as applied to his case. However, should the Court reach this issue, it is clear that in attacking the constitutionality of an allegedly cruel and/or unusual sentence, an appellant has the burden of showing through a proportionality analysis that 1) this jurisdiction imposes less severe sentences for similarly situated offenders 2) this jurisdiction imposes less severe sentences for similarly situated offenders and 3) that the sentence is unusually harsh given the gravity of the offense. Vickery v. State, 539 So. 2d 499 (Fla. 1st DCA 1989)(court must consider three-part proportionality test articulated in Solem v. Helm, 463 U.S. 277(1983)); Golden v. State, 509 So. 2d 1149 (Fla. 1st DCA 1987) (Appellant must show that his sentence falls within the criteria articulated in Helm);

Long v. State, 558 So. 2d 1091, 1092 (Fla. 5th DCA 1990) (same). See also, Jesus v. State, 565 So. 2d 1361 (Fla. 4th DCA 1990)(proportionality analysis used in determining whether the length of a sentence was unconstitutional).

Respondent argues that Section 921.001(5) is unconstitutional as applied to his case because his sentence of twenty years is not proportional to his crime, a third degree felony with a statutory maximum of five years. However, Respondent has failed to adduce evidence to satisfy any of the three prongs of the proportionality test; therefore, Respondent has not overcome the presumption that Section 921.001(5) is constitutional as applied. Furthermore, given the length and severity of Respondent's criminal background and his history of recidivism, (R 24-24), a sentence of 220.4 months is indeed proportional to Respondent's crime. This Court should find Section 921.001(5) to be constitutional not only facially but as applied.

POINT II: THE TRIAL COURT IMPOSED A LEGAL SENTENCE UNDER THE SENTENCING GUIDELINES. (Restated).

Petitioner stands by the argument made in the initial brief on this point, but makes the following additional comments in response to Respondent's answer brief. Petitioner notes that Respondent argues at page 25 of the Answer Brief that:

> The First District in Roberts v. State, 677 So. 2d 309 n.2 (Fla. 1st DCA 1996), the Second District in Garcia v. State, 666 So. 2d 231 n.1 (Fla. 2d DCA 1995), the Fourth District in both Jenkins v. State, 696 So. 2d 893 (Fla. 4th DCA 1997), and Myers v. State, supra, and the Fifth District in both Mays v. State, supra, and Green v State, supra, all expressly stated in their opinions that a criminal defendant's recommended sentence was the precise state months obtained after subtracting the 28 points. If Petitioner-State is looking for a consensus this is the finding that four of five district courts of appeal have agreed upon in written opinions.

Petitioner once again explains that the State does not disagree that the number of state months obtained after subtracting 28 points is a recommended sentence. The State merely asserts that it is not the only possible recommended sentence.

Furthermore, contrary to Respondent's implication in the above quoted paragraph, all of the district courts except for the Fourth District have implicitly, even if not expressly, recognized that, for all practical purposes, there is more than one possible and legal recommended sentence in each case. See Delancey v. State, 673 So. 2d 541 (Fla. 3d DCA 1996); Martinez v.

State, 692 So. 2d 199, (Fla. 3d DCA), rev. dismissed, 697 So. 2d 1217 (Fla. 1997); State v. Eaves, 674 So. 2d 908 (Fla. 1st DCA 1996); Floyd v. State, 23 Fla. L. Weekly D651 (Fla. 1st DCA February 26, 1998); Nantz v. State, 687 So. 2d 845 (Fla. 2d DCA 1996); West v. State, 708 So. 2d 1032 (Fla. 2d DCA 1998); Mays v. State, 693 So. 2d 52 (Fla. 5th DCA), rev. granted, 700 So. 2d 686 (Fla. 1997); Green v. State, 691 So. 2d 502 (Fla. 5th DCA), rev. granted, 699 So. 2d 1373 (Fla. 1997).

Respondent states that the use of the article "a" in the Section 921.001(5) phrase, "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," refers to a single item. (AB 30)(emphasis added). Petitioner would point out that the way that the article is used here implies that "**a** recommended sentence" is merely any one of many possible recommended sentences.

The trial court properly construed the term "recommended sentence" to be any sentence within the recommended range. The trial court could legally sentence Respondent to any sentence within that range. Thus, Respondent's sentence of 20 years was a proper nondeparture sentence in accordance with Section 921.001(5). The district court's opinion, insofar as it finds this sentence to be improper, should be quashed and Respondent's original sentence should be reinstated.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, the State of Florida respectfully submits that this Court should affirm Florida Statutes Section 921.001(5) as being constitutional on its face and as applied. The State also respectfully submits that the decision of the district court, insofar as it found that a sentence that was in excess of the guidelines recommended median sentence but within the guidelines recommended range was improper, should be QUASHED, and that the sentence originally imposed by the trial court should be REINSTATED.

Respectfully submitted,
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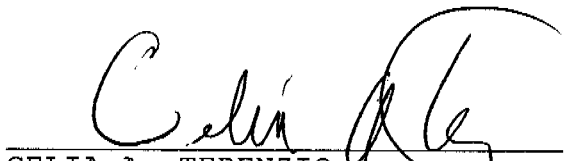

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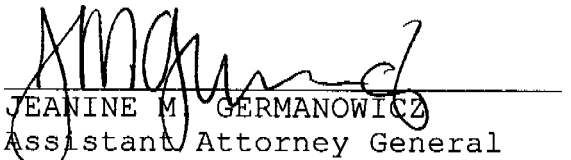

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Reply Brief on the Merits" has been furnished by courier to: JEFFREY ANDERSON, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, on July 13, 1998.

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