

IN THE SUPREME COURT OF FLORIDA

JOHNNY LEE FRYSON,

Petitioner,

v.

CASE NO. 70,631

STATE OF FLORIDA,

Respondent.

FILED

SID J. WHITE ✓

JUL 13 1987

CLERK, SUPREME COURT

Deputy Clerk

REPLY BRIEF OF PETITIONER ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #197890
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	3
 <u>ISSUE I</u>	
A TRIAL COURT'S STATEMENT, MADE AT THE TIME OF DEPARTURE FROM THE SENTENCING GUIDELINES, THAT IT WOULD DEPART FOR ANY ONE OF THE REASONS GIVEN, REGARDLESS OF WHETHER BOTH VALID AND INVALID REASONS ARE FOUND ON REVIEW, DOES NOT SATISFY THE STANDARDS SET FORTH IN <u>ALBRITTON V. STATE</u> , 476 SO.2D 158 (FLA. 1985).	3
 <u>ISSUE II</u>	
PETITIONER'S THREE CONSECUTIVE LIFE SENTENCES ARE EXCESSIVE IN LIGHT OF THE RECOMMENDED GUIDELINES RANGE OF 22-27 YEARS.	6
 <u>ISSUE III</u>	
THE IMPOSITION OF TWO CONSECUTIVE AND ONE CONCURRENT LIFE SENTENCES, WITHOUT PAROLE AND WITHOUT GAIN TIME, CONSECUTIVE TO THE LIFE SENTENCE FOR FIRST DEGREE MURDER, ALSO WITHOUT PAROLE AND WITHOUT GAIN TIME, CONSTITUTES CRUEL, AND UNUSUAL PUNISHMENT.	8
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
<u>Albritton v. State</u> , 476 So.2d 158 (Fla. 1985)	3,6
<u>Fleming v. State</u> , 374 So.2d 954 (Fla. 1979)	4
<u>Fryson v. State</u> , 506 So.2d 1117 (Fla. 1st DCA 1987)	1
<u>McGouirk v. State</u> , 493 So.2d 1016 (Fla. 1986)	4
<u>Miller v. Florida</u> , #86-5344 (U.S. June 9, 1987)	7
<u>Mitchell v. State</u> , 12 FLW 1228 (Fla. 1st DCA 1987)	4
<u>Scurry v. State</u> , 489 So.2d 25 (Fla. 1986)	4
<u>Silver v. State</u> , 188 So.2d 300 (Fla. 1966)	6
<u>Simmons v. State</u> , 496 So.2d 911 (Fla. 2d DCA 1986)	4
<u>Solem v. Helm</u> , 463 U.S. 277 (1983)	8
<u>State v. Mischler</u> , 488 So.2d 523 (Fla. 1986)	5
<u>State v. Rousseau</u> , 12 FLW 291 (Fla. June 11, 1987)	5
<u>The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988)</u> , 482 So.2d 311 (Fla. 1985)	3

STATEMENT OF THE CASE AND FACTS

Because of certain suggestions in the answer brief that petitioner cannot complain about his sentence because the state agreed not to seek the death penalty (RB 13-14), petitioner wishes to point out that the plea agreement reached by the parties in the trial court reflected petitioner's plea to first degree murder in exchange for a life sentence. As to the other crimes, petitioner had no plea agreement, and pled no contest as charged. The state would argue for a maximum sentence, and petitioner would argue for a lesser sentence (R 269-70). There was no agreement that petitioner would accept maximum departure sentences.

ARGUMENT

ISSUE I

A TRIAL COURT'S STATEMENT, MADE AT THE TIME OF DEPARTURE FROM THE SENTENCING GUIDELINES, THAT IT WOULD DEPART FOR ANY ONE OF THE REASONS GIVEN, REGARDLESS OF WHETHER BOTH VALID AND INVALID REASONS ARE FOUND ON REVIEW, DOES NOT SATISFY THE STANDARDS SET FORTH IN ALBRITTON V. STATE, 476 SO.2d 158 (FLA. 1985).

Respondent claims that the sentencing judge's language that he would depart from the recommended guidelines for any one of his stated reasons is not "boilerplate" language at all (RB 5-7). Two observations are appropriate. First, petitioner did not invent the term. It was used by this Court in rejecting an amendment to the guidelines rule in 1985. The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311,312 (Fla. 1985). Second, the language was not spoken by the judge at the sentencing hearing (R 441-43). The judge accepted the prosecutor's offer to prepare the written departure order (R 445-46). It is fair to say that the language was inserted by the prosecutor into the written departure order (R 240).¹ It is the judge who must prepare the order, not the parties, since it is the judge who

¹Being consistent with its position in Issue II, respondent notes that petitioner did not object to the boilerplate language (RB at 5). Petitioner's reply is the same -- how can one object to something which has not yet occurred? See petitioner's initial brief at 25.

imposes sentence, not the prosecutor. See, e.g., Simmons v. State, 496 So.2d 911 (Fla. 2nd DCA 1986). The remainder of respondent's argument, analogizing guidelines departures to capital cases (RB 7) is irrelevant.

Respondent next seeks to resurrect one of the reasons invalidated by the lower tribunal, again by analogy to death cases, and complains that the First District's review of reasons for departure is incomplete because it "is merely checking the phraseology" (RB 8-9). The same criticism is appropriate where the lower tribunal blindly believes the sentencing judge every time the boilerplate language is used.² In any event, respondent has not demonstrated that the First District was incorrect in striking reason #2 on authority of this Court's decisions in Fleming v. State, 374 So.2d 954 (Fla. 1979), Scurry v. State, 489 So.2d 25 (Fla. 1986), and McGouirk v. State, 493 So.2d 1016 (Fla. 1986).

Respondent does not even mention petitioner's attack on the two remaining reasons for departure, see initial brief at 10-14, much less rebut the argument. Petitioner relies on the discussion in his initial brief for the proposition that reasons #1 and #3 are invalid.

In short, respondent has not demonstrated that the two reasons for departure approved below are proper, and has not

²But see Mitchell v. State, 12 FLW 1228, 1229 (Fla. 1st DCA May 14, 1987), discussed in the initial brief at 10, note 2.

convinced anyone that the boilerplate language is not offensive to proper review of a departure order. This Court must strike reasons #1 and #3 or in the alternative, strike the offensive boilerplate language and remand for resentencing.³

³Petitioner concedes that his discussion of State v. Mischler, 488 So.2d 523 (Fla. 1986) at p. 20 of his initial brief is not correct in light of State v. Rousseau, 12 FLW 291 (Fla. June 11, 1987).

ISSUE II

PETITIONER'S THREE CONSECUTIVE
LIFE SENTENCES ARE EXCESSIVE
IN LIGHT OF THE RECOMMENDED
GUIDELINES RANGE OF 22-27 YEARS.

Respondent blithely informs us that this Court's decision in Albritton v. State, supra, was and is incorrect because this Court was without the power to require review of the extent of the departure (RB 10). Respondent's position is untenable for many reasons. First, as noted by this Court in Albritton, 476 So.2d at 160, both parties, including the Attorney General, who, incidentally, was publicly in favor of the guidelines, agreed that some sort of review of the length of the departure was necessary. The Attorney General should not be permitted to repudiate the position of his predecessor in office, where such a renunciation would be an admission that the Attorney General had mislead this Court to decide Albritton the way it did.

Second, respondent ignores the historical fact, discussed in the initial brief at 23, that some sort of departure review was intended from the infancy of the guidelines scheme.

Third, respondent cites irrelevant, pre-guidelines law (RB 10-11) for the proposition that the courts have no business examining the length of a sentence.

Respondent addresses petitioner's ex post facto claim solely with a citation to Silver v. State, 188 So.2d 300 (Fla. 1966), which held that the district court erred in declaring a larceny statute unconstitutional because the error had not been preserved in the trial court and had not even been presented as

an assignment of error in the appeal. Respondent fails to mention or otherwise address the arguments in petitioner's initial brief at 21-25 that he could not have anticipated that the Legislature would remove his right to appeal after he had been sentenced.

This Court should reverse on this issue on authority of the recent opinion in Miller v. Florida, # 86-5344 (U.S. June 9, 1987), which held that retroactive application of revisions to the guidelines is an unconstitutional ex post facto application of the law.

ISSUE III

THE IMPOSITION OF TWO CONSECUTIVE AND ONE CONCURRENT LIFE SENTENCES, WITHOUT PAROLE AND WITHOUT GAIN TIME, CONSECUTIVE TO THE LIFE SENTENCE FOR FIRST DEGREE MURDER, ALSO WITHOUT PAROLE AND WITHOUT GAIN TIME, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Respondent's discussion of this issue is just as superficial as that accorded by the lower tribunal, i.e., because petitioner committed a first degree murder, nothing the courts do to him in retaliation for the other crimes can ever constitute cruel and unusual punishment (RB 13). Again, petitioner wishes to point out that he received no "gift from the state" (RB 14). Serving a life sentence for first degree murder⁴ in an overcrowded Florida prison is no picnic, especially in the sweltering summertime. Under respondent's reasoning, because the state did not seek the death penalty, for whatever reason, the state is free to inflict any type of archaic and barbaric punishment on petitioner. Such is the danger in looking only at the nature of the offense, and ignoring the other two prongs of the test for cruel and unusual punishment.⁵

Respondent has again declined to specifically address the argument in petitioner's initial brief at 27-30 that the other two prongs of the test, the sentences imposed in Florida and in

⁴Without parole and without gain time, see petitioner's initial brief at 11-12.

⁵Solem v. Helm, 463 U.S. 277, 292 (1983).

other states for the same crimes, demonstrate that petitioner's sentences are unconstitutional. This Court must hold that they are.