IN THE SUPREME COURT OF FLORIDA

WINYATTA BUTLER,

Petitioner

v. Case No. SC01-2465

STATE OF FLORIDA,

Respondent

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ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

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PETITIONER'S AMENDED REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent's answer brief will be referred to by the symbol "AB" followed by the appropriate page numbers.

SUMMARY OF THE ARGUMENT

The State fails to explain the conflict between sections 921.002(1)(g) and 921.0024(2), nor does the State overcome the serious problems of confusion, lack of clarity, and lack of notice presented by section 921.0024(2).

The State argues that there is no conflict between section 921.0024(2) and section 921.002(1)(g). AB:4. This is clearly incorrect as there is a direct conflict between the two. The former provision allows courts to sentence defendants only up to the statutory maximum as provided by section 775.082, while the latter provision allows sentences exceeding the statutory maximum where the scoresheet sentence exceeds the statutory maximum.

It is impossible to give effect to both provisions. However, even if the two provisions could be harmonized, section 921.0024(2) is so unclear, confusing, and misleading that Petitioner is entitled to a lenient construction of the provision. In addition, section 921.0024(2) violates the notice requirement of the due process protection afforded by the Florida and U.S. Constitutions. Therefore this Court should accept jurisdiction and reverse the Fifth DCA's decision, and answer the Fifth

DCA's certified question in the negative.

ARGUMENT

I. Section 921.0024(2), Florida Statutes, is invalid because it permits a court to impose a sentence in excess of the statutory maximum, contrary to the clear mandate of Section 921.002(1)(g).

The State misconstrues the legislative history of the Criminal Punishment Code. The legislative history indicates that adherence to the statutory maximum was a fundamental principle of the Code. Final Bill Research and Economic Impact Statement of the House of Representatives Committee on Crime and Punishment for Bill CS/HB 241(Appendix B: 1, 5). The State claims that "the Legislature's intent in enacting the Code, then, was to provide greater upward sentencing discretion to the trial court while also limiting downward departure sentences." AB: 7. This is correct, but still does not support the State's construction of section 921.0024(2). Much of the legislative analysis does address the legislature's concern about the high number of downward departures under the guidelines, and the fact that the Code was designed largely to discourage downward departures. The legislative history does show that the legislature's intent in enacting the Code was, in part, to give the courts more upward discretion than the Guidelines allowed. However, the legislative history also, with at least equal clarity, expressly limits the specific provision in the Code that would provide courts with greater upward discretion: "The bill allows a judge to impose any

prison sentence up to the statutory maximum. The statutory maximum is 5 years for a third degree felony, 15 years for a second degree felony and 30 years for a first degree felony." Final Bill Research and Economic Impact Statement of the House of Representatives Committee on Crime and Punishment for Bill CS/HB 241 (Appendix B: 1, 5). This provision is codified as section 921.002(1)(g). [1]

Upward sentencing discretion was part of the legislative intent behind the Code. Petitioner does not contest such an interpretation. However, section 921.002(1)(g) constrains that discretion at the statutory maximum. Section 921.0024(2) increases the range of possible sentences, specifically beyond that statutory maximum. The principle of greater upward discretion is compatible with section 921.002(1)(g), but section 921.0024(2) cannot be salvaged by inventing a general intent to allow such increased upward discretion. Therefore, this part of the legislative analysis supports the adherence to the statutory maximum codified in section 921.002(1)(g), but is not indicative of legislative intent regarding section 921.0024(2).

A more central issue than legislative intent, however, is that the challenged

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[1] In contrast, under the Guidelines, the court could not automatically sentence up to the statutory maximum. The court was required to impose either a sentence within 25% of the recommended guidelines sentence; the court could impose an upward departure, within the statutory maximum, only by providing sufficient written reasons. Section 921.0016, Fla. Stat.

provisions are misleading and confusing. Whatever the legislature intent may be, it is so defectively expressed in the contradictory, disjointed, and misleading provisions, that regardless of legislative intent or the clarity of the legislative history, Petitioner must receive the benefit of a lenient construction. Section 775.021(1), Fla. Stat.

The 1998 Criminal Punishment Code repealed and replaced the Guidelines as Florida's sentencing scheme for all offenses committed after October 1, 1998.[2] However, as above, the State attempts to legitimize the obviously conflicting statutory provisions by piggybacking section 921.0024(2) onto the repealed 1994 Guidelines. The State claims that "[a]s provisions identical to section 921.0024(2), have been in effect since 1994 it is presumed that the Legislature was fully aware of this provision when enacting section 921.002(1)(g) and this Court is obligated to interpret these sections so that they harmonize." AB:10. The State is referring, presumably, to section 921.001(5), a provision found in the 1994 Guidelines, which were repealed by the Code.[3] The State depends on the canon of statutory construction that provides

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[2] Ch. 97-197, section 1, Laws of Florida, provides that "[s]ections 921.0001, 921.001, 921.0011, 921.0012, 921.0013, 921.0014, 921.0015, 921.0016, and 921.005, Florida Statutes, as amended by this act, are repealed effective October 1, 1998, except that those sections shall remain in effect with respect to any crime committed before October 1, 1998."

[3] Section 921.001(5), Fla. Stat. (1994, repealed 1998) provides that "[i]f a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by

that "[t]he courts' obligation is to adopt an interpretation that harmonizes two related, if conflicting statutes while giving effect to both, since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force." AB:10, citing Palm Harbor v. Kelly, 516 So. 2d 249, 251-52 (Fla. 1987).

The State's argument fails. Chapter 97-194 of the Laws of Florida repealed the Guidelines for all offenses after October 1, 1998 and established the Florida Criminal Punishment Code, an entirely separate system of sentencing that operates completely independently of the Guidelines. The Legislature, in enacting the Criminal Punishment Code, made extensive changes to Florida's system of sentencing, including restoring the statutory maximum as the sentencing cap. In light of these changes, it cannot be presumed that the Legislature would retain any particular provisions of the Guidelines, or that they would hold any value as precedent for interpreting a subsequent, independent statutory scheme. Therefore, the State cannot directly rely on the substantive provisions of the Guidelines as a guide to the Legislature's intent with regard to provisions of the Code. It is a contradiction to presume, as the State attempts, that the Legislature passed section 921.002(1)(g) while "fully aware" of

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s. 775.082, the sentence under the guidelines must be imposed, absent a departure."

certain provisions in the Guidelines and with an "intent that they remain in force," when section 921.002(1)(g) was part of the statute that repealed the Guidelines in full.

The State's argument also relies on the rule of statutory construction that "a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." AB: 10, citing Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959). The State claims that "where a defendant's score exceeds the statutory maximum, the presumption is that the specific statute, i.e., section 921.0024(2), controls and operates as an exception to the general provision that the court may impose a sentence up to and including the statutory maximum pursuant to section 921.002(1)(g)." AB: 10-11.

This argument fails, as this rule of construction does not apply to the challenged provisions. The provisions at issue, sections 921.002(1)(g) and 921.0024(2), are not, respectively, "general" and "specific." They are contradictory and inconsistent. Section 921.002(1)(g) allows a court to impose a sentence only up to the statutory maximum, while section 921.0024(2) directs that the sentence can exceed the statutory maximum when the scoresheet sentence exceeds the statutory maximum. This rule of construction cannot be applied where the former statute prohibits what the latter statute directs.

The State cites Adams v. Culver, 111 So.2d 665 (Fla. 1959) as an example of

a more specific statute governing a more general statute. However, the instant case is easily distinguishable from Adams. In Adams, the petitioner was charged with committing a lewd and lascivious act before a minor, with a maximum sentence of ten years, for exhibiting an obscene picture in the presence of a minor. On appeal, this Court held that petitioner could only be convicted of a lesser charge, the showing of an obscene picture to a minor, which carried a maximum sentence of five years. Since the exhibition of a lewd and pornographic picture had been specially and explicitly dealt with by the latter statute, the specific statute alone was applicable to the offense charged against petitioner. Id. at 667.

The relationship between the two statutes in Adams is very different from that between the challenged provisions in the instant case. In Adams, the statutes described different offenses and were not inconsistent with each other. "Specific" in this sense assumes that one statute must be completely within the universe of elements covered by the more general statute. Only in such circumstances can a specific statute more precisely define a situation without contradicting a more general statute. In the instant case, sections 921.002(1)(g) and 921.0024 are contradictory. It is impossible to give effect to both provisions.

In addition, in Adams, the court's construction favored the defendant. "It has been said that this rule is particularly applicable to criminal statutes in which the

specific provisions relating to particular subjects carry smaller penalties than the general provision." Id. at 667. The State would reverse this corollary, and construe the statutory provisions *against* the defendant.

Even if the State's arguments were correct, and the challenged provisions could be harmonized, section 921.0024(2) is so unclear and so confusing that the rule of lenity should apply, and section 921.0024(2) should be declared invalid. Under the rule of lenity, penal statutes must be strictly construed and must be construed in the manner most favorably to the accused. Section 775.021(1), Fla. Stat. Petitioner relies upon the argument set forth in his Initial Brief.

II. Section 921.0024(2) violates the notice requirement of the Due Process protection afforded by Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution.

The due process requirement of notice applies to penalties as well as to the substantive provisions of criminal statutes. To satisfy due process requirements, a provision must provide notice to a person of ordinary intelligence. It is impossible for a person of ordinary intelligence to determine whether section 921.002(1)(g), or section 921.0024(2) will apply to their sentence. Therefore, section 921.0024(2) violates due process. Petitioner relies upon the argument set forth in his Initial Brief.

Petitioner challenges section 921.0024(2), not with regard to the factual application of that statute to his case, but rather, as to the facial validity of the statute itself. Respondent's assertions concerning Petitioner's failure to adequately preserve that issue are without merit for four reasons.

First, once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case. Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1982). If this Court accepts jurisdiction of the instant case, it may consider the constitutionality of the challenged provision.

Second, the facial validity of a statute may be raised for the first time on appeal. As respondent concedes, "[t]he facial validity of a statute . . . can be raised for the first time on appeal even though prudence dictates that it be presented at the trial court level to assure that it will not be considered waived. The constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level." AB:12, citing Trushin v. State, 425 So. 2d 1126, 1129-1130 (Fla. 1982). Petitioner is challenging section 921.0024(2) as applied to any defendant whose scoresheet under the Code exceeds the statutory maximum. The validity of section 921.0024(2) does not involve any factual application and may therefore be raised for the first time on appeal.

Third, fundamental error may be raised for the first time on appeal. Johnson v. State, 616 So.2d 1(Fla. 1993). In Johnson, this Court considered whether a challenge to the habitual felony offender statute, section 775.084, constituted a fundamental error which could be raised for the first time on appeal. Id. at 3-4. The Court reviewed the statute at issue and determined that it affected "a quantifiable determinant of the length of sentence that may be imposed on a defendant," and thus allowed a trial court to impose "a substantially extended term of imprisonment" on those defendants who were deemed qualified under the statute. The Court held that the statute involved a fundamental liberty due process issue, and therefore the issue was a question of fundamental error which could be raised on appeal, even though it had not been raised in the trial court. Id.

In the instant case, Petitioner challenged the facial validity of section 921.0024(2), which, like the habitual felony offender statute, clearly affects the length of the sentence imposed upon a defendant. Section 921.0024(2) implicates fundamental liberty due process interests for defendants whose scoresheet sentences exceed the statutory maximum, since the statute allows courts to impose sentences on these defendants in excess of the statutory maximum and therefore exposes those defendants to potentially significantly longer prison terms. Accordingly, Petitioner challenges as fundamental error his sentence of 75.6 months, in excess of the statutory

maximum, imposed pursuant to an invalid statute, section 921.0024(2). Since it is fundamental error, it may be raised for the first time on appeal.

Finally, since Petitioner filed his 3.850 motion *pro se* and was not represented by an attorney at the trial court or district court level, any failure by Petitioner to raise the constitutional challenge at the trial court level should be viewed with leniency. Pleadings by *pro se* litigants are typically treated with leniency compared to formal pleadings drafted by lawyers. Barrett v. City of Margate, 743 So.2d 1160, 1162 (Fla. 4th DCA 1999), citing Haines v. Kerner, 404 U.S. 519 (1972).

In a vagueness challenge to a statute, the court should resolve all doubts against the state. However, the State cites the wrong standard for determining the constitutionality of the provisions. The State contends that "where reasonably possible, a statute will be interpreted in a manner that resolves all doubts in favor of its constitutionality." AB:12. Contrary to the State's assertion, a higher standard prevails in a vagueness challenge. "When reasonably possible and consistent with constitutional rights, the court should resolve all doubts of a statute in favor of its validity. But when there is doubt about a statute in a vagueness challenge, the doubt should be resolved in favor of the citizen and against the state." Brown v. State, 629 So.2d 841 (Fla. 1994); State v. Brake, 796 So. 2d 522 (Fla. 2001); State v. Wershow, 343 So. 2d 605 (Fla. 1977).

In addition, the standard is different for criminal rather than civil statutes. The Constitution tolerates a lesser degree of vagueness in enactments "with criminal rather than civil penalties because the consequences of imprecision" are more severe. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982).

The State's argument that section 921.0024(2) is not unconstitutionally vague is unavailing. The State claims that "section 921.0024(2) (as had previous provisions identical to this section) gives persons of ordinary intelligence adequate notice of the fact that if . . . his or her guidelines sentence is greater than the statutory maximum the guidelines sentence must be imposed." AB:13.

First, the State implies that "previous provisions identical" to section 921.0024(2) suffice to give notice that a sentence imposed under the Code can exceed the statutory maximum. Again, the State refers, presumably, to provisions in the 1994 Guidelines, which were repealed in their entirety by the Code for all offenses after October 1, 1998. The State cannot rely on the repealed 1994 Guidelines to provide notice to defendants of sentencing provisions found in the 1998 Code. Similarly, a defendant should not be expected to anticipate that the court will apply repealed statutory provisions to determine his or her sentence. The challenged provision is so lacking in notice, and is so unclear and misleading, that the State is forced to suggest that it would be clear if only the reader had looked at other, now repealed, statutes.

Second, the State claims that because the single provision of section 921.0024(2) is not facially vague when read by itself, the vagueness challenge fails. However, Petitioner has not argued that section 921.0024(2) is vague by itself; rather, it is vague and misleading in relation to section 921.002(1)(g). Petitioner relies upon the argument set forth in his Initial Brief. Since a person of ordinary intelligence cannot ascertain which provision will apply to him or her, section 921.0024(2) is unconstitutionally vague and therefore void.

Under the rule of lenity, as codified in Florida Statutes 775.021(1), penal statutes must be construed strictly and in favor of the accused. In his Initial Brief, Petitioner argued that the rule of lenity must apply and section 921.0024(2) be declared invalid. The State argues that "this rule of strict construction arises from the argument raised in point II of Butler's brief, i.e., the due process requirement that criminal statutes must apprise ordinary persons of common intelligence what is prohibited." AB:13. The State then claims that because section 921.0024(2) is not susceptible of different constructions, the rule of lenity need not be invoked. Id. This argument fails for two reasons.

First, the State confuses the rule of lenity with due process. In Florida, the rule of lenity is statutory. Section 775.021(1), Fla. Stat. Therefore, it must be applied even if the challenged provisions do not rise to a due process violation. While the rule of

lenity is related to and rooted in due process notions of notice and fair play, they are not interchangeable. Under the rule of lenity, if a provision is susceptible of different construction, it must be construed in favor of the defendant. This is a higher standard for the State to meet than that required for a due process violation, which requires that a statute give persons of ordinary intelligence adequate notice. Therefore, even if no due process violation is found, this Court should apply the rule of lenity and declare section 921.0024(2) invalid.

Second, the State claims that the language of section 921.0024(2) is not susceptible of different constructions, and that the rule of lenity therefore does not apply. However, Petitioner has not argued that section 921.0024(2), if read by itself, is susceptible of different constructions. However, sections 921.0024(2) and 921.002(1)(g) clearly point to different, and conflicting, constructions. Therefore, the rule of lenity must be invoked and section 921.0024(2) found invalid.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Court to answer the certified question in the negative, declare Petitioner's sentence to be illegal, and remand the instant cause to the trial court with directions to resentence Petitioner, Mr. Winyatta Butler, to a term in prison not to exceed the statutory maximum of five years set forth in section 775.082(3)(d), Fla. Stat. (Supp. 1998) for the offense charged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petitioner's Amended Reply Brief has been furnished by U.S. Mail to **Kellie A. Nielan,** Assistant Attorney General, **Pam Koller**, Assistant Attorney General, and **Robin Compton,** Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118; **Robert A. Butterworth**, Attorney General, Department of Legal Affairs, Suite PL-01, The Capitol, Tallahassee, FL 32399-1050; and **Office of the State Attorney**, Government Center, 2725 Judge Fran Jamieson Way, Building D, Viera, FL 32940, on this 13th day of August, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Amended Reply Brief complies with the font requirements of Rule 9.100 (1) and has been formatted in the font, Times New Roman at 14-point.

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