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IN THE SUPREME COURT OF THE STATE OF FLORIDA

SC CASE NO. SC12-657

STATE OF FLORIDA,

Petitioner,

vs.

HARRY JAMES CHUBBUCK,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

STATEMENT OF THE CASE AND FACTS

Undersigned relies upon the facts as set forth in the merits brief.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal improperly found that the plain language of Florida Statutes subsection 921.0026(2)(d) does not require the defendant to establish that the Department of Corrections could not provide the necessary treatment. If a defendant is seeking a downward departure because he requires specialized treatment, the eligibility for a departure is eliminated where the same treatment is available in the Department of Corrections.

ARGUMENT

The Fourth District Court of Appeal erred when it found that the Defendant was not required to prove that the mental health treatment he needed was unavailable, in the prison system, in order to obtain a downward departure sentence under section 921.0026(2)(d), Florida Statutes.

I. Standard of review

The standard of review of a case dealing with certified conflict is de novo. Nelson v. State, 875 So. 2d 579, 581 (Fla. 2004). Questions of statutory interpretation are subject to de novo review. Mendenhall v. State, 48 So.3d 740 (Fla. 2010).

II. Discussion on the merits

This case deals with whether or not Chubbuck presented a valid legal basis for a departure. The State contends that because the defendant failed to establish that the treatment he required was unavailable in the Department of Corrections, he had not established a valid legal basis for a downward departure pursuant to Florida Statute § 921.0026(2)(d).

A trial court's decision to grant a downward departure is a two-step process. "First, the court must determine whether it can depart, i.e., whether there is a **valid legal ground** and adequate factual support for that ground in the case pending before it...." Banks v. State, 732 So.2d 1065, 1067 (Fla.1999). Second, where the requirements of the first step are met, the trial court "must determine whether it should depart, i.e.,

whether departure is indeed the best sentencing option for the defendant in the pending case." Id. at 1068 (emphasis in original). The defendant has the burden of proof to establish the facts that support a downward departure by a preponderance of the evidence. See id. at 1067; State v. Petringelo, 762 So.2d 965, 965 (Fla. 2d DCA 2000).

In this case, the trial court stated as follows:

> I'm going to make this very simple for the Appellate Court and for the State Attorney's Office. And I don't say this with any malice. **The defendant does not belong in prison, and it's absurd to have a 66-year-old man, who put his life on the line for our country, and has the problems he now has under the supervision of the Department of Corrections. It's just called ludicrous.**
>
> The defendant has spent 97 days in jail because he tested positive for cocaine, even if he used cocaine. **I question whether anybody in this courtroom or this world, who went what this defendant when through in Vietnam when people like me sat home in our own living rooms and watched the war on television, would have handled this any better than the defendant**.
>
> The defendant is not accused of committing any new crimes. He is 66 years old. He has so many problems now dealing with mental health and physical problems. The common sense says enough is enough.

(T 28-29)(Emphasis added).

In this case, the court had no valid legal ground for departure. The Defendant did not establish a need for

specialized treatment, nor did the trial court find that the defendant required some specialized treatment that would provide a basis for a downward departure.

In his brief, the defendant has reiterated the holding of State v. Chubbuck, 83 So. 3d 918 (Fla. 4th DCA 2012)(en banc), wherein the Fourth District Court of Appeal found that the Courts of Appeal have improperly supplemented the plain language of the statute with the requirement that, "[i]f a departure is to be permitted on such ground, the defendant must also establish, by a preponderance of the evidence, that the Department of Corrections cannot provide the required 'specialized treatment'" See Chubbuck, 83 So. 3d at 921. However as previously argued, this reasoning is well beyond the plain text of the statute, and effectively renders the term "specialized" meaningless.

The relevant consideration for a downward departure is the specialized nature of the treatment, if the treatment is available in the department of corrections, then there is nothing specialized that would allow for a departure. The term specialized, has been used by the legislature in Florida Statute § 945.12(1) and in Florida Statute § 958.11 (3), a plain reading of these statutes establishes that the use of the word "specialized" must be defined as a type treatment that is unavailable in the Department of Corrections. All illnesses and

their treatments, whether physical or mental, will undoubtedly be tailored to the needs of that person, thus specialized must mean something more than just requiring individualized treatment.

The defendant asserts that the State's reliance on these statutes show that specialized treatment is always available to inmates. This assertion misses the mark. Florida Statute § 945.12(1) and Florida Statute § 958.11 (3)(c) address an inmates need for "specialized" treatment which arises **after the inmate has been committed** to the department of corrections. The legislature has provided a means by which those inmates who become ill or need additional mental health treatment **after they have been incarcerated**, may receive the required treatment. Although the language of the statutes provide guidance regarding the meaning of the term "specialized treatment", these statutes do not establish that specialized treatment is always available in the department of corrections

Florida Statute § 921.0026(2)(d), provides the defendant an opportunity to **avoid committment** to the department of corrections due to the fact that he requires "specialized treatment". Thus, it stands to reason that in order to be eligible for the downward departure, the defendant must first establish that the treatment he requires in unavailable in the Department of Corrections.

In this case, the trial court, the Fourth District Court of Appeal, and the defendant have ignored the plain text of the statute. Instead, the Fourth District Court of Appeal has merely required that a defendant establish that he or she has some physical or mental illness, and thus they are eligible to be considered for a downward departure. Establishing the existence of an illness, whether it be physical or mental, without requiring the defendant to establish that he or she requires some type of treatment that is not available in the department of corrections effectively renders the term "specialized" meaningless[1].

The Defendant also argues that as a matter of policy, giving the trial court discretion on such matters makes sense, because even if treatment is currently available, it may become unavailable. The defendant suggests that if a defendant is already receiving quality care, the trial court should be allowed to consider this fact as it will lower the cost to the department of corrections. The defendant further argues that state resources are significantly affected by the cost of imprisonment and the legislature is faced with an ongoing problem because the criminal justice system has become a

[1] "It is a fundamental rule of construction that statutory language cannot be construed so as to render it potentially meaningless." Ellis v. State, 622 So.2d 991, 1001 (Fla.1993) (citing Snively Groves, Inc. v. Mayo, 135 Fla. 300, 184 So. 839 (1938)). "

warehouse for the mentally ill, at a great cost to the taxpayers.

While undersigned recognizes that there is a cost involved with incarceration, it appears that the defendant has lost sight of the fact that the primary purpose of sentencing punishment. The Florida Criminal Punishment Code states that "[t]he primary purpose of sentencing is to punish the offender." Section 921.002(1)(b), Fla. Stat. (2009).

"A departure from the recommended guidelines sentence is discouraged unless there are circumstances or factors which reasonably justify the departure". Section 921.0016(2), Fla. Stat. (2009). As noted in State v. Chestnut, 718 So.2d 312, 313 (Fla. 5th DCA 1998), because the **first purpose of sentencing is to punish not rehabilitate**, a downward departure from the permissible sentence is discouraged and adequate justification is required (emphasis added). Thus, the overriding policy interest is not the cost of incarcerative services or the defendants medical needs, it is protection of the public with a reasonable and adequate punishment.

Thus, this Court must reverse the decision of the Fourth District Court of Appeal as it is a complete misinterpretation of the plain text of Florida Statute § 921.0026(2)(d)and remand this case for resentencing.

CONCLUSION

Wherefore, Petitioner respectfully requests that this Honorable Court reverse the Fourth District's ruling in this matter, and hold that before a defendant is eligible for a downward departure pursuant to Florida Statute § 921.0026(2)(d), he must first establish that the specialized treatment is unavailable in the department of corrections.

Respectfully submitted,

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CERTIFICATE OF SERVICE/EFILING

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Reply Brief" has been furnished by Electronic Mail to: Paul Petillo, Esq., Assistant Public Defender, appeals@pd15.state.fl.us and electronically filed with this Court on this 17th day of April, 2013.

//s Melanie Dale Surber
MELANIE DALE SURBER

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, on April 17 2013.

//s Melanie Dale Surber
MELANIE DALE SURBER