IN THE SUPREME COURT OF FLORIDA

WILLIAM BROOKS,

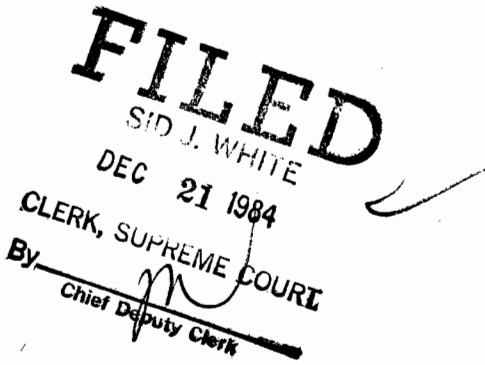
Petitioner,

vs. CASE NO. 66,137

STATE OF FLORIDA,

Respondent.

_____/



RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

William Brooks, the criminal defendant and appellant below in Brooks v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 2135, Case No. AW-329 and Brooks v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 2135, Case No. AW-337, will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below will be referred to herein as Respondent.

Citations to the record on appeal in Case No. AW-329 will be indicated parenthetically as "RA" with the appropriate page number(s). Citations to the record on appeal in Case No. AW-337 will be indicated parenthetically as "RB" with the appropriate page number(s). Citations to Petitioner's brief on the merits will be indicated parenthetically as "PB" with the appropriate page number(s). Citations to the appendix attached hereto, containing the decision of the lower court, and other pertinent documents, will be indicated parenthetically as "A" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent notes that the narrow legal question accepted for review by this Court renders extraneous a large portion of Petitioner's Statement of the Facts (PB 1-14). However, since Petitioner has chosen to set forth in detail the facts relating to the cases being reviewed, Respondent accepts as accurate, though incomplete, Petitioner's Statement of the Facts and Statement of the Case (PB 1-14) and therefore submits the following additional information:

Case No. AW-329

The victim, Rhonda Carlson, testified that she gave the suspects the money because the gun frightened her and she was afraid she was going to be shot (RA 121). She also testified that after the police were summoned, she was waiting in the back of the store because she was scared (RA 133).

Case No. AW-337

In response to Petitioner's argument concerning the alleged Brady violation, the prosecutor detailed his good faith attempts to produce the lineup sheet and the reason for his inability to do so (RB 112). The State argued that defense counsel was present at the lineup and was aware that the victim didn't identify Petitioner; that this information could be secured from the victim on cross-examination; and

that the lineup sheet would be inadmissible as hearsay (RB 112, 113).

Respondent declined to stipulate that Petitioner was present at the lineup and defense counsel chose not to put on a witness to prove that fact (RB 114).

Petitioner, neither in his Motion in Limine (RB 25, 26) nor in his argument on the motion (RB 133, 135), raised as a ground for inadmissibility, the sufficiency of the evidence, exclusive of the collateral crime evidence, to identify Petitioner as a perpetrator of the instant offense.

Finally, the lower court filed its opinions in both cases on October 9, 1984 (A1-5) wherein the defendant's convictions were affirmed and the question accepted for review was certified as being one of great public importance.

ARGUMENT

QUESTION CERTIFIED

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.CRIM.P. 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFY DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR RESENTENCING.

Respondent submits that the foregoing question should be answered as follows:

> WHEN A TRIAL JUDGE'S DEPARTRUE FROM THE SENTENCING GUIDELINES IS PREDICATED UPON AT LEAST ONE CLEAR AND CONVINCING REASON AND THE SENTENCE IMPOSED IS WITHIN THE STATUTORY PARAMETERS FOR THE CONVICTED OFFENSE, THE SENTENCE MUST BE AFFIRMED NOTWITHSTANDING THE PRESENCE OF ONE OR MORE IMPERMISSIBLE REASONS.

By adopting this position, this Court will leave intact the inherent sentencing discretion of the trial judge as narrowly modified by the sentencing guidelines while providing criminal defendants with the appellate review contemplated by Florida Statutes §921.001(5). Implicit in answering the question certified by the lower tribunal is a determination by this Court of what constitutes clear and convincing reasons for departure and what standard of review should be applied to sentencing guidelines cases.

In Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), the court held that:

> The only limitation on reasons for deviating from the guidelines is found in subsection (d)(11) which reads:
>
> > 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.

Id. at 1028. Similarly, the lower tribunal, in rejecting the argument that the nature of the offense cannot be considered for purposes of departure held:

> However, both the grammatical language and the logical import of the quoted rule [3.701 (d)(11)] would appear to preclude deviation only when predicated upon factors, related to either prior arrests or the instant offense, for which conviction has not been obtained.
>
> * * *
>
> In the present case the trial court's expressed reason for deviating from the guidelines is supported by the temporal and geographical circumstances of the offenses for which appellants were convicted, each appellant being convicted of multiple contemporaneous offenses amply substantiating the court's reference to a "crime binge" and "two-man crime wave." Rule 3.701(d))11) therefore does not preclude such deviating, and the trial court did not err in so deviating for the reasons stated.

Manning v. State, 452 So.2d 136, 138 (Fla. 1st DCA 1984). See also Garcia v. State, 454 So.2d 714, 718 (Fla. 1st DCA 1984). The foregoing decisions of the First and Second Districts are consistent with the views expressed by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) where the Court recognized that in discharging his duty of imposing a proper

sentence, the trial judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime, and that the trial judge's possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant, if not essential to the selection of an appropriate sentence where sentencing discretion is granted (Emphasis added). Id. at 57 L.Ed.2d 988, 989. See also United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582, 591, 592 (1978).

Consequently, Respondent maintains that for purposes of departure, the trial court may consider and rely upon any factor, concerning the nature and circumstances of the offense as well as the defendant's background, which is not precluded from consideration by Fla.R.Crim.P. 3.701(d)(11).

In view of the Sentencing Commission's stated intention that the guidelines are not meant to usurp judicial discretion, Fla.R.Crim.P. 3.701(b)(6), Respondent submits that the proper standard of review in guidelines cases is whether the trial court's departure constitutes an abuse of discretion. Put simply, before a departure from the sentencing guidelines can be reversed on appeal, there must be a clear demonstration of an abuse of discretion by the trial judge.

Judicial discretion, in this sense, having been defined as the power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court, Hair v. Hair, 402

So.2d 1201, 1204 (Fla. 5th DCA 1981), pet. for rev. denied, 412 So.2d 465 (Fla. 1982), is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Hair v. Hair, supra at 1204, citing with approval Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).

Some of the district courts, including the lower court, have endorsed and applied this suggested standard holding:

> While a defendant may appeal a sentence outside the guidelines, it is not the function of this court to re-evaluate the exercise of the trial judge's discretion in this area. Rather, our role is to assure that there is no abuse of that discretion.

Addison v. State, 452 So.2d 955, 956 (Fla. 2d DCA 1984).

> Decisions from our sister courts show that we are in accord in our views that the trial courts continue to have the same broad sentencing discretion conferred upon them under the general law, subject only to certain limitations or conditions imposed by the guidelines, which are to be narrowly construed so as to encroach as little as possible on the sentencing judge's discretion, but whose specific directives we are required to recognize and enforce in a manner consistent with the guidelines' stated goals and purposes.
>
> * * *

> In the final analysis, we reject the notion, implicit in this and the mounting deluge of guidelines appeals, that there reposes in the language of the guidelines, either in the "clear and convincing reasons" terminology or elsewhere, a set of sentencing departure absolutes only awaiting the proper occasion for the appellate courts to reveal them on a case-by-case basis. Rather, the guidelines are for the guidance of the trial court, as on the face thereof they are represented to be, and the appellate courts' function is simply to enforce their proper application and to review departures by the trial courts to determine if there has been an abuse of discretion warranting reversal.

Garcia v. State, 454 So.2d 714, 717, 718 (Fla. 1st DCA 1984).

> If, as this rule indicates, judicial discretion still plays a part in the sentencing process, an appellate court should not reverse a sentence which departs from those guidelines absent a showing of an abuse of that discretion, which we believe to be the standard for appellate review. The rules do not articulate an exclusive list of specific reasons to which a court must adhere in order to depart from the recommended guidelines sentence; rather, they require only that in making such departure, a court must give written reasons which are "clear and convincing." This omission of a "laundry list" of aggravating or mitigating circumstances appears to be a deliberate decision of the Study Commission rather than an oversight.[3] (Emphasis supplied).

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[3] The trial judges were cautioned that at no time should sentencing guidelines be viewed as the final word in the sentencing process. The factors delineated were selected to ensure that similarly situated offenders convicted of similar crimes receive similar sentences. Because a factor was not expressly delineated on the score sheet did not mean that it could not be used in the sentence decision-making process. The specific circumstances of the offense could be used to either aggravate or mitigate the sentence within the guidelines range or, if the offense and offender characteristics were

> sufficiently compelling, used as a basis for imposing a sentence outside of the guidelines. The only requirement was that the judge indicate the additional factors considered. (Emphasis added).
>
> Sundberg, Plante and Braziel. Florida's Initial Experience With Sentencing Guidelines, 11 Fla. St.U.L.Rev., 125, 142 (1983).

Higgs v. State, 455 So.2d 451, 453 (Fla. 5th DCA 1984). Respondent notes that the omission of a "laundry list" of approved factors is consistent with the United States Supreme Court's decision in Lockett v. Ohio, supra, wherein the Court recognized that the trial judge should be at liberty to consider all information relevant to his sentencing decision. Equally consistent with Lockett v. Ohio, supra, was the lower court's decision in Santiago v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 2479, where the court recognized the role of judicial notice in sentencing proceedings holding:

> In reviewing the instant case, we apply the standard set forth in Addison v. State, supra, and find that the trial court did not abuse its sentencing discretion by departing from the guidelines. We conclude that the trial judge's judicial notice of the character of the area and the harmful nature of LSD, compared to other Schedule I substances, was proper because these are matters uniquely within the trial judge's knowledge and expertise, and may appropriately guide the judge in exercising his sentencing discretion. To hold otherwise, in our view, would tend to reduce the trial judge--to whom is entrusted probably the most weighty responsibilities of any public official in the local community in other areas--to a mere automation in sentencing matters. This we decline to do.

Id. at 9 F.L.W. 2479. See also Albritton v. State, ___ So.2d ___ (Fla. 5th DCA 1984), 9 F.L.W. 2088 and Murphy v. State, ___ So.2d ___ (Fla. 5th DCA 1984), 9 F.L.W. 2230, where the

court applied the abuse of discretion standard.

Accordingly, where there is fair support in the record for one or more rational reasons advanced by the trial judge as a basis for imposition of a sentence outside of guidelines recommended range, it cannot be said that the trial judge, in departing, absued his discretion and the cause should therefore be affirmed. This proposition is nothing more than recognition of the well established principle that if a trial judge's order, judgment or decree is sustainable under any theory revealed by the record on appeal, nothwithstanding that it may have been bottomed on an erroneous theory, an erroneous reason, or an erroneous ground, the order, judgment or decree will be affirmed. Savage v. State, 156 So.2d 566, 568 (Fla. 1st DCA 1963), cert. denied, 158 So.2d 518 (Fla. 1963). See also Martin v. State, 411 So.2d 987, 989 (Fla. 4th DCA 1982). While not specifically articulated, this principal has been employed by the lower court and other district courts to uphold departrues where the trial court relied upon permissible as well as impermissible reasons for departure. See Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984); Swain v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 1820; Mitchell v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 2107; Webster v. State, ___ So.2d ___ (Fla. 2d DCA 1984), 9 F.L.W. 2419; Albritton v. State, supra; Higgs v. State, supra.

Particularly noteworthy, and consistent with Respondent's position, are the decisions of the Fifth District in Albritton and the Second District in Webster. In Albritton v. State, supra, the court reasoned:

> The defendant also argues that where some of the reasons given by the trial judge for departure are inadequate or impermissible and other reasons given are authorized and valid reasons this court should not merely affirm but must remand for the trial court to reconsider the matter and determine if it would depart solely on the basis of the good reasons given. We do not agree. We assume the trial judge understood his sentencing discretion and understood that the mere existence of "clear and convincing reasons" for departing from the sentencing guidelines never requires the imposition of a departure sentence and that the trial judge believed that a sentence departing from the guidelines should be imposed in this case if legally possible. Accordingly, a departure sentence can be upheld on appeal if it is supported by any valid ("clear and convincing") reason without the necessity of a remand in every case. This assumption in the trial judge's continuing belief in the propriety of a departure sentence is especially safe in view of the trial court's great discretion under Florida Rule of Criminal Procedure 3.800(b) to reduce or modify even a legal sentence imposed by it within sixty days after receipt of an appellate mandate affirming the sentence on appeal. (Footnotes omitted) (Emphasis added).

Id. at 9 F.L.W. 2088, 2089. Similarly, the court in Webster v. State, supra, held:

> . . . a sentence departing from the guidelines can be upheld on appeal where supported by any valid clear and convincing reasons even though other improper reasons may be included. It is unnecessary to remand for resentencing, and the judgment and sentence are therefore affirmed. (Emphasis added).

Id. at 9 F.L.W. 2419.

Thus, when a trial judge's departure from the sentencing guidelines is predicated upon at least one clear and convincing reason and the sentence imposed is within the statutory parameters for the convicted offense, the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons. To hold otherwise would inhibit the listing of all reasons considered by the trial judge to constitute a bona fide basis for departure in the particular case and have the insalubrious effect of compelling the trial judge to search for and list only those reasons enjoying judicial approval in an effort to insure that his sentencing decision will withstand appellate scrutiny. This result would make a mockery of the guidelines and assign the highest priority to form rather than substance.

At this point, Respondent notes that the lower court, in affirming the instant case, evidently relied upon the reasoning set forth in its opinion in Carney v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 2143 (See A 5). There the court declined to adopt a per se rule of reversal in every instance in which permissible and impermissible reasons for departure are stated by the trial judge and held:

> We think a more appropriate rule--one which would allow greater flexibility to the trial court, but still preserve the substantial rights of the accused to have meaningful appellate review of a sentence outside the guidelines--would be to affirm the trial court's sentencing departure where impermissible as well as permissible reasons for departure are stated, where the reviewing court finds that the trial court's decision to depart from the guidelines, or the severity of the sentence imposed outside the guidelines, would not have been affected by elimination

> of the impermissible reasons or factors stated. A similar standard for review has been adopted by the Florida Supreme Court in death penalty cases where valid as well as invalid aggravating factors have been considered by the trial court.

While unquestionably in agreement with the result reached in the instant cases, Respondent nevertheless urges this Court to reject the rule announced in Carney and the lower court's application thereof in the cases sub judice because the statutorily required "weighing process" involved in capital cases, Florida Statutes §921.141, is not mandated by either Florida Statutes §921.001 or Fla.R.Crim.P. 3.701.

As previously stated, the sentencing guidelines are meant to aid the judge in his sentencing decision. If by "clear and convincing reason" the judge, in his discretion, departs from the recommended guideline sentence range, he may do so when the reasons are articulated in writing and supported by the record. Only the judge's discretion is involved and that standard used by the judge in exercising his discretion is less strict than in death cases. By comparison, in death penalty cases, the judge conducts a "weighing process" of the statutory aggravating circumstances proved "beyond a reasonable doubt" with the statutory and non-statutory mitigating factors presented by the defendant. In those cases where there are no mitigating circumstances or only a relatively minor mitigating circumstance such as the age of the defandant, this Court has upheld the sentence of death, if, after disregarding the invlaid aggravating circumstances, there remained at least one valid aggravating circumstance. See Straight v. State, 397 So.2d 903 (Fla.

1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); Booker v. State, 397 So.2d 910 (Fla. 1981); Hardwick v. State, 9 F.L.W. 484 (Fla. 1984); Rose v. State, ___ So.2d ___ (Fla. 1984), Case No. 63,996, December 6, 1984. This Court has noted that even in death cases it is within the trial judge's discretion to decide in each case whether a particular mitigating circumstance was proved and weight to be given. See Lemon v. State, 9 F.L.W. 308 (Fla. 1984); Dougherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983); Riley v. State, 413 So.2d 1173 (Fla. 1982), cert. denied, 459 U.S. 981, 102 S.Ct. 773, ___ L.Ed.2d ___ (1982); Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982). Only in those cases where aggravating as well as a substantive mitigating circumstance is present and this Court finds some of the aggravating circumstances invalid, does the case sometimes get remanded for resentencing. See Booker, supra; Basset v. State, 449 So.2d 803 (Fla. 1984); Jackson v. State, 366 So.2d 752 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). The purpose of the remand is to allow the trial judge an opportunity to "reweigh" the remaining valid aggravating circumstances with the mitigating ones.

Therefore, it is abundantly clear that one cannot compare the sentencing "discretion" of a judge in a non-death sentencing guidelines case with the "weighing process" involved in death penalty cases. This is especially so in

light of the absence of a mandated weighing process in either the enabling legislation or the guidelines themselves. Thus, Respondent again submits that where the trial judge has set forth at least one permissible reason for departure, the presence of one or more impermissible reasons should not militate against affirmance.

Petitioner, on the other hand, asserts that this Court should adopt a per se rule of reversal when permissible as well as impermissible reasons are relied upon by the trial court for departure since the reviewing court is not in a position to determine to what degree the trial court's reliance on the impermissible reasons influenced the extent of his departure. In short, Petitioner argues that in addition to the propriety of departure, the appellate courts should also review the extent of the departure.

As noted above, the Fifth District refused to second-guess the trial judge's "continuing belief" in the propriety of a departure even though some, but not all, of the reasons relied upon were impermissible. But more importantly, that court has emphatically refused to become involved in appellate sentencing--a practice suggested by Petitioner's position that the extent of departure should be of interest to appellate courts in carrying out their newly created duty of limited sentencing review pursuant to Florida Statutes §921.001(5).

In Albritton v. State, supra, the court recognized that the Florida sentencing guidelines place no restrictions on a departure sentence, hence the only lawful limitation on a departure sentence is the maximum statutory sentence

authorized by statute for the offense in question. Id. at 9 F.L.W. 2089. Subsequently, in Whitlock v. State, ___ So.2d ___ (Fla. 5th DCA 1984), 9 F.L.W. 2390, the trial court departed from the presumptive sentence and imposed a sentence of five years imprisonment. The Fifth District found that the reasons given by the trial court justified departure and affirmed holding:

> Once their exists clear and convincing reasons to depart from the guidelines, we do not think the appellate courts have jurisdiction to review the extent of departure, so long as the length of the sentence is one permissible under the criminal statutes. Since Whitlock's crime for which he was convicted carries a maximum sentence of five years, we must affirm.

Id. at 9 F.L.W. 2390.

The foregoing decisions are consistent with this Court's decision in Banks v. State, 342 So.2d 469 (Fla. 1976), holding:

> . . . this Court has long been committed to the proposition that if the sentence is within the limits prescribed by the Legislature, we have no jurisdiction to interfere.

Id. at 470. Accord Brown v. State, 13 So.2d 458 (Fla. 1943), Weathington v. State, 262 So.2d 724 (Fla. 3d DCA 1972), cert. denied, 265 So.2d 330 (Fla. 1972), cert. denied, 411 U.S. 968 (1973). Furthermore, the absence of provision for appellate review of the extent of departure where the Legislature specifically provided for appellate review of the propriety of departure, Florida Statutes §921.001(5), serves as a clear indication that the Legislature intended that the trial court's exercise of its inherent sentencing discretion should remain inviolate in terms of appellate

interference, once a departing sentence had been determined to have been imposed in conformity with the requirements of Fla.R.Crim.P. 3.701. Respondent therefore contends that although Florida Statutes §921.001(5) and §924.06(e) provide for appellate review of sentences imposed without the guidelines range, if properly preserved, such reveiw must necessarily be limited to evaluation of the trial court's conformity to the procedures for departure pursuant to Fla. R.Crim.P. 3.701, and should not be extended to matters which have been consistently held to be not subject to appellate review. In sum, once a valid reason for departure has been found, appellate inquiry ceases.

Additionally, Petitioner's reliance on Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984), Bogan v. State, supra, Dorman v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 1854, Higgs v. State, supra, and Davis v. State, ___ So.2d ___ (Fla. 4th DCA 1984), 9 F.L.W. 2221, for the proposition that the magnitude of departure is a proper subject of appellate scrutiny, is misplaced. Neither the Higgs nor the Hendrix opinions contain any language remotely indicating that an appellate court should review the extent of departure.

In Dorman v. State, supra, the court held:

> Moreover, we do not consider the seven-year sentence to be clearly excessive. Dorman was convicted of a violation of section 800.04, which carries with it a maximum penalty of fifteen years incarceration under section 775.082(3)(c), Florida Statutes.

Id. at 9 F.L.W. 1855. Respondent submits that rather than mandating review of the extent of departure, the foregoing

language is merely a rejection of the appellant's contention that the sentence was excessive since the sentence imposed was within statutory parameters and thus lawful. This is especially so in light of the court's recognition that the sentence was imposed pursuant to the Mentally Disordered Sex Offender Act and therefore Rule 3.701 did not apply. See Dorman v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 2191, On Motion For Rehearing.

Concerning Bogan v. State, supra, the language relied upon by Petitioner, upon Motion for Clarification filed by the State (A 6-8), was modified to read as follows:

> We do not agree with Bogan that the departure herein was excessive. The sentence imposed was within the statutory limits. (Emphasis added).

(See A 9-14). Consequently, it is evident that the Bogan court rejected the position that the extent of departure should be subject to appellate review. In all fairness to opposing counsel, there is no way he could have been aware of the above-noted modification since it was not reported in either Florida Law Weekly or the Southern Reporter, a circumstance which was confirmed by undersigned counsel in a conversation with Deputy Clerk, Karen Roberts, of the First District Court of Appeal, on December 17, 1984.

Lastly, with respect to Davis v. State, supra, Respondent submits that the Fourth District's concern that unacceptable reasons may have affected the extent of departure, rather than justifying review of the extent of departure, demonstrates precisely why the notion should be rejected.

The court specifically stated that it was speculating that the unacceptable reasons may have affected the extent of departure (Emphasis added). Id. at 9 F.L.W. 2221. It is well settled that reversible error cannot be predicated upon mere conjecture on the part of the reviewing court. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974). Consequently, this Court should not now countenance appellate speculation as a basis for reversible error nor should it condone appellate review of a matter traditionally and currently beyond the jurisdiction of the appellate courts.

Moreover, Respondent notes that Petitioner's analogy to probation revocation cases in support of his position on appellate sentencing was found unpersuasive by the Fifth District and should likewise be rejected by this Court. See Albritton v. State, supra, footnote 3, where the court stated:

> For an argument by analogy the defendant cited Jackson v. State, 449 So.2d 309 (Fla. 5th DCA 1984), which relates to the revocation of probation for multiple violations some but not all of which are disapproved on appeal. However, many cases affirm without remand a revocation of probation based on any valid violation charge although on appeal other violation charges are found not to be supported in law or fact. See, e.g., Cikora v. State, 450 So.2d 351 (Fla. 4th DCA 1984). This court has previously affirmed without remand where a departure sentence is based on insufficient reasons as well as sufficient ones, see Higgs v. State, No. 84-113 (Fla. 5th DCA September 6, 1984) [9 FLW 1895]. Cf., Young v. State, No. AX-1 (Fla. 1st DCA August 24, 1984) [9 FLW 1847].

Id. at 9 F.L.W. 2089.

Similarly unpersuasive is Petitioner's reliance upon Minnesota Supreme Court cases interpreting that state's sentencing guidelines scheme. The Minnesota high court, unlike the appellate courts of this State, has exhibited a marked penchant for appellate sentencing as evidenced by its routinely expressed concern that a departing sentence should not exceed some vague arithmetic multiple of the presumptive sentence. See State v. Evans, 311 N.W.2d 481 (Minn. 1981), an upward departure should not exceed double the presumptive sentence length; State v. Stumm, 312 N.W.2d 248 (Minn. 1981), upheld a departure 3 1/2 times greater than the presumptive sentence even though the court had adopted a general upper departure limit of double the presumptive sentence; State v. Martinez, 319 N.W.2d 699 (Minn. 1982), we reduce the defendant's prison term from 150 months to 90 months, which is twice the maximum presumptive sentence; State v. Norton, 328 N.W.2d 142 (Minn. 1982), the decision which we must make is whether this is one of the extremely rare cases in which more than a double departure is justified; State v. Shiue, 326 N.W.2d 648 (Minn. 1982), we conclude that the trial court was justified in departing from the presumptive sentence beyond doubling to the 3.4 times herein imposed; State v. Partlow, 321 N.W.2d 886 (Minn. 1982), we therefore conclude that the aggravation of the presumptive sentence should fall within the doubling limitation expressed in State v. Evans, 311 N.W.2d 481 (Minn. 1981), rather than the expanded limitations propounded in State v. Stumm, 312 N.W.2d 248 (Minn. 1981).

Respondent notes that an additional point warranting rejection of Minnesota authority on this issue is the fact that neither the Lesiglature in enacting Florida Statutes §921.001 nor this Court in promulgating Fla.R.Crim.P. 3.701, chose to establish some arbitrary multiple of the presumptive sentence as a permissive range of departure--evidently satisfied that the maximum penalties prescribed by the Legislature coupled with the reasoned exercise of judicial discretion, which has guided trial judges in their sentencing function since the inception of the Republic, sufficiently protects criminal defendants from subjection to the imposition of outrageous sentences. Additionally, the lower court and the Fifth District have refused to follow Minnesota authority for purposes of resolving other issues arising in guidelines litigation. See Bogan v. State, supra; Hendrix v. State, supra. Consequently, this Court should likewise reject Minnesota authority as persuasive in resolving the instant issue since the Legislature has not made provision for review of the extent of departure and prior decisions of this Court indicate that such review would be improper if the sentence imposed is within statutory limits.

Finally, Respondent takes exception to Petitioner's representation that the lower court, in Case No. AW-337, found only one of the eight reasons relied on by the trial judge to be permissible (PB 16). As Respondent reads the lower court's opinion, it found that the trial court's reference to multiple victims was factually incorrect;[1]

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[1] Case No. AW-329 involved multiple victims so it is assumed that the trial judge must have confused the two

that the reference to absence of pretense of moral or legal justification was inappropriate to the particular crime; and that the reference to need of correctional and rehabilitative treatment was so vague as to be both unclear and unconvincing (A 4,5). These were the only reasons rejected by the lower court and Respondent maintains that such rejection was improper because each reason was rationally related to sentencing, Lockett v. Ohio, supra, and was not precluded from consideration by Fla.R.Crim.P. 3.701(d)(11). See also Higgs v. State, supra, footnote 3.

While not supported by the record in Case No. AW-337, the involvement of multiple victims was clearly a circumstance of the offense in Case No. AW-329, and was therefore properly considered by the trial judge as a factor supporting departure in that case. Similarly proper was the trial judge's finding that Petitioner demonstrated no pretense of moral or legal justification for the commission of the offenses. The lower court's finding that consideration of this factor was inappropriate simply cannot stand in view of the fact that the absence of moral or legal justification has been recognized as an element of an aggravating factor in capital cases. Florida Statutes §921.141(5)(i). Cf. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982); O'Callaghan

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cases concerning this factor since both cases were before him for sentencing at the same time (A 3). The trial court's reliance upon the involvement of multiple victims was factually supported and thus proper in Case No. AW-329.

v. State, 429 So.2d 691 (Fla. 1983); Cannady v. State, 427 So.2d 723 (Fla. 1983). Lastly, the need for rehabilitative treatment afforded by a penal facility and concomitantly an offender's amenability thereto has been recognized as a valid reason for departure, Higgs v. State, supra, and is consistent with the United States Supreme Court's decision in Lockett v. Ohio, supra, and the Legislature's recognition that such factor may be properly considered by the trial judge in sentencing. See Florida Statutes §921.005. In any event, only three of the eight reasons relied on in Case No. AW-337 were found to be impermissible and two of the eight reasons relied on in Case No. AW-329 were found impermissible (See footnote 1, infra).

Based upon the arguments advanced above and the authority cited in support thereof, the lower court correctly upheld the departures since it found that the trial court relied upon valid reasons in both cases, notwithstanding the presence of impermissible reasons. This is not to suggest that the determination of the validity of a departure should be reduced to a "numbers game". See State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), where this Court recognized that the capital sentencing procedure is not a mere counting process. The lower court could have properly affirmed even if it found only one reason advanced by the trial judge was permissible. Accordingly, the lower court's decisions in Case Nos. AW-329 and AW-337 should be affirmed.

CONCLUSION

This Court, in answering the question certified by the lower tribunal must necessarily determine what constitutes clear and convincing reasons for departure and what standard of review should be applied to sentencing guidelines cases.

Based on recent decisions of the district courts, Weems v. State, supra, Manning v. State, supra, and Garcia v. State, supra, the United States Supreme Court's decisions in Lockett v. Ohio, supra, and United States v. Grayson, supra, and the proscriptions found in Fla.R.Crim.P. 3.701, Respondent contends that for purposes of departure, the trial court may consider and rely upon any factor, concerning the nature and circumstances of the offense as well as the defendant's background, which is not precluded from consideration by Fla. R.Crim.P. 3.701(d)(11).

Since the sentencing function has been traditionally recognized as an area where the trial courts exercise discretion which, until the advent of the guidelines, was almost wholly unbridled, Respondent maintains that the only proper standard of review is whether the trial court, in departing, abused its discretion. Addison v. State, supra; Garcia v. State, supra; Higgs v. State, supra; Albritton v. State, supra; Murphy v. State, supra; Santiago v. State, supra. In applying this standard of review, a well established appellate principle, Savage v. State, supra, Martin v. State, supra, which has been employed in substance in recent guidelines cases decided by the district courts, Bogan v. State, supra, Swain v. State,

supra, Mitchell v. State, supra, Webster v. State, supra, Albritton v. State, supra, and Higgs v. State, supra, dictates that where a trial judge's departure from the sentencing guidelines is predicated upon at least one clear and convincing reason and the sentence imposed is within the statutory parameters for the convicted offense, the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons.

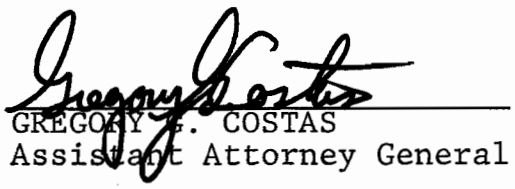
While the results reached by the lower court in the instant cases are consistent with the foregoing principles, the lower court appears to have relied upon a rule predicated upon a "weighing process" akin to that employed in capital cases. This rule should be rejected and replaced by the principles set forth above because neither Florida Statutes §921.001 nor Fla.R.Crim.P. 3.701 mandate the weighing of statutorily enumerated aggravating factors vis a vis mitigating factors for purposes of a departure determination.

Accordingly, the decisions of the lower court in the cases sub judice should be affirmed and the certified question answered as follows:

> WHEN A TRIAL JUDGE'S DEPARTURE FROM THE SENTENCING GUIDELINES IS PREDICATED UPON AT LEAST ONE CLEAR AND CONVINCING REASON AND THE SENTENCE IMPOSED IS WITHIN THE STATUTORY PARAMETERS FOR THE CONVICTED OFFENSE, THE SENTENCE MUST BE AFFIRMED NOTWITHSTANDING THE PRESENCE OF ONE OR MORE IMPERMISSIBLE REASONS.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to L. Sanford Selvey, II Attorney at Law, 906 Thomasville Road, Tallahassee, Florida 32303, this 21st day of December, 1984.

GREGORY C. COSTAS