IN THE SUPREME COURT OF FLORIDA

LAWRENCE LOGAN,

Petitioner,

v. **FSC No. SC03-1155**

STATE OF FLORIDA,

Respondent.
_____/

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

SUPPLEMENTAL MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

By its order dated February 4, 2005, the Court ordered supple-mental briefing limited solely to the following question:

> Because the defendant committed the offenses prior to July 1, 1984 (the effective date of the 1983 guidelines), but after October 1, 1983, does he have the right to select to be sentenced pursuant to section 921.001(4)(b)(1), Florida Statutes?

The Court prescribed a briefing schedule. The instant brief is submitted in compliance with the Court's briefing schedule.

SUMMARY OF THE ARGUMENT

The petitioner, Lawrence Logan, does have the right to elect a guidelines sentence. The state's opinion is based on legislative intent, the weight of judicial precedent as established by this Court and the District Courts of Appeal, and the rule of statutory construction that when a statute is reenacted, the judicial con-struction placed on the statute is presumed to have been adopted in the reenactment.

ARGUMENT

THE STATE RESPONDS TO THE QUESTION RAISED BY THE COURT IN THE AFFIRMATIVE IN LIGHT OF THE LEGISLATIVE INTENT, THE WEIGHT OF JUDICIAL PRECEDENT AS ESTABLISHED BY THIS COURT AND THE COURTS OF APPEALS, AND THE PRINCIPLE OF STATU-TORY CONSTRUCTION THAT WHEN A STATUTE IS RE-ENACTED THE JUDICIAL CONSTRUCTION PLACED ON THE STATUTE IS PRESUMED TO HAVE BEEN ADOPTED IN THE REENACTMENT.

The Honorable Court has asked for supplemental briefing regarding the following question:

> Because the defendant committed the offenses prior to July 1, 1984 (the effective date of the 1983 guidelines), but after October 1, 1983, does he have the right to select to be sentenced pursuant to section 921.001(4)(b)(1), Florida Statutes?

The state responds the Court should answer this question in the affirmative and approve the opinion of the Second District Court of Appeal.

Section 921.001(4)(b)1, Florida Statutes (2000) as enacted by chapter 93-417, Laws of Florida, and effective November 24, 1993 states:

> The guidelines enacted effective October 1, 1983, apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994; and to all felonies, except capital felonies and life felonies, committed before October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions.

The guidelines from 1983 to 1992 contained a similar provision

which this Court and the various district courts construed:

> The guidelines shall be applied to all felonies, except capital felonies, committed on or after October 1, 1983, and to all felonies, except capital felonies and life felonies, committed prior to October 1, 1983, for which sentencing occurs after such date when the de-fendant affirmatively selects to be sentenced pursuant to the provisions of this act. (e.s.)

Fla. Stat. s. 921.001 (4)(a) (1983) et seq. Florida courts have never given the statutes a restrictive reading as to defendants committing criminal offenses after October 1, 1983. To construe section 921.001(4)(b)(1) strictly and literally would deprive Logan of his statutory right to elect between a nonguidelines or a guide-lines sentence. A strict construction might also place the stat-ute's constitutionality into question.

Since Logan's offenses took place on or about March 17, 1984 (S.R. 38, 39) and the guidelines were not constitutionally effec-tive until July 1, 1984, ***Smith v. State***, 537 So. 2d 982, 988 (Fla. 1989), he would not fall under the first clause of section 921. 001(4)(b)1 despite the fact the first clause refers to October 1, 1983. The second clause permits an election to be sentenced under the guidelines for defendants whose offenses were committed before October 1, 1983. This would obviously exclude the petitioner. A literal reading of the statute would leave the petitioner without a remedy.

The courts of Florida, however, in their interpretation of *Smith*, have not construed section 921.001(4)(b)(1) literally. *See Sheely v. State*, 820 So. 2d 1080 (Fla. 2d DCA 2002); *Kunkel v. State*, 765 So. 2d 244 (Fla. 1st DCA 2000); *Fowler v. State*, 641 So. 2d 941 (Fla. 5th DCA 1994); *Banks v. State*, 548 So. 2d 723 (Fla. 1st DCA 1989); *Wahl v. State*, 543 So. 2d 299 (Fla. 2d DCA 1989). In each of these cases the various courts afforded relief, despite the fact the offenses were committed after October 1, 1983. The logic being, a sentence that is imposed pursuant to guidelines which have not been constitutionally enacted is an illegal sentence subject to correction. *Sheely*, 820 So. 2d at 1081.

The sentence is illegal unless the defendant affirmatively elects to be so sentenced. *Wahl*, 543 So. 2d at 299. The *Fowler* court considered the issue:

> Although there is a factual distinction between our case and *Smith*, it appears to be without substance. Smith would have been en-titled to make his affirmative selection even if the 1983 version of 921.001(4)(a) had ef-fectively adopted the guideline rules because his felony was committed before October 1, 1983. In fact, he made such an affirmative selection prior to his original sentence. In our case, Fowler would have had no such option because his offense was committed after Octo-ber 1, 1983. <u>However, since his offense was committed prior to July 1, 1984, the new date determined by the supreme court to replace the original cut-</u>

> off date, then under *Smith*, Fow-ler is entitled to be resentenced either under the appropriate statutes or, if he now affirmatively selects, under the current guidelines. (e.s.)

641 So. 2d at 942. Thus, the date October 1, 1983 is not written in stone. The actual date is a distinction without a difference. A defendant sentenced under the guidelines for an offense committed prior to July 1, 1984 is effectively under an illegal sentence and cannot be sentenced under the guidelines absent a positive elec-tion.

The matter is a mixed question of legislative intent and judi-cial construction. The *Smith* court interpreted section 921.001 (4)(a) as applicable to defendants who committed offenses prior to July 1, 1984. If the offense occurred before this date and the sentencing took place after the date, defendants are entitled to make their election. *Smith* has been unanimously followed. Of course, reasonable jurists might wonder why section 921.001(4)(b)1, enacted over four years following the *Smith* decision, did not substitute July 1, 1984 for October 1, 1983.

A possible reason: when a statute is reenacted, the judicial construction placed on the statute is presumed to have been adopted in the reenactment. *Burdick v. State*, 594 So. 2d 267, 271 (Fla. 1992). Accordingly, the legislature has tacitly

approved the procedure of allowing criminal defendants whose crimes post-dated October 1, 1983 the right of election between preguidelines and guidelines sentencing. The legislature has also implicitly ap-proved the practice adopted in *Smith* and its progeny that in exercising the right of election, a defendant elects the guidelines in effect at the time of the election.

In this case, those guidelines are the Criminal Punishment Code. To construe the statute strictly and literally would con-travene the legislative intent to give those defendants whose of-fenses predated the guidelines the right to elect guidelines sen-tencing. It is a court's primary duty to give effect to the legis-lative intent of a statute; if a literal interpretation of a statute leads to an unreasonable result, plainly at variance with the purpose of the legislation as a whole, the court must examine the matter more closely. *State v. Iacovone*, 660 So. 2d 1371, 1373 (Fla. 1995). Statutes, as a rule "will not be interpreted so as to yield an absurd result." *Id*. (quoting *Williams v. State*, 492 So. 2d 1051, 1054 (Fla. 1986)).

To strictly read section 921.001(4)(b)(1) as precluding re-lief to defendants who committed offenses after October 1, 1983 would lead to an absurd result, since in *Smith* this Court deter-mined the actual effective date of the sentencing guidelines was July 1, 1984. Although criminal statutes are to be strictly

con-strued, they are not to be construed so strictly as to emasculate the statute and defeat the legislative intent; such strict con-struction is subordinate to the rule that the intention of the legislature must be given effect. *St. Suren v. State*, 745 So. 2d 514, 515-516 (Fla. 3d DCA 1999).

The petitioner has the right to elect to be sentenced pursuant to section 921.001(4)(b)(1), Florida Statutes.

CONCLUSION

The petitioner was entitled to elect sentencing under the guidelines; the Court should affirm or approve the opinion of the Second District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carol J.Y. Wilson, Esq., Assistant Public Defender, P.O. Box 9000, Drawer PD, Bartow, Florida 33831 on this ——— day of March 2005

CERTIFICATE OF COMPLIANCE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

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OF COUNSEL FOR RESPONDENT