IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, Vs. TIMOTHY LEE CARNEY, Respondent,	)	CASE NO. 66,163

ON APPEAL FROM THE
DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

*See page iv.

TABLE OF CITATIONS

OTHER AUTHORITIES

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PRELIMINARY STATEMENT

Petitioner, State of Florida, was the prosecution in the trial court and appellee in the District Court of Appeal and will be referred to in this cause as "State."

Respondent, Timothy Lee Carney, was the defendant in the trial court and appellant in the District Court of Appeal and will be referred to in this cause as "Respondent."

The one volume of the record on appeal and one volume of supplemental record are consecutively numbered and will be referred to by the symbol "R" followed by the appropriate page number in parentheses.

References to the opinion rendered by the District Court will be referred to by the symbol "OP" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent, along with two co-defendants not involved in the instant cause, was charged with the armed robbery of Karen Travers (R 1). Respondent entered a plea of nolo contendere as charged(R 35) and sentencing was deferred pending disposition of federal charges against him in Kentucky, which charges were ultimitely dismissed. (R 12, 36-37).

A sentencing hearing was held on November 18, 1983. In the order scheduling the sentencing hearing, the trial judge ordered counsel for the State to file a written memorandum setting forth the recommended sentence and clear and convincing reasons for departure from the sentencing guidelines, if departure is recommended (R 13-14). In complying with the court's order, the prosecuting attorney wrote a letter to Judge Fleet dated November 3, 1983. In the letter, the prosecutor recommended departure from the sentencing guidelines and suggested a term of imprisonment of ten (10) years. The letter set out the following reasons for departure from the sentencing guidelines:

> 1. The defendant knowingly created a risk of injury or death to many people in that he brandished a pistol in a restaurant.
> 2. The robbery was premeditated and calculated and for pecuniary gain.
> 3. There was no provocation.
> 4. There were not excuses or justification's (sic) for defendant's conduct other than being under the influence of drugs which enhanced the dangers to others through irrationality.

> 5. Defendant has not compensated the victim.
> 6. The victim (sic) has a prior history of delinquency and was on parole at the time of committing this offense.
> 7. The criminal (sic) is likely to recur based on testimony of a co-defendant; the defendant and others robbed a number of establishments enroute to Florida.

(R 16).

Counsel for Respondent submitted a letter to Judge Fleet dated November 17, 1983 in which he objected to a departure from the guidelines and to the State's recommended reasons for departure. Counsel wrote:

> Concerning the November 3, 1983, letter from the State Attorney, I believe grounds 1,2,3,4,5 and 6 would be improper grounds to allow the court to go outside the sentencing guidelines. I further feel paragraph 7 is unsupported by the facts of this case as seemingly referred to crimes for which the defendent was not arrested or convicted. There being no competent reason to go outside the guidelines it is my opinion and belief that a reasonable sentence would be four and one half years in the state prison.

(R 15).

Respondent affirmatively elected to be sentenced under the guidelines and at the sentencing hearing, counsel renewed his objections to a departure from the guidelines and to the reasons for departure stated by the prosecuting attorney (R 36, 40). Judge Fleet adjudicated Respondent guilty of armed robbery and sentenced him to a term of ten (10) years imprisonment with credit for 313 days time served. A three (3) year minimum mandatory sentence was imposed for use of a firearm during the armed robbery. The trial judge adopted

the state attorney's recommendation in his sentencing order stating:

> In imposing the above sentence, the court departed from the guideline sentencing for clear and convincing reasons delineated on the attached letter from the Office of the State Attorney, which reasons are herein specifically adapted(sic) and incorporated as those set forth verbatim.

(R 17-20, 41-42). He then attached the letter from the state attorney to the judgment and sentence (R 21).

Notice of appeal was timely filed on November 22, 1983 (R 30). The Public Defender of the Second Judicial Circuit was designated to represent Respondent on appeal and an initial brief was filed on April 19, 1984. The State filed its answer brief on May 9, 1984 and Respondent filed his reply brief on June 11, 1984.

The District Court of Appeal, First District, rendered its opinion on October 9, 1984. The Court opined that "some of the reasons for departure from the guidelines adopted by the trial court either are or might be considered 'clear and convincing reasons.'" (OP 3) Judge L. Smith, writing for the Court, held:

> Thus, it appears that the trial court utilized some reasons for departure that are "clear and convincing," or permissible along with others that are not.

(OP 4). After discussing three (3) cases in which the District Court affirmed cases where the trial court considered permissible and impermissible reasons for departure from the guidelines, the District Court certified the following

question to this Honorable Court as being one of great public importance:

> When an appellate court finds that a sentencing court relied upon a reason or reasons that are impermissible under Fla.R.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.

(OP 6). The District Court had previously certified the same question in Young v. State, 9 F.L.W. (Fla. 1st DCA 1984). In Young, the Court found that all but one of the reasons relied upon by the trial court were impermissible. As for the remaining reason, the District Court found support in the record for the reason. However, the Court nevertheless concluded:

> [W]hen this reason is mired in the confusion revealed by this record, it is impossible to determine whether the trial judge would have come to the same conclusion on this reason alone.

(OP 6). The District Court below found itself "hampered, as was the majority in Young, by an inability to determine whether the trial judge would have imposed the same sentence based only upon the permissible stated grounds for departure." (OP 6). Finally, the Court found it necessary to reverse the trial court's sentence because it was "reluctant to speculate, under the circumstances, that elimination of the impermissible grounds for departure would have no effect on the trial court's sentencing decision." (OP 7). (The opinion by the First

District Court of Appeal in this cause is attached hereto and made a part of this brief)

The State filed its motion for rehearing/rehearing en banc on October 24, 1984. Said motion was denied on November 14, 1984. On November 15, 1984, the State filed its notice of intent to invoke discretionary review and the briefing schedule was issued four (4) days later. This appeal follows.

ARGUMENT

QUESTION CERTIFIED

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.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.

ISSUE RESTATED

> WHEN AT LEAST ONE OF THE REASONS GIVEN BY THE TRIAL JUDGE FOR DEPARTING FROM THE SENTENCING GUIDELINES IS CLEAR AND CONVINCING AND THE SENTENCE IMPOSED IS LAWFUL, THE SENTENCE MUST BE AFFIRMED.

Fla.R.Crim.P. 3.701(b)(6) provides that the purpose of the sentencing guidelines is to aid the judge in the sentencing decision not to usurp his judicial discretion. The Rule states:

> 6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.

However, the First District has certified a question in this case as one of great public importance which impliedly asks this Honorable Court to rule in such a manner that the appellate courts would be looking for impermissible reasons for departure on appeal rather than permissible "clear and

convincing" reasons which would uphold the lower courts ruling. The State submits that the real issue is: where there is a valid clear and convincing reason for departure from the sentencing guidelines, one which is supported by the record, and the sentence imposed is within the lawful limits of the penalty statute, the sentence, absent a clear abuse of discretion, must be affirmed. Once a valid "clear and convincing" reason for departure is discerned by the District Court, the State contends there is no need to examine the remaining reasons given by the trial judge. The sentence should be affirmed. The State asserts the same result should be reached even if all of the reasons save one which is supported by the record were impermissible.

The First District Court of Appeal held in Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984) that the trial judges should...

> 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 in a manner consistent with the guidelines stated goals and purposes. (emphasis supplied)

Id., at 717. In Santiago v. State, 9 F.L.W. 2479 (Fla. 1st DCA 1984) the District Court held:

> Moreover, these reasons should be reviewed broadly so as not to "usurp judicial discretion." Rule 3.701(b)(6). We are in agreement with the standard of review in

> Addison v. State, 452 So.2d 955 (Fla. 3d DCA 1984) which held that the reviewing court should not "reevaluate" the trial court's exercise of discretion. Rather, the reviewing court should "assure that there is no abuse of this discretion."

After finding the trial judge properly took judicial notice of the harmful nature of LSD compared to other Schedule I substances, the Santiago court said:

> ...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 automaton in sentencing matters. This we decline to do. (emphasis supplied)

Id., at 9 F.L.W. 2479. The State agrees with Garcia and Santiago and submits that before a departure from the sentencing guidelines is reversed on appeal, there must be a clear demonstration of an abuse of discretion by the sentencing trial judge.

Judicial discretion is 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 (Fla. 5th DCA 1981), pet. for rev. denied, 412 So.2d 465 (Fla. 1982) citing 1 Bouvier's Law Dictionary and Concise Encyclopedia 804 (8th ed. 1914). The Hair Court cited with favor the following statement of

the test for review of the judge's discretionary power:

> Discretion, in this sense, 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. Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942) (emphasis supplied)

Accordingly, the State contends that the appellate courts should review the rulings of the lower courts with the idea that if the ruling can be affirmed on any theory supported by the record, then the appellate court must do so. This position is consistent with current Florida law.

In Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963), cert denied, 158 So.2d 518 (Fla. 1963), the Court noted:

> All orders, judgments and decrees rendered by the trial courts reach the appellate courts clothed with a presumption of correctness, City of Miami v. Hollis, 77 So.2d 834 (Fla. 1955).

And in Martin v. State, 411 So.2d 989 (Fla. 4th DCA 1982) the Court noted it was "obliged to affirm the trial court" if it could do so "by any theory revealed by the record on appeal." Thus, the State submits the District Court below erred in reversing the trial court's departure from the sentencing guidelines after determining that at least two (2) of the seven (7) reasons given for departure were without question "clear and convincing." If the Court had applied

Savage as urged by the State below, then the result would have been in the tradition of the cases holdings that the ruling and decisions of the trial court come to the appellate court clothed with a presumption of correctness and should be affirmed on any theory where the judge does not abuse his discretion.

The State's position is supported not only by previous holdings from the First District but also by decisions from the Second and Fifth District Courts of Appeal. In these cases, the sentence departures were affirmed where one, or some, but not all of the reasons given by the trial judge were permissible or "clear and convincing." In Bogan v. State, 9 F.L.W. 1706 (Fla. 1st DCA 1984), the trial court erroneously stated that the defendant's probation officer recommended departure from the guidelines. However, the trial court also relied on past abuses of probation which were held on appeal to be clear and convincing. In Swain v. State, 9 F.L.W. 1820 (Fla. 1st DCA 1984), several reasons given by the trial judge for departure were impermissible but a finding that the defendant's pattern of committing crimes within a very short period of time justified departure. In Mitchell v. State, 9 F.L.W. 2107 (Fla. 1st DCA 1984), the departure was affirmed where the trial court found that although the defendant was acquitted for conspiracy to traffic in marijuana the factor relating to the "quantity" of marijuana could be considered relative to the conviction

for possession of marijuana in excess of 20 grams. In Webster v. State, 9 F.L.W. 2419 (Fla. 2d DCA 1984), certain of the reasons relied upon by the trial judge were impermissible and others were valid clear and convincing reasons. The Court held that it was "unnecessary to remand for resentencing, and the judgment and sentence are affirmed. Accord Albritton v. State, No. 84-204 (Fla. 5th DCA September 27, 1984) [9 F.L.W. 2088].

The Fifth District Court of Appeal in Albritton adopted the "per se" rule now advanced by the State that the lower court must be affirmed if any clear and convincing reason for departure is relied upon and supported by the record regardless of the number or extent of impermissible reasons. The Court developed its reasoning as follows:

> The defendant also argues that where some of the reasons given by trial judges 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 Proceudre 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. (emphasis supplied)

See also Higgs v. State, 9 F.L.W. 1895 (Fla. 5th DCA 1984) (departure upheld if even one reason is clear and convincing). Contra, see Davis v. State, 9 F.L.W. 2221 (Fla. 4th DCA 1984).

In declining to find a per se rule of reversal in every instance in which permissible as well as impermissible reasons for departure are stated by the trial judge, the District Court below opined:

> 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 of 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. (citations omitted)

(OP 8). The State disagrees with the District Court's analysis and comparison to the "weighing process" involved in death cases.

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 the 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 defendant, this Honorable Court has upheld the sentence of death, if, after disregarding the invalid aggravting 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).[1/] This Honorable 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,

1/ See also Rose v. State, 9 F.L.W. ____ (Fla. 1984), slip opinion filed December 6, 1984

75 L.Ed.2d 469 (1983); Riley v. State, 413 So.2d 1173 (Fla. 1982), cert denied, 459 U.S. 981, 103 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 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. The State submits a more appropriate rule in sentencing guidelines cases would be to affirm the trial judge's sentencing departure if it is determined that at least one "clear and convincing" reason is present. Because no "weighing process" is involved any impermissible reasons stated by the sentencing judge would be mere surplusage and could be disregarded on review.

The State takes comfort in the Fifth District's

reasoning in Albritton, supra. Furthermore, the State asserts the reasoning is even more applicable to the instant case as it must be assumed that the trial judge, the Honorable Erwin Fleet, a member of the Sentencing Guidelines Commission, "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." Id., at 9 F.L.W. 2089.

It is the integrity of the trial judge's inherent sentencing discretion that is at issue here. While it is true the sentencing guidelines were promulgated in an attempt to remove disparate sentencing, it must always be remembered that never were the guidelines intended to usurp judicial discretion. Addison, supra; Garcia, supra; Mitchell, supra; Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984); Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1982); Higgs v. State, supra; Brooks v. State, 9 F.L.W. 2135 (Fla. 1st DCA 1984).

Moreover, the only explicit prohibition of total judicial discretion in sentencing under the sentencing guidelines is found at Rule 3.701(d)(11). The rule states:

> 11. Departures from the guidelines 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 relating to either instant offense or prior arrests for which convictions have not been obtained.

The Committee Note to Rule 3.701(d)(11) states:

> (d)(11) 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.
>
> Sentences under provisions of the Youthful Offender Act (Ch. 958), the Mentally Disordered Sex Offender Act (Ch. 917) or which requires participation in drug rehabilitation programs, (sec. 397.12) need not conform to the guidelines.

Thus, it is the State's position that any factor which is rationally related to the character of the defendant may be considered in reaching an appropriate sentence in each case unless expressly prohibited by Rule 3.701(d)(11) or some other rule of law.

The United States Supreme Court has recognized "that the concept of individualized sentencing in criminal cases generally, although not Constitutionally required, has long been accepted in this country. See Williams v. New York, 337 U.S. 241, 69 S.Ct 1079, 93 L.Ed 1337 (1949); Pennsylvania, ex rel. Sullivan v. Ashe, 302 U.S. 51, 82 L.Ed 43, 58 S.Ct 59 (1937)." Lockett v. Ohio, 438 U.S. 586, 98 S.Ct 2954, 57 L.Ed.2d 973 (1978). The Court in Lockett noted:

> And where sentencing discretion is granted, it generally has been agreed that the sentencing judge's "possession of the fullest information possible concerning the defendant's

> life and characteristics" is "[h]ighly relevant--if not essential--[to the] selection of an appropriate sentence...." Williams v. New York, supra at 247, 93 L.Ed 1337, 69 S.Ct 1079. (emphasis added in original)

57 L.Ed.2d at 989.

Moreover, in United States v. Grayson, 438 U.S. 41, 98 S.Ct 2610, 57 L.Ed.2d 582 (1978), the Court, again citing Williams v. New York, noted:

> ...Mr. Justice Black observed that the "prevalant modern philosophy of penology [is] that the punishment must fit the offender and not merely the crime,"...

57 L.Ed.2d at 586. In holding that the avoidance of irrationality is of the "highest order" the Court said:

> ..., the evoluntionary history of sentencing, ... demonstrates that it is proper -- indeed, even necessary for the rational exercise of discretion -- to consider the defendant's whole person and personality... The "parlous" effort to appraise "character," degenerates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning "every aspect of a defendant's life." (citations omitted)

57 L.Ed.2d 591.

Inasmuch as the "primary purpose" of the sentencing guidelines is to punish the offender and "to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process," and not necessarily to require uniform sentencing, the State submits that unless prohibited from doing so, a sentencing judge may rely on any factor rationally related to the defendant or the circumstances of the crime in imposing a sentence departure under the

provisions of the guidelines. And, unless a clear abuse of discretion is demonstrated, a sentence departure based on articulated "clear and convincing" reasons must be affirmed. To hold otherwise would be to weaken the inherent discretionary sentencing power of the trial judges of this State when even the sentencing guidelines did not contemplate such an action. The State asserts that where impermissible as well as permissible reasons were relied upon by the trial judge in imposing sentence no remand for resentencing is necessary. To cause a judge to search out on resentencing one "clear and convincing" reason, already judicially accepted, would be the ultimate form of form over substance.

In the case at bar, seven (7) "clear and convincing" reasons were articulated by the trial judge in support of his departure from the guidelines. The State asserts that all of these reasons rationally relate to the Respondent or to the circumstances of the crime of armed robbery and were properly considered by the trial judge. The District Court found at least two (2) reasons given by Judge Fleet to be "clear and convincing."[2/] While the State disagrees with the District Court's findings regarding the trial judge's reasons for departure, the State contends that because the Court

2/ The District Court noted that reason number seven (7) may have been proper but it could not make a determination from the record before it.

made such findings, the sentence must be affirmed, the four alleged impermissible reasons notwithstanding. As stated earlier, there is nothing gained by remanding such cases for resentencing as Judge Fleet, a member of the Sentencing Guidelines Commission, clearly "believed that a sentence departing from the guidelines should be imposed in this case if legally possible." See Albritton, supra.

Therefore, the decision of the District Court must be reversed.

CONCLUSION

The question certified by the District Court should be answered in the affirmative, in part, and in the negative in part. A reviewing court should examine all of the reasons given by the trial court for departing from the guidelines. However, if the appellate court finds one of the stated reasons for departure to be "clear and convincing" and supported by the record, the inquiry should end and the sentence affirmed. On the other hand, if in reviewing the reasons for departure the court determines the sentencing court relied upon an impermissible reason for departure, it should examine the other reasons and affirm if it can do so based on any theory supported by the record.

The Appellate court should not engage in a weighing process in sentencing guidelines' cases when reviewing the lower court's sentence. To do so undermines the time honored notion that the trial court's sentencing rulings come to the appellate court clothed with the presumption of correctness. Nor should a comparison be made with the death penalty cases where aggravating factors proven "beyond a reasonable doubt" are weighed by the trial judge with mitigating factors. The two are vastly different. See Lockett v. Ohio, supra. In sentencing guidelines' cases, where a "clear and convincing" reason for departure is identified regardless of the stated impermissible reasons and where no abuse of discretion is demonstrated, the inquiry should stop and sentence affirmed.

Only when there are no "clear and convincing" reasons for departure identified by a reviewing court should a case be remanded for resentencing.

Accordingly, based on the foregoing argument and authority, the District Court should be reversed and the certified question answered in the affirmative, in part, and in the negative, in part.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Paula Saunders, Post Office Box 671, Tallahassee, Florida 32302, by hand delivery, on this 10th day of December, 1984.

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