IN THE SUPREME COURT OF FLORIDA

CHARLES BURKE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,091

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, CHARLES BURKE, JR., was the Defendant and the Respondent was the Prosecution in the Circuit Court for Putnam County, Florida. In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" - Record on Appeal

"A" - Appendix to Petitioner's Brief on the Merits

SUMMARY OF ARGUMENT

The trial court's departure from the recommended guideline sentence fails to comply with several of the dictates and exclusions of Florida Rule of Criminal Procedure 3.701. No written statement of justification for the departure was provided, as required by Rule 3.701 d.11.. More importantly, the verbal reasons articulated show that the trial court relied upon offenses for which convictions had not been obtained, in direct contravention of Rule 3.701 d.11. and Committee Note (d)(11); on status offenses and juvenile offenses which are expressly excluded from being considered as prior record by Rule 3.701 d.5)c) and Committee Note (d)(5); and on prior convictions which were taken into account in calculating the recommended guideline sentence.

STATEMENT OF THE CASE AND FACTS

The Petitioner, CHARLES BURKE, JR., was arrested on July 22, 1983 for armed robbery (R1,8). Burke, a seventeen year-old, was transferred to adult court, and pled guilty to robbery with a firearm. Burke v. State, Case No. 84-7 (Fla. 5th DCA, September 20, 1984)[9 FLW 1983](See A-1);(R66-84). Burke appeared for sentencing on December 9, 1983 before the Honorable Robert R. Perry, Circuit Judge for Putnam County, and elected to be sentenced under the sentencing guidelines. Burke, supra; (R54-55). On the sentencing guidelines scoresheet Burke was given eighty-two points for primary offense and twelve points for prior record (one third-degree felony and one misdemeanor), which corresponded with a recommended sentence range of three and one-half to four and one-half years of incarceration. Burke, supra; (R44). The trial court departed from the recommended range and sentenced Burke to fifteen years of incarceration. Burke, supra; (R41-43). No written statement of reasons in support of the deviation from the guidelines was provided by the trial court. Burke, supra. Judge Perry did, however, make the following comments at the sentencing hearing, indicating that the departure was based on Burke's prior juvenile record:

> But the record should show that in Mr. Burke's case, he is presently eighteen years old, turned eighteen in September of this year. His encounters with the law go back to the time when he was eight years old. And in that period of time, he has encountered the law twenty-two times, this being his twenty-second encounter with the law.

He has a consistent history of theft, escalating to burglary, escalating to car theft, escalating to violence: aggravated assault, aggravated assault a second time, numerous burglaries, and now for armed robbery, one of the more serious offenses that can be made or can be charged against a person.

During his rather checkered career, since he was eight years old, he has served time in every branch of the juvenile system available. He has served time at the Eckerd Camp, which is the non-incarceration equivalent of Devil's Island, and if they can't straighten you out at Eckerd Camp, I'm not sure you can be straightened out. He has also served time in three separate state institutions with regard to these matters.

It appears to me that Mr. Burke has had numerous opportunities to straighten up his life and one of the things that he needs to realize is that crime doesn't pay. He has been singularly unsuccessful at it. If he would devote his energies to gainful employment, he would certainly have fared better since I don't think he's ever gotten much from the thefts that he's committed except incarceration.

I think that Mr. Burke has had the benefit of everything that we can give him. He's had probation, he's had the chance to go to a non-incarceration camp-type environment, and then he's been incarcerated. Nothing has served to help or deter Mr. Burke.

I am not, with an escalating pattern of violent crimes like this, going to abide by the sentencing guidelines. The sentencing guidelines in and of themselves in this case are a

farce.

> If I sentence Mr. Burke to four years, he would not serve but two years because he would undoubtedly receive day-for-day gain time. I simply think that this escalating pattern of violence, violent crime, deserves the Sentence outside the guidelines. And those are the reasons spread upon this record to be followed by a written order that I am going outside these guidelines.

Burke, supra at 1984 (Sharp, J., dissenting); (R57-59). The Pre-Dispositional Report (P.D.R.) for Burke, which the trial court relied upon, showed the following prior history:

Referral No.	Date of Referral	Reason Referred	Specific Disposition/Date	
(1)	5/7/74	Shoplifting	Dismissed after initial counseling	5/22/74
(2)	10/8/74	Beyond Control	Dismissed after initial counseling	11/4/74
(3)	8/6/76	Runaway	Information only	8/6/76
(4)	11/21/77	Runaway/Ungovernable	Runaway returned	12/7/77
(5)	3/21/78	Ungovernable	Delinquent Probation	7/13/78
(6)	4/14/78	Larceny/Burglary of a Dwelling	Closed after initial contact	4/28/78
(7)	4/14/78	Runaway	Closed after initial counseling	4/28/78
(8)	4/24/78	Burglary	Closed after initial counseling	4/28/78
(9)	6/5/78	Ungovernable	Delinquent Probation	7/13/78
(10)	6/5/78	Using Vehicle without Owner's consent	Probation	7/13/78
(11)	7/6/78	Disorderly intoxication	Information only	7/13/78
(12)	8/16/78	Aggravated assault (2 cts);Auto Theft (1 ct)	Committed	9/7/78
(13)	8/29/78	Grand Theft	Committed	9/7/78
(14)	9/5/78	Burglary	Committed	9/7/78
(15)	5/10/79	Burglary	Recommitted	5/17/79

Referral No.	Date of Referral	Reason Referred	Specific Disposition/Date	
(16)	5/10/79	Aggravated assault	Recommitted	5/17/79
(17)	5/18/79	Auto theft	Recommitted	5/17/79
(18)	6/23/81	Runaway	Complaint withdrawn	7/8/81
(19)	7/17/81	Retail theft	Committed	8/6/81
(20)	7/28/81	Grand theft	Committed	8/6/81
(21)	6/2/83	Grand theft auto	Involuntary transfer to adult court - case dismissed	6/8/83
(22)	7/22/83	Armed robbery	Involuntary transfer to adult court - pled guilty - pending sentencing	8/23/83

Burke, supra at 1984 (Sharp, J., dissenting); (R33-34). Defense counsel objected to the departure from the presumptive sentence and argued that the reasons articulated by the trial judge were improper (R60-63).

On appeal Burke urged that the departure from the recommended sentence range is improper for several distinct reasons. First, no written statement delineating the reasons for departure was provided by the trial judge, as required by Florida Rule of Criminal Procedure 3.701 b.6. and d.11. Assuming arguendo that verbal reasons are sufficient, Burke argued that the trial court's reliance on offenses for which he had never been convicted violated Florida Rule of Criminal Procedure 3.701 d.11. and the accompanying Committee Note (d)(11). Third, juvenile offenses which occurred more than three years from commission of the instant offense and P.D.R. entries which were not the equivalent of crimes were improperly relied upon as a justification for departure. Fourth, the departure was also based on prior convictions which were already taken into account in determining the

recommended guideline sentence.

On September 20, 1984 the Fifth District Court of Appeal, in a 2-1 decision, affirmed Burke's sentence. (See A-1). The majority held that verbal reasons dictated into the record were adequate compliance with Florida Rule of Criminal Procedure 3.701 d.11. and that the trial court articulated reasons sufficient to support sentencing Burke in excess of the recommended guideline range. The majority certified conflict with Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984), on the issue of the propriety of the trial court's reasons for departure. In the dissenting opinion Judge Sharp pointed out that many of the juvenile prior history entries relied upon by the trial judge did not culminate in conviction, many were not the equivalent of crimes, and all but four were disposed of more than three years before the instant offense was committed. The dissent recognized that Florida Rule of Criminal Procedure 3.701 d.5.a)1) prohibits scoring as prior record anything less than conviction, and that Rule 3.701 d.5.c) bars scoring for non-criminal acts and for juvenile offenses committed more than three years before the instant offense. Agreeing with Harvey, supra, Judge Sharp stated that "because the guidelines detail how a past record should be treated, it follows that matters in the history which the guidelines mention as not permissible to be used in scoring should not be used as a basis for departure". Burke, supra at 1284 (Sharp, J., dissenting).

Petitioner filed a Motion for Rehearing and/or Clarification of Opinion on September 20, 1984 (A-2). The motion was

denied on October 10, 1984 (A-3). On October 25, 1984 Petitioner filed a Notice to Invoke Discretionary Jurisdiction. This Honorable Court issued the briefing schedule in the above-styled cause on October 30, 1984.

ARGUMENT

THE TRIAL COURT'S DEPARTURE FROM THE RECOMMENDED GUIDELINE SENTENCE FAILS TO COMPLY WITH THE DICTATES AND EXCLUSIONS OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.701.

The sentencing guidelines were a response to the widespread problem of disparity in sentencing practices around the state. The purpose for the adoption of Florida Rule of Criminal Procedure 3.701 was to eliminate unwarranted variation in sentencing and to promote fairness in the sentencing process by assuming that similarly situated offenders convicted of similar crimes receive similar treatment. Fla.R.Crim.P.3.701 b.; See Sundberg, Plante, Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 FLA. ST. U.L. REV. 125 (1983). It was recognized that in some cases factors would be present which warranted imposing a sentence outside the recommended guideline range. Thus, the rule contains provisions allowing departures from the presumptive sentence. At the time of Burke's sentencing, Rule 3.701 d.11. provided as follows:

> Departures from the guideline sentence: Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors re-

> lating to either instant offense or prior arrests for which convictions have not been obtained.[1/]

The accompanying Committee Note (d)(11)[2/] stated:

> The written statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public, of the reasons for departure. The court is prohibited from considering offenses for which the offender has not been convicted.

Similarly, Rule 3.701 b.6. provides that "departures from the presumptive sentence established in the guidelines shall be articulated in writing and made only for clear and convincing reasons".

The recommended guideline sentence range for Burke was three and one-half to four and one-half years (R44). The trial

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1/ Effective July 1, 1984, Rule 3.701 d.11. was amended to provide:

> Departures from the guideline sentence: Departures from the guideline range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.

See Ch. 84-328, Laws of Florida, and The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 451 So.2d 824 (Fla. 1984).

2/ As a matter of clarification, this Court in The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 451 So.2d 824 (Fla. 1984), stated that the original committee notes were adopted as part of the rule.

court departed from the guidelines and sentenced Burke, a seventeen year-old youth at the time of the offense, to a term of fifteen years of incarceration in the Department of Corrections. The guidelines departure in the instant case should not stand for several reasons.

First, the rule unequivocally requires that a sentence outside the guidelines be accompanied by a written statement setting forth the court's reasons for departure. Petitioner submits that a trial court's verbal explanation in the record is not sufficient compliance with the rule[3/]. As the First District noted in Jackson v. State, 454 So.2d 691,692 (Fla. 1st DCA 1984), the rule rather noticeably emphasizes the requirement of a contemporaneous statement, rather than an oral statement later transcribed. In R.B.S. v. Capri, 384 So.2d 697 (Fla. 3d DCA 1980), the court held that where a statute (in that case Section 39.032(5)(a), which deals with detention of juveniles) requires a written order giving reasons, the transcript of the proceedings cannot act as a substitute. The court recognized that it was not the function of an appellate court to cull the underlying record of the proceedings in search of reasons which the trial court may have relied upon. Where the trial court provides a written statement of reasons for departure from the guidelines, there is no doubt as to what factors the court relied upon and appellate

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3/ This issue is presently pending before this Court in State v. Jackson, (Sup.Ct. Case No. 65,857), the First District having certified conflict in Jackson v. State, 454 So.2d 691,692 n.2 (Fla. 1st DCA 1984).

review is thereby facilitated. In Keeley v. State, Case No. 84-9 (Fla. 5th DCA, October 11, 1984)[9 FLW 2190](Sharp, J., specially concurring), Judge Sharp observed:

> Further, a judge's oral statements made at sentencing may be rambling, poorly expressed and may require extrapolation and reconstruction by the appellate court to be sustainable as "clear and convincing". This makes appellate review difficult, and presents a quandary when some of the reasons given are possibly not convincing or are improperly considered in this context.

The instant case well illustrates this problem. At the sentencing hearing Judge Perry went into a long discourse referring to sundry things including Burke's twenty-two "encounters with the law", his commitment to various juvenile institutions, his failure to straighten up his life, an "escalating pattern of violent crimes", and the effect of gain time on his sentence (R57-59). As the dissenting opinion points out, Burke, supra at 1983, given this rambling discussion, it is not clear what specific factors or circumstances the trial judge relied upon to aggravate the sentence. This kind of problem could be remedied by preparation of a written statement.

Another reason to require a written statement is to make the reasons for departure readily available to the parties, the public, and the Sentencing Guidelines Commission. Committee Note (d)(11) to the rule provides that "the written statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public, of the reasons for departure". Additionally, the Sentencing Guidelines Commission

documents and analyzes the articulated reasons for departure in order to determine the need for adjustments to the guidelines. FLORIDA SENTENCING GUIDELINES COMMISSION, GUIDELINES MANUAL, 7 (October 1983). The manual stresses the importance of accurate recordation of the aggravating factors in order to properly monitor the guidelines and explains that the Clerk of the court has the responsibility to forward the reasons for departure to the Commission. FLORIDA SENTENCING GUIDELINES COMMISSION, GUIDELINES MANUAL, 5,7 (October 1983). If dictation into the record suffices, then transcription by a court reporter, an expensive and time-consuming procedure, would be necessary in order to make the reasons available to the parties, the public and the Commission. The small inconvenience to the trial judge of delineating his reasons in a written statement is outweighed by the benefits of such a requirement.

Even if this court determines that an oral explanation of the basis for departure is a sufficient substitute for a written statement of reasons, Petitioner contends that the factors announced by the trial judge in the instant case do not constitute clear and convincing reasons which warrant the five-cell departure from the recommended range. The most compelling reason why the departure is improper is that the trial judge considered offenses for which Burke had never been convicted. The trial court's statements at the sentencing hearing indicate that he was considering Burke's twenty-one previous "encounters with the law", the first of which occurred ten years before when Burke was eight years old (R57-58). As the Pre-Dispositional Report shows,

ten of these encounters did not result in conviction (P.D.R. referral numbers 1,2,3,4,6,7,8,11,18,21). (See p.5-6 supra). Thus, the court's consideration of these charges flies in the face of Rule 3.701 d.11., which states in relevant part that "reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained" (emphasis added) and the caveat in Committee Note (d)(11) that "the trial court is prohibited from considering offenses for which the offender has not been convicted". In Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984), the trial court, in departing from the recommended guideline sentence, relied upon the defendant's juvenile history which consisted of seven previous contacts with the law, four of which were mere arrests. The Fourth District Court of Appeal held that consideration of these offenses was clearly proscribed by Rule 3.701 d.11. and vacated the sentence outside the guidelines. Similarly, in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), the First District held that the trial court's consideration of pending felony charges violated Rule 3.701 d.11.

The second problem is that many of the twenty-one entries in the P.D.R. were not the equivalent of crimes (i.e. beyond control, runaway, ungovernable). Children who commit these status offenses are treated as dependent, not delinquent, children in Florida's juvenile justice system. See Section 39.01(9), Florida Statutes. Very often status offenses are alleged by parents or school officials, rather than the police. The history set out in the P.D.R. listed all of Burke's referrals

to the Department of Health and Rehabilatative Services, which included criminal as well as non-criminal matters. Juvenile dispositions which would not have been criminal if committed by an adult are expressly excluded by Rule 3.701 d.5.c) and Committee Note (d)(5) from being scored as prior record on the scoresheet. Furthermore, of the juvenile dispositions which did culminate in the equivalent of convictions and which would have been criminal if committed by an adult (P.D.R. referral numbers 12 to 17,19 and 20), all but two (numbers 19 and 20) were disposed of more than three years before the instant offense, that is when Burke was fourteen years of age or younger. Rule 3.701 d.5.c) and the accompanying Committee Note detail how a juvenile's record is to be treated under the sentencing guidelines. Section d.5.c) provides:

> Juvenile record: all prior juvenile dispositions which are the equivalent of convictions as defined in section d(2), occurring within three (3) years of the current conviction and which would have been criminal if committed by an adult, shall be included in prior record.

Committee Note (d)(5) states:

> Juvenile dispositions, with the exclusion of status offenses, are included and considered along with adult convictions by operation of this provision. However, each separate adjudication is discharged from consideration if three (3) years have passed between the date of disposition and the conviction for the instant offense.

Petitioner contends that because juvenile adjudications older than three years and status-type offenses are <u>expressly</u> <u>excluded</u>

from being scored as prior record, these matters are improper grounds for departure.[4/]

Juvenile adjudications have been accorded special treatment by Florida law. Section 39.10, Florida Statutes provides in relevant part:

> (4) Except for use in a subsequent proceeding under this chapter, an adjudication by a court that a child has committed a delinquent act shall not be deemed a conviction; nor shall the child be deemed to have been found guilty or to be a criminal by reason of that adjudication; nor shall that adjudication operate to impose upon the child any of the civil disabilities ordinarily imposed by or resulting from conviction or to disqualify or prejudice the child in any civil service application or appointment. (emphasis added).

Section 39.12(6), Florida Statutes, generally prohibits the use of juvenile court records in other civil or criminal actions. Section 90.610, Florida Statutes, prohibits the admission of prior juvenile adjudications for the purpose of impeaching a witness. This limitation on the impact of juvenile adjudications is based upon the immaturity and inexperience of the offender and reflects the Florida Juvenile Justice Act's purpose of protecting the juvenile. See Section 39.001, Florida Statutes. It also recognizes that juvenile court procedure does not afford the

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4/ The issue of whether juvenile adjudications which are more than three years old and therefore excluded from being scored as prior record can serve as a basis for departure is presently pending before this Court in Weems v. State, (Sup.Ct. Case No. 65,598), on petition for review of the decision in Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984).

defendant all of the procedural rights and safeguards which are available in adult courts, such as the right to jury trial. The exclusion of "old" juvenile adjudications in the sentencing guidelines rule is consistent with the Florida law's special treatment of juvenile offenses and was most likely motivated by these same concerns. The trial court's departure in the instant case based on "old" juvenile offenses was an attempt to circumvent Rule 3.701 d.5.c) and renders that provision meaningless. Judge Perry's reliance on juvenile adjudications (not to mention mere arrests) as a justification for imposing a period of incarceration in state prison more than three times greater than that recommended by the guidelines ignores the caveat in Section 39.10 that a child shall not be deemed a criminal by reason of a juvenile adjudication. At the very least, "old" juvenile adjudications for offenses committed when the defendant was fourteen years of age and younger do not rise to the level of a clear and convincing reason warranting such a departure. Even if these offenses had been scored as prior record on the scoresheet, the recommended sentence would have been only eight years. Thus, the trial court attached more weight to "old" juvenile offenses than the weight which the guidelines assign to adult offenses in the sentencing decision.

The third problem is that the trial judge also relied upon prior convictions which were already taken into consideration in calculating the presumptive guideline sentence. Burke was given twelve points on the scoresheet for a prior third-degree felony (P.D.R. referral no. 20) and one misdemeanor (P.D.

R. referral no. 19). Petitioner urges that clear and convincing reasons for departure do not include the same factors which are utilized in determining the recommended sentence. See Hendrix v. State, No. 83-1702 (Fla. 5th DCA August 2, 1984)[9 FLW 1697] (Sharp, J., dissenting).[5/]

The sentencing guidelines identify five variables[6/] deemed to be an integral part of the sentence decision-making process and assign points to each variable depending on the relative weight which the variable should have in the sentencing decision. Sundberg, Plante, and Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 FLA. ST. U.L. REV. 125 (1983). The statement of purpose contained within the sentencing guidelines rule declares:

> Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense - and offender - related criteria and in defining their relative importance in the sentencing decision.

Rule 3.701 b.

5/ In Gene v. State, No. 84-87 (Fla. 4th DCA October 17, 1984) [9 FLW 2221], the Fourth District certified to this Court the question whether prior convictions which are considered in calculating the recommended guideline range can constitute clear and convincing reasons for exceeding the presumptive sentence. This issue is also pending before this Court in Hendrix v. State, (Sup.Ct. Case No. 65,928), on petition for review of Hendrix v. State, No. 83-1702 (Fla. 5th DCA August 2, 1984)[9FLW 1697].

6/ Primary offense at conviction, additional offenses at conviction, prior record, legal status at time of offense, and victim injury.

Committee Note (d)(11) now provides that, other than those reasons specifically excluded by the guidelines, factors which are consistent and not in conflict with the statement of purpose may be utilized by the sentencing judge as a basis for departure. Allowing departures based on the identical factor used in determining the recommended sentence means that the trial court is free to reject the guidelines' accessment of the relative importance of the five specified variables in the sentencing decision and permits the trial court to reinsert its subjectivity into these areas. This is inconsistent with the guidelines' goal of reducing the subjectivity in defining the relative importance of these specified variables. This Court in its report to the Legislature on the proposed sentencing guidelines stated:

> It stands to reason that the use of a uniform set of sentencing guidelines will eliminate a considerable amount of unwarranted variation simply because only certain objectively quantifiable variables can be considered without the trial judge specifically enumerating other factors he deems worthy of consideration.

A Report to the Legislature, Statewide Sentencing Guidelines Implemention and Review, 37 (1982). (emphasis added).

The State of Minnesota implemented sentencing guidelines in 1980, which served as a partial model for the Florida sentencing guidelines. See Spitzmiller, An Examination of Issues in the Florida Sentencing Guidelines, 8 NOVA L.J. 687,689 (1984). Florida Rule of Criminal Procedure 3.701 has many similarities

with the Minnesota guidelines.[7/] The Minnesota Supreme Court has held that it is improper for the trial court to use as a grounds for departure the same facts which are taken into account in determining the recommmended guideline sentence. State v. Magnam, 328 N.W. 2d 147 (Minn. 1983); State v. Brusven, 327 N.W. 2d 591 (Minn. 1982); State v. Barnes, 313 N.W. 2d 1 (Minn. 1981). In Magnam, supra at 149-150, the court stated:

> Generally, the sentencing court cannot rely on a defendant's criminal history as a ground for departure. The Sentencing Guidelines take one's history into account in determining whether or not one has a criminal history score and, if so, what the score should be. Here defendant's criminal history was already taken into account in determining his criminal history score and there is no justification for concluding that a qualitative analysis of the history justifies using it as a ground for departure.

Additionally, this Court has followed a similar rationale in the death penalty context and held that it is improper to consider the same factual circumstance as the basis for more than one aggravating factor. Francois v. State, 407 So.2d 885 (Fla. 1981); Provence v. State, 337 So.2d 783 (Fla. 1976). This Court should follow the Minnesota Supreme Court on this issue in order

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7/ The statements of purpose and the enumerated principles are very similar; both proscribe departures based on offenses for which convictions have not been obtained; Minnesota allows departures for substantial and compelling reasons, compared with the requirement of Rule 3.701 that the reasons be clear and convincing. See Minn.Stat. appendix Section 244 (1983).

to achieve the guidelines' purpose of similar treatment for similar offenders.

Besides prior record, a few other factors considered by the trial judge at sentencing warrant some mention. The trial court indicated that he believed that an extended sentence was needed because if the recommended sentence of four years were followed, Burke "would not serve but two years because he would undoubtedly receive day-for-day gain time" (R59). Section 944.275(4), Florida Statutes, grants prisoners basic gain time in the amount of ten days per month; day-for-day gain time would be awarded only to an inmate "who performs some outstanding deed, such as serving a life or assisting in recapturing an escaped inmate..." Section 944.275(4)(c), Florida Statutes. It appears that the trial court was under the mistaken impression that thirty days gain time per month was automatic and that Burke would actually serve only one-half of his fifteen year sentence. Petitioner also takes issue with Judge Perry's conclusion that Burke had already been given all that could be given, leaving a fifteen year sentence as the only alternative (R59). This was Burke's first offense handled in the adult system and he had never before served any time in the Department of Corrections. It also appears that any aggravating factors in the instant case should have been offset by the presence of mitigating factors, namely, Burke's young age (R71) and the evidence that he was intoxicated when he committed the robbery (R56).

In closing, the Petitioner urges this Court to vacate his sentence of fifteen years for the foregoing reasons and

restore the guidelines' intended purpose of achieving uniformity and fairness in sentencing, which the Fifth District Court of Appeal has substantially undermined. Prior to the guidelines, a defendant's sentence too often depended more on the geographical area in which the crime was committed or the particular judge that imposed sentence, rather than upon the offender's culpability.[8/] This disparity will continue if the mandates and exclusions of Rule 3.701 are not enforced, and "the sentencing guidelines in Florida will become an interesting but failed social experiment". Hendrix v. State, Case No. 83-1702 (Fla. 5th DCA August 2, 1984)[9 FLW 1697](Sharp,J., dissenting).

8/ The latest statistical report from the Sentencing Guidelines Commission on county-to-county compliance rates suggests that geographical disparity in sentencing continues. Sentencing Guidelines Commission, Sentencing Guidelines Compliance Rates (September 10, 1984)(available from Florida Sentencing Guidelines Commission (See A-4). The report shows the state-wide rate of upward departure is 8.1% and the rate of downward departure 9.2%. Id. It was anticipated that from 15 to 20% of sentencing decisions would fall outside the guidelines, either above or below the recommended sentence range. Sundberg, Plante, and Braziel, Florida's Initial Experience with Sentencing Guidelines 11 FSU L.REV. 125,142. In Putnam County, however, the rate of upward departure is 36% and the rate of downward departure 12%, nearly triple the state-wide rate of departure. (See A-4).

CONCLUSION

BASED UPON the foregoing arguments, authorities, and policies, the Petitioner respectfully requests that this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Charles Burke, Inmate No. 092218, #B-320, Sumter Correctional Institute, P.O. Box 667, Bushnell, Florida 33513, on this 19th day of November, 1984.

Lucinda H. Young

LUCINDA H. YOUNG
ASSISTANT PUBLIC DEFENDER