IN THE SUPREME COURT OF FLORIDA

LAWRENCE LOGAN,	:	
Petitioner,	:	
vs.	:	Case No. SC03-1155
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The charges against Mr. Logan were for robbery. (S.R.38-39). There were no criminal charges pending before the trial court for aggravated battery or attempted murder of a police officer, or for perjury, obstruction of justice or witness tampering. (S.R. 38-39). Therefore the statements in the Respondent's brief that concern firing a gun at a police officer, or lying in official court proceedings, or threatening state witnesses, Respondent's Brief at 1-5, have no bearing on the charges and issues before the court and should be stricken. The complete lack of record cites to support these statements as having been proved by evidence adduced at the trial level is an additional ground for striking these statements from Respondent's brief. Fla.R.App.P. 9.210(b)(3). Moreover, since Respondent contends the sentencing guidelines are not applicable to Mr. Logan's case and does not argue there exist factual or legal grounds to support an upward departure sentence against Mr. Logan, these facts are not relevant to any issues argued by Respondent and should be stricken. Baldwin v. State, 857 So.2d 937 (Fla. 1st DCA 2003).

ARGUMENT

ISSUE I.

CAN DEPARTURE LIFE SENTENCES FOR MARCH, 1984 OFFENSES, IMPOSED UNDER THE SENTENCING GUIDELINES, BE UPHELD AS VALID UNDER THE CRIMINAL PUNISHMENT CODE?

The basis of the state's sole argument to this Court is that the criminal punishment code (the Code) and the sentencing guidelines are the same body of law, joined in some evolutionary manner. This argument has no foundation in the Florida statutes, case law, or logic. While Smith v. State, 537 So.2d 982 (Fla. 1989) stated that the then current version of the sentencing guidelines was applicable when an election was made for that case, Smith did not decide whether the legislature intended that an entirely new sentencing law, like the Code, is the applicable law under the sentencing guidelines selection provision. Under the state's argument, any sentencing scheme enacted after the sentencing guidelines that considers traditional sentencing facts, like the degree of the offense and the prior record, would be a logical extension of the sentencing guidelines.

The Code does not qualify as some evolutionary extension of the sentencing guidelines simply because it happened to be the law enacted after the sentencing guidelines were abolished. The Code does not qualify as an extension of the sentencing guidelines because it contains point calculations. The Code plainly is not an extension of the sentencing guidelines because the legislature stated clearly in enacting the Code that the sentencing guidelines were repealed by the Code. Repealed means to abandon, renounce, or recall. When the

legislature in 97-194 stated it was repealing the sentencing guidelines statutes, the legislature was clearly abandoning, renouncing and recalling those sentencing guidelines laws. In so repealing, recalling and abandoning the sentencing guidelines, the legislature did not write a specific selection provision into the Code, as existed in the repealed sentencing guidelines.

The state argues to this Court, "Now, the petitioner seeks to have the Court overturn fifteen years of precedent and remand for resentencing under the 1983 guidelines. This is untenable. It is wrong." Answer brief at 31. The state does not justify this argument with case law or any statutory provisions or with the record in this case. Apparently the state considers its own opinion alone sufficient precedent for this Court. Petitioner is not seeking to overturn precedent, but is seeking a lawful result based on the applicable laws. There is nothing untenable or wrong about petitioner's position. The state misrepresents the facts of this case by stating, "Yet one thing is certain: the state correctly asserted the Code was the applicable law at the time of the election." Answer Brief at 31. The state never asserted the Code was the applicable law in the trial court. The only other meaning this statement could possibly hold is that the only thing that is certain is that the state's argument is correct. This argument then is reduced to the following: the state is correct because it says it is. No decision of this or any other court should rest on so flimsy a foundation.

Aside from simply arguing that it is right, the state suggests that petitioner's request to apply the 1983 sentencing law is "absurd" because that law was enacted "almost twenty years after the

fact." Answer Brief at 30-31. The state argues, "In this case, the petitioner would have the Court reach the patently absurd result of having the parties apply 1983 sentencing law almost twenty years after the fact. This is an undue burden on everyone concerned, defense counsel, state attorneys, and the courts. No one wants to descend into the old "twilight zone" of the guidelines and research whether reasons for departure are still valid, whether the court may depart upwardly again, whether contemporaneous reasons must be filed, etc. As a practical and policy matter, application of the law at the time of the election is best for all concerned. It is easier to understand and apply current law since over time the original parties and relevant materials may no longer be available." ***Id. Obviously, since the state did not bother to respond to the numerous sentencing guidelines issues presented in the initial brief, its particular desire to avoid researching and arguing those points is apparent. However, lawyers are constantly required to research and argue areas of law from times past, sometimes delving back into laws existing even before the birth of this nation. See e.g., Lawrence v. Texas, 123 S.Ct. 2472, 2478-2480 (2003)(discussion of history, beginning in colonial times, of laws directed at homosexual conduct); State v. Webb, 335 So.2d 826 (Fla. 1976)(right to trial by jury applies to cases in which the right was recognized at the time of the adoption of the State's first constitution). Our system of jurisprudence that relies on precedent, requires looking into past decisions and laws, however far back that search may take one. Moreover, had the state truly wanted to avoid the "twilight zone" of whether the given reasons for departure are still valid in the trial court, the state***

could have requested that the trial court impose a guidelines sentence. Instead, the state at the trial level requested that an upward departure sentence be imposed and on the appellate level has successfully sought to have appellate review of this upward departure sentence removed, by claiming for the first time on appeal that the Code applies to Mr. Logan's sentencing. While this result the state requests certainly is expedient, it is neither lawfully grounded in the applicable statutes or case law; nor is this result just.

The state does not seek to justify its arguments with the facts of this record. Instead, the state recites the trial judge's reasons for the original upward departure sentences as facts in this case, without referring back to the facts adduced during the trial itself. Respondent's Brief at 1-5. By so doing, the state perpetuates the wrong facts found by the trial judge and claims those wrong facts as truths in this record. It is improper for the state to recite and rely on these erroneous sentencing departure grounds, when the state claims the sentencing guidelines do not apply to this case. If the sentencing guidelines do not apply, then the upward departure grounds given by the trial judge are not relevant to the state's argument. Facts which are not relevant to an argument should not be made a substantial part of a brief and should be stricken.

Additionally reciting the upward departure grounds as facts is not proper, because the departure grounds must be supported by evidence in the record, and cannot be facts pulled out of thin air. State v. Mischler, 488 So.2d 523 (Fla. 1986). The state, however, cites to no part of this record to support the trial court's upward departure grounds. Presumably this is because no factual basis for

these findings exists in this record. If no factual basis exists for these upward departure reasons and if those reasons provide no support for the state's argument, then the state wrongly uses those upward departure grounds in its brief. The state's argument cannot prevail when that argument is based on unsubstantiated facts.

The state argues that Mr. Logan was "fairly warned" that an election in 2001 would mandate sentencing under the Code. Answer Brief at 16. In support of this argument the State relies on two cases, Quevado v. State, 838 So.2d 1253 (Fla. 2d DCA 2003) and Sheely v. State, 820 So.2d 1080 (Fla. 2d DCA 2002), both decided in 2003, **after** Mr. Logan made his election. Additionally the state cites no case dated prior to resentencing, which flatly holds that an election under the guidelines was actually an election to be sentenced under the Code. The state does not explain how Mr. Logan was fairly warned by cases occurring after his selection.

In this fashion the state relies on "doublespeak" for the foundation of its implausible arguments in this case. The state argues that a warning is "fair" when it comes after the event to be warned about. In the state's reality, the Code says it repeals the previous guidelines, but this means that the Code "retains the election provision" of the repealed law. The state does not explain how one law can simultaneously repeal and retain another single law.

The state explains its failure to make in the trial court the argument it first presented on appeal as follows: "Why the parties at the resentencing hearing of May 8, 2001 failed to comprehend the applicable law is anyone's guess." Answer Brief at 27. Not only did the parties fail to perceive the Code as applicable to Mr. Logan's

sentence, but additionally the trial judge himself failed to share the state's most current perception of the law. Usually a party on appeal is arguing a position already presented to the lower tribunal. The state, however, makes an argument to this Court when that argument was never presented to the trial court and the reasoning behind it was not even adopted by the district court. All the lawyers at the trial level, including the lawyer for the state, failed to see that the sentencing guidelines and the Code are the same, because those sentencing provisions are not the same. The reality of the Code being some "evolutionary refinement" of the sentencing guidelines is a position taken only by the Attorney General's Office. Answer Brief at 18. That the guidelines and the Code are the same is an argument that should be soundly rejected by this Court.

The State not only fails to cogently explain why the Code is the applicable law to this case, but then ignores every other argument presented concerning the sentencing guidelines departure sentence. By failing to dispute Appellant's arguments regarding the sentencing guidelines issues, the state then concedes that if the Code does not apply, Mr. Logan must then be sentenced to the applicable 1983 sentencing guidelines range of 12 to 17 years. The Code is not the sentencing provision applicable to Mr. Logan's case. The district court erred in applying the Code to Mr. Logan's sentence. Accordingly, the decision of the district court should be quashed and this matter remanded for resentencing under the 1983 version of the sentencing guidelines. Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Dale E. Tarpley and Robert J. Krauss, Concourse Center #4, Suite 200, 3507 E. Frontage Rd., Tampa, FL 33607, (813) 287-7900, on this _____ day of February, 2004.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

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