IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-717

DCA CASE NO. 3D02-2354

SHAMOND BYRD,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

PAGES

TABLE OF CITATIONS

FEDERAL CASES

STATE CASES

OTHER AUTHORITIES

INTRODUCTION

The Petitioner, SHAMOND BYRD, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal. THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the Third District Court of Appeal. The parties shall be referred to as Petitioner and Respondent in this brief. The symbol "R" designates the record on appeal, the symbol "Ex." designates the Exhibit provided in the Index to the Court, followed by the appropriate letter, a colon and the page number, i.e., (R/Ex. E:14).

STATEMENT OF THE CASE AND FACTS

The Petitioner, SHAMOND BYRD, along with co-defendants Desmond Hallman and Eddie Gaitor, was charged by Information in LC# 98-12208C on February 7, 2000. He was charged in Count 1 with the second degree murder using a firearm of Paul Wilson-a first degree felony, in Count 2 with attempted second degree murder with a firearm of Conrad Thomas-a second degree felony, in Count 5 with unlawful possession of a firearm by a convicted felon-a second degree felony, and in Count 6 with carrying a concealed firearm-a third degree felony, all offenses occurring on April 12, 1998. (R/Ex. E:14-19). Following a trial by jury Petitioner was adjudicated guilty of Counts 1, 2 and 6 on February 10, 2000. (R/Ex. A:350-351).

Petitioner's guidelines score was calculated pursuant to the 1995 scoresheet and his Level 10 sentencing guidelines scored 384 points indicating a minimum of 288 months or 24 years and a maximum of 480 months or 40 years state prison. (R/Ex. D:348-349). However, since Petitioner's crime was committed on April 12, 1998, the applicable sentencing guidelines worksheet was the 1997 guidelines and not the 1995 worksheet. On March 29, 2000, the Honorable Stanford Blake sentenced Petitioner in Count 1 to a term of natural life, in Count 2 to a term of fifteen (15) years and in Count 6 to a term of five (5) years, Counts 1 and 2 with a minimum mandatory term of three (3) years each, sentences in all counts and mandatory terms served concurrent to each other, and 696 days credit for time served (CTS). (R/Ex. B:352-356).

On direct appeal in DCA# 3D00-1186, Petitioner's appointed counsel filed a Motion To Withdraw and Memorandum of Law under Anders v. California, 386 U.S. 738 (1967). Petitioner filed a *pro se* brief raising the following issues:

I THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR WHEN IT HELD TRIAL FOR THE APPELLANT IN VIOLATION OF FLORIDA RULE OF CRIMINAL PROCEDURE RULE 3.191 SPEEDY TRIAL WITHOUT DEMAND.

II THE TRIAL COURT ERRED AND ABUSED IT'S DISCRETION IN SENTENCING THE APPELLANT TO LIFE IN PRISON FOR SECOND DEGREE MURDER AND AGGRAVATED BATTERY WITH A FIREARM, AND CARRYING A CONCEALED FIREARM, BY FAILING TO

PROVIDE WRITTEN REASON FOR SAID SENTENCE OUTSIDE THE GUIDELINES.

III WHETHER TRIAL COURT COMMITTED A FUNDAMENTAL AND REVERSIBLE ERROR IN IMPOSING SENTENCE AS PERTAINED TO THE JURY DETERMINATION.

IV WHETHER TRIAL [Sic.] ERRED IN IMPOSING A LIFE SENTENCE WITH THIRTY YEARS MINIMUM MANDATORY WHEN CONSIDERING SENTENCING GUIDELINE SCORESHEET OF 1998.

V TRIAL COURT COMMITTED FUNDAMENTAL ERROR WHEN THE COURT FAIL [Sic.] TO ALLOW APPELLANT JURT [Sic.] TO DETERMINED THE ENHANCEMENT OF HIS OFFENSE FROM SECOND DEGREE, TO A FIRST DEGREE MURDER, TO ENHANCE HIS SENTENCE.

(R/Ex. C:i-28). Petitioner's claim, among others, was that the life sentence for the second degree murder conviction could not be imposed without departure reasons. The Third District Court of Appeal *per curiam* affirmed the Petitioner's convictions and sentences on May 23, 2001 without opinion. Byrd v. State, 788 So. 2d 981 (Fla. 3d DCA 2001), *review dismissed*, 791 So. 2d 1095 (Fla. 2001), *cert. denied*, 535 U.S. 937 (2002).

Petitioner then challenged his conviction and sentence by a motion to correct illegal sentence pursuant to Rule 3.800(a), Fla.R.Crim.P., raising as error the following:

ISSUE I
SENTENCING GUIDELINES SCORESHEET ERROR IN SCORING SECOND-DEGREE MURDER AS VICTIM INJURY POINTS, THEREFORE RESULTING IN A UPWARD DEPARTURE WITHOUT JUSTIFICATION FOR DEPARTURE.

The Third District Court of Appeal affirmed the denial of relief finding Petitioner was convicted of second degree murder with a firearm, aggravated battery with a firearm, and carrying a concealed weapon. Byrd v. State, 841 So. 2d 502, 503 (Fla. 3d DCA 2003). The court further found Petitioner received a term of life imprisonment with a three-year mandatory minimum sentence for the second degree murder conviction, fifteen years with a three-year mandatory minimum sentence for the aggravated battery, and five years for the concealed firearm conviction. Id. at 502-503.

Petitioner contended that the life sentence could not be imposed without departure reasons. The Third District Court of Appeal determined that as a threshold matter, the claim was procedurally barred because it was raised by the previous *pro se* brief and rejected, citing Raley v. State, 675 So. 2d 170, 173 (Fla. 5th DCA 1996). The Third District affirmed, holding:

> In an abundance of caution, we also address the merits of this claim. The defendant's guidelines scoresheet provided a score of three hundred eighty-four state prison months. **Under the applicable version of the guidelines, "If the total sentence points are equal to or greater than 363, the court may sentence the offender to life imprisonment." § 921.0014(2), Fla. Stat. (1997).** Since the points score 384, the court was authorized to impose the life sentence and did so.

Byrd v. State, 841 So. 2d at 503; Emphasis added.

Petitioner filed his notice to invoke the jurisdiction of this Court to review the Third District Court's decision in 3D02-2354 citing conflict with the Fourth District Court of Appeal in Franco v. State, 777 So. 2d 1138 (Fla. 4th DCA 2001). The Court has ordered review on the merits and accordingly, this appeal followed.

QUESTION PRESENTED

WHETHER IMPOSITION OF A LIFE SENTENCE AS AUTHORIZED UNDER §921.0014(2) WHERE THE SENTENCING GUIDELINES POINTS TOTAL MORE THAN 363 POINTS DOES NOT CONSTITUTE A DEPARTURE SENTENCE AS DEFINED IN §921.0016(1)(c) WHICH REQUIRES WRITTEN REASONS TO SUPPORT A DEPARTURE SENTENCE, THUS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING PETITIONER TO LIFE WITHOUT PROVIDING WRITTEN REASONS?

SUMMARY OF THE ARGUMENT

The 1997 sentencing guidelines worksheet specifically sets out in a separate paragraph the sentencing recommendation for those defendants whose guidelines points total 363 points or more. This sentencing recommendation provides the sentencing court with two options, the first of which is that any defendant whose sentencing points total 363 points or more may be sentenced to life in state prison. This is not one of the "departure" options set out in the previous paragraphs and does not constitute a "departure" sentence for purposes of the requirement that departure sentences have written reasons. Therefore, since the trial court opted to sentence Petitioner under the first option to natural life pursuant to the authority of §921.0014(2), paragraph 5, finding that the sentencing guideline points totaled more than 363, the sentence is not a departure sentence and no written reasons are required.

The Third District Court of Appeal's opinion in this case holding that the trial court was authorized to impose a life sentence without departure reasons where the sentencing guidelines points totaled 363 points or more, is not in express and direct conflict with the Fourth District Court of Appeal in Franco v. State, 777 So. 2d 1138 (Fla. 4th DCA 2001) where the Fourth District reversed upon holding the trial court erred for

failing to excuse a juror for cause and the trial court's prejudice against the defense counsel required his disqualification, stating in passing, that ***after retrial the issue could arise*** *concerning whether a life sentence without any form of early release, which can be imposed when sentencing points total 363, is a departure sentence requiring written findings*. (Emphasis added).

ARGUMENT

IMPOSITION OF A LIFE SENTENCE AS AUTHORIZED UNDER §921.0014(2) WHERE THE SENTENCING GUIDELINES POINTS TOTAL MORE THAN 363 POINTS DOES NOT CONSTITUTE A DEPARTURE SENTENCE AS DEFINED IN §921.0016(1)(c) WHICH REQUIRES WRITTEN REASONS TO SUPPORT A DEPARTURE SENTENCE, THUS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING PETITIONER TO LIFE WITHOUT PROVIDING WRITTEN REASONS.

Petitioner contends that any sentence of life where the sentencing guidelines points total 363 or more is a departure sentence requiring written reasons. He further argues that his sentence of life without written reasons warrants reversal in his case. Petitioner's claim is without merit.

Initially, the State submits that a claim that written reasons were not provided to support a departure sentence is not cognizable in a motion to vacate pursuant to Rule 3.850 or, as here, in a motion to correct illegal sentence pursuant to Rule 3.800. State v. Evans, 693 So. 2d 553 (Fla. 1997); Stephens v. State, 823 So. 2d 180 (Fla. 1st DCA 2002); Lashley v. State, 741 So. 2d 1149 (Fla. 2d DCA 1999).

Even if the claim were not procedurally barred it still would not succeed on the merits. Pursuant to §921.001(6), Fla. Stat. (1997), "Any sentence imposed outside the range recommended by the guidelines must be explained in writing by the trial court judge." However, the same sentencing scheme

specifically authorizes the imposition of a life sentence where the sentencing points, as here, are equal to or exceed 363 points; §921.0014(2), Fla. Stat. (1997). The 1997 version of the sentencing guidelines applies to Petitioner because he committed his crimes on April 12, 1998. Paragraph five, Section 921.0014(2), Fla. Stat. (1997) Recommended Sentences, provides:

> **If the total sentence points are equal to or greater than 363, the court may sentence the offender to life imprisonment.** An offender sentenced to life imprisonment under this section is not eligible for any form of discretionary early release, except pardon, executive clemency, or conditional medical release under s. 947.149. (Emphasis added.)

By its plain meaning the imposition of such a sentence under this sentencing recommendation does not constitute a departure which must be accompanied by written reasons. At least three circuits have construed the statutory provision in this manner. *See* Willis v. State, 785 So. 2d. 648, 649 (Fla. 2d DCA 2001)(trial court has discretion to impose life sentence where defendant has 459 total sentence points, however, if the court sentences defendant to a term of years which is a departure from the guidelines it must provide written reasons); Cash v. State, 779 So. 2d 425(Fla. 2d DCA 2000)(a strict reading of §921.0014(2) permitting a trial court to sentence an offender to life imprisonment where the total sentence points are equal to or greater than 363, allows only for a guidelines sentence **or** a life sentence);

Stoltzfus v. State, 735 So. 2d 549 (Fla. 5th DCA 1999)(a life sentence imposed pursuant to §921.0014(2) is not a departure sentence in support of which there must be written reasons where a plain reading of the statute authorizes the court to impose a life sentence if the defendant scores 363 or more sentencing points); Kalapp v. State, 729 So. 2d 987, 990 (Fla. 5th DCA 1999)(where a plain reading of §921.0014(2) authorizes the trial court to impose a life sentence if the defendant scores 363 or more points and defendant scored 463 points, five concurrent life sentences do not constitute departure sentences requiring written reasons).

Moreover, there is no ambiguity in the wording of the statute, which specifically authorizes a trial court to exercise its discretion ("may") in sentencing any defendant whose sentencing guidelines points are equal to or more than 363. The only additional explanation is contained in the next sentence which advises the court that "an offender sentenced to life imprisonment **under this section** is not eligible for discretionary early release" and specifically lists the exceptions. The phrase "under this section" separates the particular sentencing option to which the statute refers. Such language is unambiguous and not susceptible of interpretation in opposite ways. Friedman v. Virginia Metal Products Corp., 56 So. 2d 515, 517 (Fla. 1952). The trial court either chooses to sentence a qualifying

defendant to life **or** chooses a term of years which then are subject to the rules of departure.

Only the Fourth District has construed the sentencing guidelines to require the filing of written reasons where the life sentence imposed pursuant to the above provision exceeds the recommended sentence by more than 25 percent. *See* Franco v. State, 777 So. 2d 1138 (Fla. 4th DCA 2001). Since this rationale is contrary to the plain meaning of the statutory provision permitting imposition of the life sentence where the points are equal to or greater than 363 it should be rejected. *See* Stoltzfus v. State, 735 So. 2d at 549.

Section 921.0014(2) provides several levels of calculation starting with the first paragraph which recommends no state prison sanction but permits a trial court discretion in increasing points at 40 or less by 15 percent. In paragraph two, the recommendation refers to situations where the points total is 40 to 52, and allows a trial court discretion to sentence a defendant to state prison. In paragraph three the recommended sentence for a point total which exceeds 52 points must be state prison and is calculated by the total sentence points, as follows:

> State prison months = total sentence points minus 28.

> The recommended sentence length in state prison months may be increased by up to, and including, 25 percent or decreased by up to, and including, 25 percent, at the discretion of the court. The recommended sentence length may not be increased if the total sentence points have been increased for that offense by up to, and including, 15 percent. If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence recommended under the guidelines must be imposed absent a departure.

§921.0014(2), paragraph 4, Fla. Stat. (1997).

Here, Petitioner's sentencing guidelines points totaled 412 points. The trial court had the option of choosing either: 1] to sentence Petitioner to life as provided by the statute in paragraph 5 of the recommended sentences, or 2] to a term of years calculated according to paragraph 4 by taking the sentencing points and subtracting a factor of 28 points to reach the total number of state prison months. That is, 412 less 28 equals 384 state prison months, indicating a minimum of 24 years and a maximum of 40 years. In this case the trial court exercised its discretion and sentenced Petitioner under the first option to natural life.

Petitioner's argument erroneously presupposes that his life sentence varied upward from the recommended guidelines of 24 to 40 years by more than 25 percent, and therefore the trial court erred in failing to give written reasons for the departure. A life sentence is

not quantifiable. The statute specifically set out a method for calculating "departure" sentences, basing the formula on specific terms of years. Beginning with the minus factor of 28 points against the exact sentencing guidelines points scored by a defendant, the formula contemplates a factor of 25 percent to measure deviation either upward or downward. The operating constant is the quantifiable number of points scored by the offender. Life cannot be scored, which is precisely why the Legislature assigned a discretionary option for the trial court to choose from when a defendant scored 363 points or more: either life or a term of years. §921.0016(1)(c), Fla. Stat. (1997).

This statutory construction is analogous to those cases in which the sentencing scheme provides a person may be punished for:

> ...a life felony committed on or after October 1, 1883, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years.

§775.082(3)(a)2., Fla. Stat. (1997). In such cases, where a trial court has sentenced a defendant to 50 years, reversal is mandated to correct the sentence to a term of years "not to exceed 40 years." Also, in such cases, it is a legal sentence to impose a life sentence **or** a 40 year sentence. Likewise, in this case, the plain reading of the statute recommending a life

sentence for those defendants who score 363 points or more, indicates that the Legislature contemplated the trial court should have discretion to impose such a sentence. Or, if it chose the alternative – a guidelines sentence, the court would then be required to adhere to the recommendations setting out procedures for sentencing within the guidelines range, and for calculating either the 25 percent upward or 25 percent downward deviation. If the sentence was outside the permitted 25 percent range, that is, a departure sentence, the court would be required to provide written reasons for departure.

In Franco the Fourth District opined in *obiter dictum* that:

> We have considered the other issues raised by appellant and find them to be without merit, except for ***one sentencing issue, which could arise again after retrial.*** That issue is **whether a life sentence without any form of early release, which can be imposed when sentencing points total 363, is a departure sentence requiring written findings.**

Franco v. State, 777 So. 2d at 1140-1141 (Emphasis added). The Fourth District Court went on to define a departure sentence pursuant to §921,0016(1)(c), Fla. Stat., to include the "life sentence" permitted by the guidelines if the total sentencing points are 363 points or more. The district court further determined that the life sentence in Franco based upon the total sentencing points of 411 points did vary by more than 25% from

the recommended sentence of 31.9 years – a calculation which is a result of the trial court's rejection of the life sentence option in favor of the next option of a term of years which is calculated by reducing the sentencing points by a count of 28 to arrive at the total State prison **months**. Once the number of State prison months is determined with the minimum and maximum months factored according to the sentencing guidelines formula, if the trial court deviates by 25 percent on the term of months/years, then the argument as to the propriety of the departure is germane – not before and not if the trial court chooses the first option of a life sentence.

The Fourth District Court specifically stated that the sentencing issue was one **which could arise again after retrial**, and its holding in Franco v. State did not include the sentencing issue. Rather, reversal was based exclusively upon 1]the trial court's failure to excuse a juror for cause and 2]the trial court's patently discernible prejudice against defense counsel which required his disqualification. Franco v. State, 777 So. 2d at 1138, 1139-1140.

In contrast, here, the Third District Court followed §921.0014(2), Fla. Stat. and specifically rejected the Petitioner's departure argument, holding 1]defendant was procedurally barred from asserting a claim that had been

addressed on direct appeal from the conviction, and 2]the trial court was authorized to impose a life sentence without departure reasons if the sentence points are 363 or more (412 in this case), and citing as authority Willis v. State, Cash v. State, Stoltzfus v. State and Kalapp v. State.

The Petitioner's reliance on the Fourth District Court of Appeal's holding in Franco v. State, 777 So. 2d 1138 – that if the trial court wishes to use the authority to impose the life sentence in those circumstances, it amounts to a departure sentence and the trial court must announce departure reasons – was rejected by the Third District Court in this case. Franco v. State, 777 So. 2d at 1141. In support of the proposition that the trial court may sentence an offender to life imprisonment without departure reasons where the sentence points are 363 or more, the Third District Court relied upon Willis v. State, 785 So. 2d at 649; Cash v. State, 779 So. 2d 425; Stoltzfus v. State, 735 So. 2d 549); Kalapp v. State, 729 So. 2d at 990. Byrd v. State, 841 So. 2d 502, 503 (Fla. 3d DCA 2003).

Therefore, absent an abuse of discretion, the trial court's imposition of a life sentence was consistent with the plain meaning of the statute, does not constitute an upward departure sentence requiring written reasons, and should not be disturbed on appeal.

CONCLUSION

WHEREFORE, the State respectfully requests that the petition for discretionary review be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was mailed to **MANUEL ALVAREZ**, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit of Florida, 1320 NW 14th Street, Miami, Florida 33125 on this ____ day of July, 2004.

CONSUELO MAINGOT
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for the Respondent, the State of Florida, hereby certifies that 12 point Courier New is used in this brief.

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APPENDIX TO
BRIEF OF RESPONDENT ON THE MERITS

INDEX

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