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IN THE SUPREME COURT OF THE STATE OF FLORIDA,

STATE OF FLORIDA, Petitioner, vs. HARRY JAMES CHUBBUCK, Respondent.	)	CASE NO. SC12-657

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent omits the Statement of the Case and Facts. *See* Fla. R. App. P. 9.210(c).

SUMMARY OF THE ARGUMENT

The Criminal Punishment Code allows a downward departure sentence if the defendant needs specialized treatment for a mental disorder or a physical disability. § 921.0026(2)(d), Fla. Stat. (2007). Although the statute contains no requirement that the treatment be unavailable in the Department of Corrections, courts have added that requirement.

In *State v. Hunter*, 65 So. 3d 1123 (Fla. 4th DCA 2011), Judge Warner pointed out the obvious: the statute does not require the defendant to prove that the specialized treatment is unavailable in prison. *Id*. at 1125-27 (Warner, J., concurring). In *State v. Chubbuck*, 83 So. 3d 918 (Fla. 4th DCA 2012) (*en banc*), the Fourth District Court of Appeal adopted Judge Warner's concurring opinion, and it receded from its cases holding that the defendant must prove the specialized treatment is unavailable in prison. The Fifth District soon followed suit and receded from its cases on this issue. *State v. Owens*, 95 So. 3d 1018 (Fla. 5th DCA 2012) (*en banc*).

The Fourth and Fifth Districts are correct. The statute must be given its plain and obvious meaning, and there is nothing in the statute about unavailability of treatment in prison.

The State points to two statutes that authorize the Department of Corrections to transfer inmates who need specialized treatment to other prisons or to public or

private facilities. But these statutes support the Fourth District's interpretation. They show that specialized treatment is arguably always available to inmates in prison. And if that's the case, a defendant would never be able to prove unavailability of treatment, and a trial court would never be able to depart. Thus, the State's interpretation leads to an absurd result: a departure ground that may never be used.

These statutes also show that the Legislature knows how to write "specialized treatment otherwise not available in the Department of Corrections." The Legislature could have put those words in section 921.0026(2)(d), Florida Statute (2007), but it didn't. That the Legislature did not put those words in the statute suggests the Legislature did not intend unavailability of specialized treatment to be an element of the mitigating circumstance.

Finally, courts may not add these words to the statute. Florida has a strict separation of powers doctrine that bars courts from adding words to statutes.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY INTERPRETED SECTION 921.0026(2)(D), FLORIDA STATUTE. THE STATUTE DOES NOT REQUIRE THE DEFENDANT TO PROVE THAT SPECIALIZED TREATMENT IS UNAVAILABLE TO THE INMATE IN THE DEPARTMENT OF CORRECTIONS

This case is about the meaning of section 921.0026(2)(d), Fla. Stat. (2007):

> (2) Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to:
>
> (d) The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment.

The Fourth and Fifth District Courts of Appeal have given this statute its plain and ordinary meaning. A trial court has the discretion to depart if "[t]he defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment." *Id*. As discussed below, the Fourth and Fifth Districts receded from previous case law requiring the defendant to also prove that the specialized treatment was unavailable in the Department of Corrections. Because the meaning of section 921.0026(2)(d), Florida Statute, is a pure question of law, the standard of review is *de novo*. *See Diamond Aircraft Industries, Inc. v. Horowitch*, 38 Fla. L. Weekly S17, S18 (Fla. Jan. 10, 2013).

I. *The Fourth and the Fifth Districts Court of Appeal held that the plain meaning of the statute does not require unavailability of treatment in prison, and they receded from case law to that effect.*

A trial court is "reasonably justified" in sentencing below the lowest permissible sentence if "[t]he defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment." § 921.0026(2)(d), Fla. Stat. (2007). This departure ground also was available under the Sentencing Guidelines. *See* § 921.0016(4)(d), Fla. Stat. (1997).

These statutes have never required that the specialized treatment also be unavailable to inmates in the Department of Corrections. But the Second District Court of Appeal read that requirement into section 921.0016(4)(d), Florida Statute, in *State v. Abrams*, 706 So. 2d 903 (Fla. 2d DCA 1998). And the other district courts, including the Fourth District Court of Appeal, applied that interpretation to section 921.0026(2)(d), Florida Statute. *State v. Holmes*, 909 So.2d 526 (Fla. 1st DCA 2005); *State v. Ford*, 48 So. 3d 948 (Fla. 3d DCA 2010); *State v. Green*, 971 So. 2d 146 (Fla. 4th DCA 2007); *State v. Thompson*, 754 So. 2d 126 (Fla. 5th DCA 2000) (overlooking *State v. Spioch*, 706 So.2d 32, 36 (Fla. 5th DCA 1998), in which it held that "a lack of available treatment in prison is not required under the statute.").

But in *State v. Hunter*, 65 So. 3d 1123 (Fla. 4th DCA 2011), Judge Warner pointed out the obvious: the statute does not require the defendant to prove that the specialized treatment is unavailable in prison. *Id*. at 1125-27 (Warner, J., concurring).

Judge Warner traced the history of this judicially-added requirement to its "origins in *Abrams*." *Id*. at 1125. She wrote that sentencing statutes must be "strictly construed according to their letter" and that any ambiguity must be construed in the defendant's favor. *Id*. at 1126. She observed that "nothing in the legislative history even hints that in order to justify a downward departure on this ground, services must be unavailable in prison to treat the condition." And "[w]hile that might be what the Legislature intended, . . . it should state its intentions clearly so that no one has to guess as to the requirements in punishment statutes." *Id*. She noted how difficult it is for the defendant to prove unavailability of treatment in prison, and how much easier it is for the state, if it opposes the departure, to prove that treatment is available. Judge Warner said that "without any legislative guidance as to what is meant by 'specialized treatment,'" she would hold that the defendant's burden is met "by proving amenability to treatment and that the treatment he needed was indeed 'specialized,' requiring various special therapies." *Id*.

In *State v. Chubbuck*, 83 So. 3d 918 (Fla. 4th DCA 2012) (*en banc*), the Fourth District Court of Appeal adopted Judge Warner's concurring opinion, and it receded from its cases holding that the defendant must prove the specialized treatment is unavailable in prison. The court held that the availability of treatment in prison was a factor the trial court could consider in exercising its discretion to depart, but that such availability would not preclude the court from departing. *Id*. at 923.

A few months later, the Fifth District Court of Appeal followed the Fourth District's lead. In *State v. Owens*, 95 So. 3d 1018 (Fla. 5th DCA 2012) (*en banc*), the court adopted Judge Warner's concurring opinion and receded from its case law.

> II. *The statute is plain on its face and the State has not provided a cogent reason for disregarding its plain meaning. Contrary to the State's argument, the term "specialized treatment" does not mean "specialized treatment unavailable in the Department of Corrections."*

When a statute "is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1150 (Fla. 2000). Section 921.0026(2)(d), Florida Statute, is clear and unambiguous: the statute gives the trial court the discretion to depart from the Criminal Punishment Code if "[t]he

defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment." § 921.0026(2)(d), Fla. Stat. (2007).

The State argues, however, that the Fourth District ignored the plain text of the statute. *Answer Brief* at page 10. The State points to two statutes that authorize the Department of Corrections to transfer inmates who need specialized treatment to public or private facilities (and, in the case of youthful offenders, to other prisons where the specialized treatment is available). §§ 945.12(1), 958.11(3)(c), Fla. Stats. The State infers from these statutes that the Legislature defined "specialized treatment" as "specialized treatment that is unavailable to the inmate in the Department of Corrections." *Answer Brief* at page 12. But neither statute said it was defining "specialized treatment." Moreover, these statutes actually support the Fourth District's plain reading of the statute; and they show that the State's interpretation would render section 921.0026(2)(d), Florida Statute (2007), meaningless.

First, these statutes show that specialized treatment is arguably always available to inmates because the Department of Corrections can transfer inmates to public or private facilities that can provide such treatment. So if, as the State argues, the defendant must prove the treatment he needs is unavailable to inmates in the Department of Corrections, the State could always point to these statutes and

defeat his claim. ("If he needs specialized treatment, your Honor, the Department of Corrections can transfer him to a public or private facility that can provide such treatment.") Thus, the State's interpretation would render section 921.0026(2)(d), Florida Statute, meaningless and would lead to this absurd result: a court may depart if the defendant needs specialized treatment; specialized treatment means treatment unavailable to inmates in the Department of Corrections; there is no treatment that is unavailable to inmates in the Department of Corrections; accordingly, the court may not depart. But "a statutory provision should not be construed in such a way that it renders the statute meaningless or leads to absurd results." *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 n. 9 (Fla. 2004).

Second, these statutes show that the Legislature knows how to write "specialized treatment otherwise not available in the Department of Corrections." *See, e.g.*, § 958.11(3)(c), Fla. Stat. (authorizing Department of Corrections to assign youthful offender to another institution "[i]f the youthful offender needs medical treatment, health services, or other *specialized treatment otherwise not available at the youthful offender facility*." e.s.). The Legislature could have put those words in section 921.0026(2)(d), Florida Statute (2007), but it didn't. That the Legislature did not put those words in the statute suggests the Legislature did not intend unavailability of specialized treatment to be an element of the mitigating circumstance. *See Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 315 (Fla.

2006) ("In the past, we have pointed to language in other statutes to show that the Legislature 'knows how to' accomplish what it has omitted in the statute in question").

The State argues that if the specialized treatment is available to inmates in the Department of Corrections, then the need for a downward departure sentence is eliminated, and the defendant is not eligible for a downward departure. *Answer Brief* at pages 13-14. But the statute says that a defendant's need for specialized treatment "reasonably justif[ies]" a departure sentence. *See* § 921.0026(1), Fla. Stat. (2007). The State might be able to persuade the trial court *not* to depart because the specialized treatment is available to the inmate in the Department of Corrections, but the trial court would still be reasonably justified in departing, notwithstanding the availability of the specialized treatment. *See Chubbuck*, 83 So. 3d at 923 (availability of treatment "is merely an additional factor which the trial court may consider in exercising its discretion as to whether to grant the defendant's request for a downward departure.").

Giving the trial court this discretion makes sense. Even if treatment is currently available in prison, it may later become unavailable. And specialized treatment, especially mental health treatment, is not always fungible. Treatment in general, and specialized treatment in particular, is both a science and an art. Therefore, if a defendant is receiving good specialized care, the trial court should

be able to consider that. Finally, cost—who pays—is an important consideration. Thus, the Legislature could reasonably conclude that the need for specialized treatment "reasonably justifies" a departure sentence, and that a trial court, in the sound exercise of its discretion, may depart for that reason.

III. *Although there are good policy reasons for giving the trial court discretion to depart when the defendant requires specialized treatment, the issue isn't one of policy (or just one of policy), but of following the plain language of the statute.*

Cost and quality of care are two (of many) good policy reasons why the Legislature would give trial court's discretion to depart even if specialized treatment is available to the inmate in prison. But the issue isn't one of policy (or just one of policy), but following the plain language of the statute.

Again, criminal statutes must be given their plain and obvious meaning. *See State v. Kelly*, 964 So. 2d 135, 138 (Fla. 2007) ("[T]he intent of the Legislature as expressed in the plain language of the applicable sentencing statutes guides our decision…."). One of the purposes of our criminal code is "[t]o give fair warning to the people of the state in understandable language of the nature of the conduct proscribed *and of the sentences authorized upon conviction*." § 775.012(2), Fla. Stat. (emphasis added). Moreover, the Legislature mandates that penal statutes "be strictly construed" and "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. These principles of fair warning and strict construction are rooted in

fundamental principles of due process under the state and federal constitutions. *See Dunn v. United States*, 442 U.S. 100, 112 (1979); *Borjas v. State*, 790 So. 2d 1114, 1115 (Fla. 4th DCA 2001); Art. I, § 9, Fla. Const.; Amend. XIV, U.S. Const.

In *State v. VanBebber*, 848 So. 2d 1046 (Fla. 2003), this Court held that the provisions of section 921.0026, Florida Statutes, must be given their plain and obvious meaning. In that case, Vanbebber pleaded no contest to DUI manslaughter and other offenses. The trial court departed downward on the ground that the crime was committed in an unsophisticated manner and was an isolated incident for which the defendant showed remorse. The Second District affirmed, and the State sought discretionary review based on a conflict with *State v. Warner*, 721 So. 2d 767 (Fla. 4th DCA 1998), which held that DUI is not a crime that can be committed in an unsophisticated manner.

This Court approved of the decision of the Second District and disapproved of *State v. Warner's* contrary ruling. This Court wrote that the Second District was correct because it looked to the plain language of the statute authorizing a downward departure:

> We agree with the Second District's reasoning. Section 921.0026 plainly states, "This section applies to any felony offense, except any capital felony, committed on or after October 1, 1998." Because the mitigator in section 921.0026(2)(j) applies to any felony offense, except any capital felony, committed on or after October 1, 1998, it is available to support a downward departure from a felony DUI conviction. The fact that the Legislature specifically exempted only capital felonies is further support for the conclusion that section

> 921.0026(2)(j) applies to felony DUI convictions. Legislative intent must be determined primarily from the language of the statute. *See Rollins v. Pizzarelli*, 761 So.2d 294, 297 (Fla. 2000). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984).

VanBebber, 848 So. 2d at 1049 (footnote omitted).

This Court wrote further that *State v. Warner* was wrong because it ignored the plain language of the statute, and repeated: "Although we fully recognize the State's strong public policy against DUI, we find that the issue in this case, whether the mitigator in section 921.0026(2)(j) is available to support a downward departure from a DUI conviction, is resolved by the clear and unambiguous statutory language of section 921.0026." *Id*. at 1050.

This Court wrote that "if the Legislature intended to specifically exempt felony DUI offenses from this statutory scheme this Court must presume that it would have explicitly done so in the statute." *Id*.

Likewise at bar, if the Legislature intended to add a requirement that the specialized treatment be unavailable in the Department, the courts must presume that it would have explicitly done so in the statute. (And as pointed out above, the Legislature knows how to write a statute to that effect.)

Section 921.0026(2)(d), Florida Statute, contains no requirement that the defense show that treatment is unavailable in the Department of Corrections, and it

is error to read that requirement—that the defense prove a negative—into the statute.

IV. *The Legislature writes statutes, and courts may not rewrite them.*

Florida has "a strict separation of powers doctrine." *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000). And this constitutional doctrine bars courts from reading words into statutes. The courts "are not at liberty to add words to statutes that were not placed there by the Legislature." *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999).

The Legislature has primary responsibility for allocation of state resources and for criminal justice policy. *See Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002) ("[A] statutory criminal sentencing scheme, such as the Code, is substantive in nature because it is a product of legislative policy."). State resources are significantly affected by the cost of imprisonment, and the Legislature is faced with an ongoing problem that the criminal justice system has become a warehouse for the mentally ill, at great cost to the taxpayers.[1] As the Fifth District has observed: "As a society, we have got to find a better way of handling our mentally

[1] The Department of Corrections states: "In Fiscal Year 2009-10, it cost $19,469 a year or $53.34 a day to feed, clothe, house, educate and provide medical services for an inmate at any state facility, and $15,498 to do so at a prison for adult males, which are the majority of individuals incarcerated in the Florida state prison system." http://www.dc.state.fl.us/oth/faq.html (question 12; site visited March 8, 2013).

ill and mentally handicapped citizens than incarceration in our jails and prisons." *Cardinal v. State*, 939 So. 2d 158, 159 (Fla. 5th DCA 2006).

Addressing this problem lies within the province of the Legislature. It has provided in straightforward terms that a court may depart downward whenever the defendant has a specialized need for treatment without consideration of whether such treatment is available in the Department of Corrections.

Ultimately, the Legislature's policy reasons for its decision, the pros and cons that it may have considered, the concerns about financial liability on the one hand versus a "tough on crime" attitude on the other, are neither here nor there. It was the Legislature's call when to allow a downward departure, and the Legislature made that call.

The Legislature does not compel a downward departure, but it does allow it. For this legislative decision to be second-guessed by the courts violates our constitution.

This Court should approve the decision under review.

CONCLUSION

This Court should approve the decision of the Fourth District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that this brief has been electronically filed with the Court and a copy of it has been served to Melanie Dale Surber, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 8th day of March, 2013.

/s/ Paul E. Petillo
Paul E. Petillo

CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a Fla. R. App. P. 9.210(a)(2).

/s/ Paul E. Petillo
Paul E. Petillo