

**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC03-717

DCA NO. 3D02-2354

**SHAMOND BYRD,**

Petitioner,

-vs-

**STATE OF FLORIDA,**

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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**PETITIONER'S BRIEF ON THE MERITS**

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## STATEMENT OF THE CASE AND FACTS

The question raised in this case is whether, under the sentencing guidelines, the imposition of a life sentence, based on the fact that the defendant's guideline score exceeded 363 points, constitutes an upward departure necessitating written reasons.

Mr. Byrd was convicted, after a jury trial, of second degree murder with a firearm, aggravated battery, and carrying a concealed firearm (R. 350-51). He was sentenced to life imprisonment because his sentencing guideline score exceeded 363 points (R. 352-56). The Petitioner appealed his convictions and sentences which resulted in a per curiam affirmance by the Third District Court of Appeal in *Byrd v. State*, 791 So. 2d 1095 (Fla. 3d DCA 2001) (Table).

The Petitioner later filed a pro se motion to correct illegal sentence under Rule 3.800(a), Florida Rules of Criminal Procedure (2002), because the life sentence exceeded the recommended sentencing range. The guidelines scoresheet indicated that Mr. Byrd had 412 total sentence points with a recommended sentencing range between 24 years (288 months) and 40 years (480 months) (R. 348-49). The trial court imposed a life sentence without articulating a justification for an upward departure. The Petitioner appealed the lower court's denial of the motion and the Third District affirmed the sentence finding that the claim was

procedurally barred because it had been raised in the Petitioner's pro se initial brief. The court, nevertheless, addressed the issue on the merits and held that the plain meaning of the statute permitted the trial court to impose a life sentence whenever a defendant scores 363 points, or more. *See Byrd v. State*, 841 So. 2d 502 (Fla. 3d DCA 2003).

The Petitioner sought review in this Court as a *pro se* litigant and asserted that the Third District's decision was in direct conflict with *Franco v. State*, 777 So. 2d 1138 (Fla. 4th DCA 2001).

## **SUMMARY OF THE ARGUMENT**

The imposition of a life sentence where a defendant's total score under the guidelines is equal to, or greater, than 363 points constitutes an upward departure sentence requiring written reasons if the life sentence exceeds the recommended sentence by more than 25 percent. Section 921.0014(2), Florida Statutes (1997), defines an upward departure as a sentence that either increases, or decreases, the recommended sentence by more than 25 percent. In the case *sub judice*, the defendant was twenty years old when he committed the offenses for which he was convicted. His recommended sentence was 32 years (384 months) and his maximum guideline sentence was 40 years. A life sentence without the possibility of early release constituted more than a 25 percent increase from the recommended sentence of 32 years and thus required written reasons justifying the departure.

## ARGUMENT

**THE THIRD DISTRICT COURT OF APPEAL'S DECISION THAT THE IMPOSITION OF A LIFE SENTENCE, WHERE THE DEFENDANT'S TOTAL SENTENCING POINTS EXCEED 363 AND WHERE THE LIFE SENTENCE FELL OUTSIDE THE RECOMMENDED SENTENCING RANGE, DID NOT REQUIRE WRITTEN REASONS WAS INCONSISTENT WITH THE STATUTORY DEFINITION OF A DEPARTURE SENTENCE AND FAILED TO APPLY THE RULE OF LENITY.**

Section 921.0016(1)(c), Florida Statutes (1997), states as follows:

*A State prison sentence which varies upward or downward from the recommended guidelines prison sentence by more than 25 percent is a departure sentence* and must be accompanied by a written statement delineating the reasons for the departure, filed within 7 days after the date of the sentencing. A written transcription of orally stated reasons for departure from the guidelines at sentencing is permissible if it is filed by the court within 7 days after the date of sentencing.

(Emphasis added). A departure sentence is defined as “[a] State prison sentence which varies upward or downward from the recommended guidelines prison sentence by more than 25 percent.” The Legislature indicated that departure sentences are “discouraged unless there are circumstances or factors which reasonably justify the departure.” §921.0016(2), FLA. STAT. (1997). The statutory scheme pertaining to the sentencing guidelines are thus to be interpreted with the



understanding that sentences within the recommended range are greatly favored. There is also a presumption that defendants must be sentenced within the recommended range in the absence of significant aggravating circumstances, in which case the trial court must specify those aggravating factors and they must be sufficient to justify the higher sentence.

Section 921.0014(2), Florida Statutes (1997), states that “[i]f the total sentence points are equal to or greater than 363, the court may sentence the offender to life imprisonment.” It is apparent, however, that the imposition of a life sentence, where a defendant scores in excess of 363 total points, constitutes a departure sentence if it exceeds the recommended sentence by more than 25 percent since section 921.0014(2), must be construed in conjunction with section 921.0016(1)(c).

The recommended range is determined by computing the total number of sentencing points, subtracting 28 points to obtain the recommended sentence in months and then increasing and decreasing the number of months by percent. Here, the Petitioner’s recommended sentence was 32 years (384 months) and the recommended range was a term of imprisonment between 24 to 40 years (32 years +/- 8 years). Mr. Byrd, who was born on July 6, 1977, was sentenced on March 29, 2000, at which time he was 22 years old. At the time of the offense, which

occurred on April 12, 1989, he was 20 years old. In this case, a sentence of natural life without eligibility for any form of discretionary early release constituted a departure from the top of the guideline range of 40 years. According to the Center for Disease Control (CDC), the life expectancy for white males in the United States, as of 2000, was 74.8 years and the life expectancy for African-American males was 68.2 years. See ELIZABETH ARIAS, PH.D., *National Vital Statistics Reports*, VOL. 51, No. 3 (Dec. 19, 2002), located at [http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_03.pdf). Based on the CDC's statistical estimates, Mr. Byrd (who is a black male) at the time of sentencing was projected to live an additional 46 years; if he had been a white male he would have been expected to live an additional 52 years.<sup>1</sup>

In *Franco v. State*, 777 So. 2d 1138 (Fla. 4th DCA 2001), the defendant was sentenced to life imprisonment without the possibility of early release because his

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<sup>1</sup>If the defendant had been 33 years old at the time of the offense and had been sentenced to 41 years, it would probably violate the Equal Protection Clause of the United States Constitution to hold that since the life expectancy of blacks is 68.2 years and the defendant's life expectancy was less than 41 years, the sentence was not a departure sentence; whereas, if the defendant had been a white male with a longer life expectancy the sentence would constitute an upward departure. Since the difference in life expectancies between Caucasian and African-American males is due to socio-economic factors, such as poverty and inadequate access to health care, as opposed to inherent racial biological factors, punishing blacks further for their shortened life spans would be morally abhorrent.

guideline score exceeded 363 points. The Fourth District Court of Appeal reversed the conviction based on the improper denial of a cause challenge against a prospective juror. The court also addressed the life sentence. The court held that a life sentence was, in effect, higher than a 25% increase from the recommended range since the defendant was only fifteen years old when he committed the crime. The trial court was, therefore, required to furnish written reasons justifying the departure. The court added that in the event that section 921.0014(2), was susceptible to more than one construction, the requirement of written reasons would nonetheless be mandated by the rule of lenity, section 775.021(1), Florida Statutes (1997).<sup>2</sup>

The Third District's interpretation of the language in section 921.0014(2), Florida Statutes (1997), which states, "[i]f the total sentencing points are equal to or greater than 363, the court may sentence the offender to life imprisonment[,]" did not take into account the definition of a departure sentence under 921.0016(1)(c), and assumed that the word "may" dispensed with the requirement to provide written reasons. *See Byrd v. State*, 841 So. 2d 502, 503 (Fla. 3d DCA 2003).

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<sup>2</sup>*Friedman v. Virginia Metal Prods. Corp.*, 56 So. 2d 515, 517 (Fla.1952) ("Language is ambiguous where it is susceptible of interpretation in opposite ways.") (quoting *J.E. Blank, Inc. v. Lennox Land Co.*, 351 Mo. 932, 174 S.W.2d 862, 868 (1943)).

Under *Byrd's* rationale, if the trial court had imposed a sentence of 41 years, it would qualify as an upward departure thus requiring written reasons, but a life sentence is not a departure sentence and thus no justifications need be articulated. This construction is illogical, inconsistent with the definition of a departure sentence and at odds with the rule of lenity.

The lower court failed to discern the apparent discrepancy that arises when sections 921.0014(2) and 921.0016(1)(c) are read side by side. A fundamental maxim of statutory construction is that courts must construe penal statutes narrowly and resolve ambiguities in favor of defendants. The Third District's decision, in contrast to *Franco, supra*, did not apply the rule of lenity because it ignored the ambiguity in the statute. *See* §775.021(1), FLA. STAT. (2003); *Perkins v. State*, 576 So. 2d 1310 (Fla.1991).

Because the life sentence imposed in this case amounted to a departure sentence without written reasons, this Court should reverse the lower court and remand this case for resentencing within the guidelines. *See Pope v. State*, 561 So. 2d 554 (Fla.1990) (where departure sentence is reversed for failure to provide written reasons, the case must be remanded for resentencing within the guidelines).

## CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully requests that this Court reverse the decision of the Third District Court of Appeal in *Byrd v. State*, 841 So. 2d 502 (Fla. 3d DCA 2003), and remand this case for resentencing within the guidelines.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the Brief of Petitioner on the Merits has been forwarded to Consuelo Maingot, Assistant Attorney General, Office of the Attorney General, the Republic Tower, 110 S.E. 6th Street, 9th Floor, Fort Lauderdale, Florida 33301, this 24th day of June, 2004.

BY: \_\_\_\_\_  
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**CERTIFICATION OF FONT**

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

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