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IN THE SUPREME COURT
STATE OF FLORIDA

CLERK, SUPREME COURT
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DONALD J. BANKS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 93,469
)	
STATE OF FLORIDA)	
)	
Respondent.)	
)	

**PETITION FOR REVIEW OF DECISION
OF SECOND DISTRICT COURT OF APPEAL**

REPLY BRIEF OF PETITIONER

FRANK LOUDERBACK

Florida Bar No. 193295
 ✓ Louderback and Helinger
 150 2nd Avenue North
 Suite 840
 St. Petersburg, FL 33701
 (813) 896-2147

Counsel for Petitioner

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ARGUMENT

I. A VICTIM'S DESIRE TO FOREGO RESTITUTION FOR A PRISON SENTENCE IS IRRELEVANT TO THE SENTENCING PROCESS AND SHOULD NOT ELIMINATE A TRIAL COURT'S DISCRETION TO DEPART DOWNWARD IN SENTENCING A DEFENDANT WHEN THE NEED FOR RESTITUTION IS OUTWEIGHED BY THE NEED FOR A PRISON SENTENCE.

Contrary to the explicit provisions of section 921.143(2), Fla. Stat. (1995), the State urges this Court to ignore the plain meaning of the statute and hold that it does not limit a victim's statements at a sentencing hearing solely to the facts of the case and the impact of any harm, including social, psychological, or physical harm, financial losses and loss of earnings directly or indirectly relating to the crime for which the defendant is to be sentenced. Instead, the State contends that a victim's right to make statements at a sentencing is much broader and includes actually making the determination as to whether a statutory mitigator applies by agreeing to forego restitution in exchange for a prison sentence. Noticeably absent from the State's brief is a single authority in support of such an argument. Rather, the State reasons that "the need for restitution must lead to the inquiry of whose need the court is looking at." (Respondent's Brief at p. 8) The illogic of such an argument rests on the faulty assumption that the statutory basis for a downward departure under section 921.0016(4)(e) permits consideration of a victim's desire to forego restitution. The "need for restitution" inquiry includes the

amount of restitution and the ability to pay, and whether the victim suffered compensable injuries. But, in light of section 921.143(2), it does not include a victim's desire to receive or not receive restitution or to determine whether a statutory mitigator is applicable. In sum, the State would argue that the scope of a victim's desires for punishment of an offender is broader than that permitted by law and even exceeds the historic discretion afforded trial judges in fashioning appropriate sentences. Accepting such an argument by the State would lead to impermissible sentencing schemes, and this Court should reject the broad construction of section 921.143(2) advanced by the State.

Petitioner does not take issue with the importance of victim impact statements at a sentencing hearing. Such statements are a method by which the victim or the victim's family convey the crime's impact on them and give the victim a voice in the proceeding which creates a sense of fairness. See Constitutionality of Victim Impact Statements, 60 Mo. L. Rev. 731, 746-747 (1995). However, broadening the scope of victim impact statements to the level urged by the State injects an arbitrary factor into the sentencing process which would inevitably lead to disparity in sentencing based on what a victim wants the sentence to be. Therefore, victim impact statements are properly limited to the **effect** of the crime upon, and not the sentence desired by, the victim. Such a limitation conforms to the intent expressed by the

legislature in adopting section 921.143(2), Fla. Stat. (1995), and allows a trial judge to employ rationale at sentencing, not emotion.

The State also urges this Court not to construe the statutory mitigator liberally in favor of the Petitioner because there is no lack of definiteness or ambiguity in section 921.0016(4)(e). If there is no ambiguity in the statutory mitigator, then why did the district court certify the question to this Court not only in this case, but also in State v. Baker, 713 So.2d 1027 (Fla. 2d DCA 1998)?¹ Obviously the district court grappled with the proper application of section 921.0016(4)(e), and therefore, it is entirely appropriate to consider the statute liberally in favor of the accused as well as other pertinent statutes as evidence of the legislature's intent. In that vein, consideration of the legislature's limitation on a victim's input at sentencing by virtue of section 921.143(2) is both relevant and controlling in this case.

¹In the specially concurring opinion by Acting Chief Judge Patterson in this case, he "agree[d] with the certified question not only as to the issue of the ability to pay [restitution], but also as it relates to a victim's desire to receive restitution." State v. Banks, 712 So.2d 1165, 1167 (Fla. 2d DCA 1998).

II. THE WRITTEN FINDINGS BY THE TRIAL COURT THAT THE VICTIM PROVOKED THE INCIDENT ALONG WITH THE FACTS SET FORTH IN THE RECORD SUPPORTED A DOWNWARD DEPARTURE BASED ON SECTION 921.0016(4)(f), FLA. STAT. (1995).

The State urges this Court to reject the plain and obvious atmosphere in the trial court proceedings in which the trial judge attempted to delicately balance the emotional situation of the victim's injuries and what it thought was the appropriate sentence to be rendered to Petitioner. Admittedly, the trial court's oral statements on the record could have been more precise. However, even a cursory review of the transcript makes it readily apparent that the trial judge was simply attempting to avoid pouring more fuel on a fire by specifically stating in the presence of the victim that he had initiated and provoked the offense. In response to counsel for Petitioner's statements relating to the provocation by the victim, the trial judge stated that she wasn't "going to make any more comment on that." (R-38-40) (Emphasis added) The trial judge did not disagree with the contention that the victim provoked the offense, but simply stated she wasn't going to make anymore comment on the matter.²

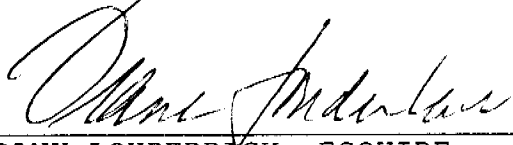
²It must be remembered that the departure sentence was a negotiated plea with the court, and was entered "pursuant to discussions with the Court," and "with the understanding" that the departure sentence was "based upon the need for restitution and that the victim provoked or initiated the offense." (R26) Even in light of this exchange the State clings to the assertion that the trial judge "clearly rejected" victim provocation as a basis for the departure sentence. (Respondent's Brief, p. 11).

The State also claims that the factual circumstances surrounding the incident in question, which are undisputed, do not support designating the victim as an initiator of the offense. Petitioner respectfully disagrees with this contention. While there is no question that the victim did not deserve the acts of violence committed upon him by Petitioner, it cannot be seriously argued that a teenager driving through a residential neighborhood at a high rate of speed and making an obscene gesture with one's hand when told to slow down would not provoke the anger of any parent whose children might be harmed thereby. Accordingly, the undisputed facts support a finding that the victim provoked the instant offense within the meaning of section 921.0016(4)(f).

The State also quibbles with the fact that the change of plea form itself, which the trial judge signed, expressly acknowledged a downward departure sentence based on the victim having initiated or provoked the offense. The State claims that because the trial judge's signature appears on page two of the document, there is no indication that the trial judge wrote or even read what appears on page one of the form. The State further argues that there is record support for the proposition that the trial judge flatly rejected victim provocation as a basis for downward departure although it fails to cite where in the record this occurred. While Petitioner believes such an argument devoid of merit, given the fact that the trial judge (a) signed the change of plea form

acknowledging victim provocation as a basis for a departure sentence, but (b) failed to check the appropriate box on the sentencing scoresheet, and (c) made ambiguous comments at sentencing in an effort to avoid fueling the victim's emotions, Petitioner believes it is appropriate to remand this case to the trial court for the purpose of clarifying its intention on this matter. In this regard, this Court's decision in Pease v. State, 712 So.2d 374 (Fla. 1997), would allow for the trial court to correct any deficiencies which clearly are not attributable to the Petitioner. Accordingly, Petitioner urges this Court to reverse the decision of the district court, or alternatively, remand to the trial court for the limited purpose of clarifying its intentions with respect to finding victim provocation as a statutory mitigator in support of the downward departure sentence.

Respectfully submitted,

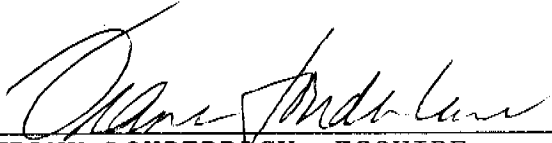


FRANK LOUDERBACK, ESQUIRE
Louderback & Helinger
150 2nd Avenue North, Suite 840
St. Petersburg, FL 33701
(813) 896-2147
Fla. Bar No. 193295

Attorney for Petitioner

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Regular U.S. Mail this 1st day of October, 1998, to: ERICA M. RAFFEL, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Westwood Center, Tampa, FL 33607-2366.



FRANK LOUDERBACK, ESQUIRE