O/a 6-6-85

IN THE SUPREME COURT OF FLORIDA

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LLOYD E. ALBRITTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,169

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Lloyd E. Albritton, the defendant and appellant in Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984), will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below, will be referred to as Respondent.

Citations to the Record on Appeal will be indicated parenthetically as "R", with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On September 19, 1983 the Petitioner, LLOYD E. ALBRITTON, was charged by information with Murder in the Second Degree, D.U.I. Manslaughter, and Driving While License Suspended or Revoked (R46). Petitioner pled guilty to Counts II and III, and the State nol prossed the Second Degree Murder charge (R72-79).

Sentencing was held on January 25, 1984 before the Honorable Robert B. McGregor, Circuit Judge (R1-29). Petitioner announced his formal election to be sentenced under the sentencing guidelines (R6). He did not dispute the guidelines scoresheet prepared for the court (R6). The scoresheet placed Petitioner in the three to seven (3-7) year range of recommended sentences (R101-102). The State argued the trial court should depart from the guidelines, while Petitioner urged that the recommended sentence be imposed (R7-17).

The court decided to depart from the guidelines, stating its reasons on the record, and in a written order (R22-27,103). The reasons for departure, as stated in the written order were as follows:

> 1. At the time of this offense, the defendant's driving privilige was revoked, a factor which is not scored on the guidelines scoresheet and should be considered in determining the appropriate sentence in this cause.
>
> 2. The defendant's driving record reflects that he has been convicted of Driving Under the Influence upon seven occasions over a fifteen-

> year period. Although the guidelines score a factor for prior misdemeanors, these prior convictions are not the usual miscellaneous grouping of offenses but instead reflect a continuing series of violations of the same law, that is, Driving Under the Influence and as such deserve greater weight than provided under the guidelines. On account of these convictions, the defendant, LLOYD EDGAR ALBRITTON, had seven prior opportunities to correct this behavior and his failure to do so demonstrates his utter contempt for the law.
>
> 3. The presumptive sentence under the guidelines is neither appropriate nor in keeping with the way our society values human life.

The court sentenced Petitioner to fifteen years on the D.U.I. Manslaughter charge, with the final three years to be served on probation (R76). An additional year of probation was added for the charge of Driving While License Revoked or Suspended (R78).

On appeal, Petitioner argued that his sentence should be reversed because none of the three reasons given by the trial court for its departure from the recommended guidelines sentence were "clear and convincing". Petitioner argued alternatively that should the District Court of Appeal find one or more of the reasons sufficient while rejecting one or more other reasons, the case should be remanded for consideration of whether departure is justified solely on the basis of the reasons found sufficient by the Appellate Court. Petitioner further argued that even if the District Court were to accept as "clear and convincing" the trial court's reasons for exceeding the recommended sen-

tence, his sixteen year sentence should still be reversed as clearly excessive. Petitioner argued the Appellate Court must consider the extent of departure if the guidelines purpose of eliminating unwarranted sentencing disparity is to be achieved.

In its opinion rendered September 27, 1984 the District Court of Appeal affirmed Petitioner's sentence. The Court based its decision on only one of the trial court's three stated reasons for departure. One reason was found to be erroneous and another was not addressed. The trial court's third reason, Petitioner's prior D.U.I. convictions, was found sufficient to justify the sentence imposed. The District Court rejected Petitioner's contention that remand was necessary to allow the trial court to impose sentence while considering only the reasons found to be "clear and convincing". The District Court stated:

> 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.

The District Court also rejected Petitioner's contention that it should review the length of the departure from the recommended sentence, stating:

> 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.

Petitioner filed Notice to Invoke Discretionary Review on November 13, 1984. Jurisdictional briefs were timely filed, and the Florida Supreme Court accepted jurisdiction on March 8, 1985. Oral Argument has been set for June 6, 1985.

SUMMARY OF ARGUMENT

In Point I herein, Petitioner argues that where a trial judge states reasons for departure from the guidelines, some but not all of which are held improper on appeal, the appellate court should in most cases remand the case for resentencing. In its opinion in this cause, the Fifth District Court of Appeal upheld Petitioner's departure sentence based on only one of the three reasons stated by the trial judge. The District Court stated it would assume "that the trial judge believed that a sentence departing from the guidelines should be imposed in this case if legally possible", thus there was no need for resentencing. Petitioner argues that this approach amounts to a "per se harmless error" rule which finds no support in prior case law and would frustrate the purpose of the guidelines.

In Point II Petitioner argues that in reviewing departure sentences appellate courts must consider not only the fact of departure from the recommended range, but also the length of the departure. The District Court's opinion below precludes any review of the length of departure. Petitioner argues that without some review of length of departure, the guidelines goal of reducing unwarranted disparity in sentencing cannot be achieved.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DECISION TO DEPART FROM THE SENTENCING GUIDELINES BASED ON ONLY ONE OF THE TRIAL COURT'S THREE STATED REASONS.

The major impetus for developing the sentencing guidelines system in Florida was the desire to eliminate or at least minimize unwarranted variations in sentencing[1/]. To that end the guidelines set a presumptive sentence which should be imposed in each criminal case, absent "clear and convincing reasons" for departure. Fla.R.Crim.P. 3.701(d)(11). While the rule does not eliminate judicial discretion in sentencing, it does seek to discourage departures from the guidelines. Judges must explain departures in writing and may depart only for reasons that are "clear and convincing." Fla.R.Crim.P. 3.701(b)(6),(d)(11). Moreover, the guidelines direct that departures "should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence." Fla.R.Crim.P. 3.701(d)(11). And the Legislature has authorized appellate review whenever a trial judge departs from a recommended sentence. Section 921.001(5), Florida Statutes (1983).

1/ Sundberg, Plante and Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Fla.St. U.L. Rev. 125, 128 (1983).

This case presents two fundamental questions concerning the scope of such appellate review.

The first issue can be stated as follows: What does an appellate court do when it finds that a trial court, in deciding to depart from the guidelines, has relied on some reasons which are proper and "clear and convincing", and some reasons that are improper or not "clear and convincing"? In the instant case, the Fifth District Court of Appeals resolved the question with the following statement:

> 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[3]. 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.
>
> [3] For an argument by analogy the defendant cites 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)[9FLW 1895]. Cf., Young v. State, No. AX-1 (Fla. 1st DCA August 24, 1984)[9FLW 1847].

Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984).

The First District Court of Appeal has taken a different approach to this problem. In Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984), the court announced the following rule:

> 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 guide-

> lines, 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. See Bassett v. State, 449 So.2d 803,808 (Fla. 1984), quoting Brown v. State, 381 So.2d 690,696 (Fla. 1980), cert. den., ___ U.S. ___, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983); Straight v. State, 397 So.2d 903 (Fla. 1981), cert. den.,454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed2d 418 (1981). (emphasis added).

Petitioner would first argue that the Fifth District Court's position is clearly unacceptable. The standard adopted is tantamount to a per se harmless error rule which would render appellate review meaningless in most departure cases. There is no support in the case law for such a position.

Prior to the enactment of the sentencing guidelines and the concomitant appellate review of sentences imposed outside their presumptive range, it was well-settled that the imposition of a sentence was within the sole discretion of the trial judge so long as the statutory maximum was not exceeded. E.g., Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943); Walker v. State, 44 So.2d 814 (Fla. 1950); Infante v. State, 197 So.2d 542 (Fla. 3d DCA 1967). However, even under that system, sentencing decisions were not immune from appellate scrutiny. Rather, courts of this state did not hesitate to reverse a facially legal sentence where it was apparent that the trial judge based the sen-

tence upon unreliable evidence or upon impermissible factors. Further these reversals clearly were not limited to cases where the trial court's only sentencing considerations were improper. In Harden v. State, 428 So.2d 316 (Fla. 4th DCA 1983) the court found that the trial judge's decision to retain jurisdiction over the defendant's parole release was partially based on his failure to confess. The District Court stated:

> Because the court stated that one of the reasons for retaining jurisdiction was the defendant's failure to confess and this violated his constitutional privilege against self incrimination, the court erred.
>
> We therefore vacate the sentence and remand to permit the trial court to articulate appropriate reasons for retaining jurisdiction pursuant to the statute or to omit retention upon resentencing.

(emphasis added) Id. at 317.

In Webb v. State, 454 So.2d 616 (Fla. 5th DCA 1984) the district court found only one of the trial judge's three reasons for an increased sentence to be improper, yet the sentence was reversed. The district court wrote:

> While we do not disagree with the judge taking into consideration the earlier undisclosed prior felony conviction and the fact that he felt appellant had lied on the witness stand, we do find fault with "number one" from the quote. The factors that "we" had to bring witnesses from California (the record indicates Pennsylvania) and that "we" were forced into trial position are not valid considerations for sentencing purposes.

> We vacate the sentence, remand the matter to the trial court for resentencing.

Id. at 617.

The First District Court's approach to reviewing departure cases appears to be a more conventional harmless error standard. Petitioner would agree that in certain very limited situations an appellate court could decide that a departure sentence "would not have been affected by elimination of the impermissible reasons or factors stated." Carney, supra. This approach is similar to the standard applied in probation revocation cases.

The decision to revoke probation has always been regarded as a highly discretionary one. Nevertheless, the appellate courts have reversed revocation orders and remanded the cause for reconsideration when the decision to revoke has been based, in part, upon an improper ground. E.g. Watts v. State, 410 So.2d 600, 601 (Fla. 1st DCA 1982) ("We are unable to determine, however, whether the trial judge would have revoked probation and imposed the same sentence without a violation of Condition 4 and must reverse the order of revocation and remand this cause to the trial judge for such redetermination as may be warranted."); Aaron v. State, 400 So.2d 1033, 1035 (Fla. 3d DCA 1981) ([S]ince we do not know whether the trial court would have revoked his probation under the remaining grounds or whether the trial court would have imposed the remaining portion of the term of imprisonment; we reverse the judg-

ment and sentence and remand the cause to the trial court, as we did in Jess v. State, 384 So.2d 328 (Fla. 3d DCA 1980), to make such findings and determinations and then to re-sentence the defendant as it is so advised."); Clemons v. State, 388 So.2d 639,640 (Fla. 2d DCA 1980)("Accordingly, we reverse the order of revocation and remand the cause to permit the court to consider whether the violation of condition 1 warrants revocation.") Peterson v. State, 384 So.2d 965,966 (Fla. 1st DCA 1980)("We are unsure as to whether the trial court would have revoked appellant's probation in this case and imposed the same sentence for the sole reason that appellant failed to be gainfully employed during certain months of 1977 and 1978. Therefore, we decline to uphold the probation revocation on that ground alone and instead remand for further consideration."); Page v. State, 363 So.2d 621,622 (Fla. 1st DCA 1978)("We do not know if the trial court would revoke probation and impose the same sentence for the sole reason that Page failed to file timely monthly reports. We, therefore, reverse and remand for proceedings consistent with this opinion."); McKeever v. State, 359 So.2d 905,906 (Fla. 2d DCA 1978)("While it is undisputed that appellant violated the terms of his probation by failing to file monthly reports and failing to make monthly payments, we are uncertain whether the trial court would have revoked probation and imposed the sentence it did solely on those grounds. Accordingly, the order of revocation is reversed and the cause is remanded for further proceedings.") The courts refused to indulge in the pre-

carious presumption that the improper findings could be regarded as mere surplusage, affecting neither the decision to revoke nor the sentence imposed. Rather, these decisions reflect a proper application of the harmless error doctrine. When the appellate court can know that neither the decision to revoke nor the sentence was affected by the erroneous findings, the error is harmless and the cause properly affirmed. E.g. Sampson v. State, 375 So.2d 325 (Fla. 2d DCA 1979)(trial judge's remarks at sentencing explicitly reveal that decision to revoke and sentence imposed would be unaffected by invalidity of one of reasons); Scherer v. State, 366 So.2d 840 (Fla. 2d DCA 1979)(remand not necessary where improper reason merely technical and revocation supported by other substantial violations, including commission of subsequent crime). When this determination cannot be made, a remand for reconsideration by the trial court is required.

A similar standard of review should apply to guideline departures. A sentence based, in part, upon improper grounds for deviation should not be affirmed unless the appellate court can determine that the improper grounds did not contribute to the decision to depart or to the actual sentence imposed[2/].

2/ The Fourth District has recognized that unacceptable reasons for departure may affect the extent of the departure, and for that reason has held that the more equitable approach where impermissible reasons have been relied upon is to reverse and remand for resentencing. Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984).

Properly applied, the harmless error doctrine would support affirmance of a deviated sentence, without necessity of a remand for reconsideration by the sentencer, in only a limited number of cases - only when it is unequivocally clear that the erroneous reasons did not contribute to the sentence imposed by the trial judge. Any broader approach would result in appellate sentencing - the appellate court second-guessing the trial judge. The sentence recommended by the guidelines must be considered the presumptively correct one. When a trial judge has imposed a sentence departing therefrom, that decision has presumingly been based upon the reasons he has articulated - that due to these extraordinary factors, the presumptive guideline sentence is inappropriate. When certain of those factors have been deemed inapproprate by the appellate court, it should be exceedingly difficult to conclude that the trial judge would have departed, and to the same extent, had he known factors he found so significant (obviously so, since he is the one who articulated them) were improper ones.

In the instant case, the Fifth District Court affirmed Petitioner's sentence based on a finding that <u>one</u> of the trial court's <u>three</u> stated reasons for departure was proper. For the reasons stated herein, Petitioner asserts that this decision was erroneous and should be reversed.

POINT II

THE DISTRICT COURT ERRED IN REFUSING TO REVIEW THE EXTENT OF DEPARTURE FROM THE RECOMMENDED GUIDELINES SENTENCE.

The issue here is whether the extent of departure from the guidelines should be subject to appellate review, or whether such review should be limited solely to the initial decision to depart from the guidelines. Petitioner would assert that this is probably the single most important question this Court will face concerning the sentencing guidelines. Section 921.001(5), Florida Statutes (1983) provides that "the failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to chapter 924." Admittedly the statute quoted above does not resolve the issue raised here. However, the stated purpose of the guidelines, to eliminate unwarranted disparity and promote uniformity of sentences on a statewide basis, can never be achieved unless the extent of departure is subject to appellate review to insure that the length of an aggravated sentence bears some reasonable relationship to the reasons for departure.

Without review of the extent of departure, trial judges' discretion, and thus the potential for abuse of that discretion, becomes much greater than it was before the guidelines took effect. Before the guidelines trial judges were of course free in most cases to sentence an offender to any term up to the statutory maximum without explanation or appellate scrutiny. How-

ever, the trial court's decision had little influence over the length of time the offender actually served. At least where a lengthy sentence was imposed, an offender's true release date was usually determined by the Parole Commission. Even after the Commission had set a Presumptive Parole Release Date, the decision was not final. The inmate's release date was reviewed again every two years until his release. Section 947.174,Fla.Stat. (1983). Under the sentencing guidelines,the possibility of parole release is eliminated. Section 921.001(8), Fla.Stat. (1983). The offender must serve his entire sentence, shortened only by accumulated gain time. Thus the trial court's initial sentencing decision is more important than ever before. And the only review of this decision is the appellate review authorized by Section 921.001(5). Like it or not, the appellate courts have been assigned the task of preserving some degree of proportionality in sentencing, and by necessary implication, preserving the guidelines themselves.

The Fifth District Court's approach to the issue raised here may seem attractively simple. In Petitioner's case the Court stated:

> 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.

Albritton, supra.

This approach has enormously broad and far-reaching consequences. For instance, the Fifth District Court has held the fact that a defendant has violated probation is a sufficient reason for departure. Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984). Take this decision together with the court's view on length of departure and the conclusion is clear - the trial judge has absolute discretion to sentence anywhere from the guidelines range to the statutory maximum in any probation violation case. The only change the guidelines require is the abolition of parole.

In Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984) the District Court upheld the use of a defendant's prior criminal convictions as justification for a departure sentence. This opinion together with Albritton, supra, means that the guidelines place no limits on the discretion of a trial judge sentencing a defendant with a criminal record. The only required change is again, the abolition of parole.

The sentencing guidelines "represent a synthesis of current sentencing theory and historic sentencing practices throughout the state." Fla.R.Crim.P. 3.701(b). Years of study and effort were spent in their development. Surely they were meant to require more than an end to parole.

Early in the process of developing the guidelines, the Sentencing Guidelines Commission recognized that some form of review mechanism would be necessary in order to

insure compliance with the new system. At its meeting on March 3, and 4, 1983 the Commission unanimously adopted the following position:

> "Although sentencing guidelines show considerable promise for reducing unwarranted sentence variation, their impact on the sentencing process would be substantially reduced unless a mechanism is provided to review sentences imposed outside the guiddlines. Therefore, the guidelines commission recommends that a sentence review panel be established to evaluate the propriety of the sentences which fall outside the suggested range.
>
> "The review panel should consist of three circuit judges, each representing a different geographic section of the state (the areas to be determined by the boundaries of the district courts of appeal), to be appointed on a rotating basis by the chief judges of the circuit courts comprising the district. A fourth judge would also be appointed to serve as a supernumerary if one of the panel members was unable to serve.
>
> * * *
>
> "The review panel would have appellate jurisdiction for sentence adjustment in all felony cases in which the sentence falls outside of the range prescribed by the guidelines, except for cases in which (a) the sentence was imposed pursuant to an agreement as to that sentence, or (b) the right to sentence review has been waived.
>
> "The procedures governing sentence review would be promulgated by Supreme Court Rule. The review panel would have the authority to reduce or increase the sentence to the same extent as was originally permissible for the trial court at the time the sentence was imposed. Panel opinions which adjust sentences would then be published as written decisions to form the basis for a "common law of sentencing."
>
> * * *

> "Responsibility for the review of sentences should be placed in the hands of a review panel rather than with the appellate courts for a number of reasons. Given the large case load of the appellate courts, the utilization of existing circuit court judges to form an independent sentence review panel offers the best solution for a speedy and effective review process. Inherent in the review panel proposal is the concept of peer review. Trial judges actually sitting on the criminal bench, and therefore directly involved in the felony sentencing process, would review the sentencing decisions of their colleagues. These judges would gain a broad perspective on sentencing practices across the state. The discussion among the panel members during the review process would not only encourage a critical evaluation of the case at hand, but also would encourage the panel member to evaluate his own sentencing practices. Publication of the positions sustained, as well as those rejected, would be an additional aid in the sentencing process. The decisions would represent a persuasive form of precedent established for trial court judges by trial court judges."

Minutes of Sentencing Guidelines Commission Meeting, March 3-4, 1983 (emphasis supplied)(copies available from State Courts Administrator, Tallahassee, Fla.)[3/].

The proposal outlined above did not become law, apparently because the creation of the new court envisioned would have been unconstitutional. However the position of the Sentencing Guidelines Commission is set out here as persuasive authority for Petitioners position. The Commission realized that unwarranted sentencing variation

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3/ The complete minutes are attached hereto as Appendix "A"

could not be controlled without some form of appellate review. They recognized the need for "sentence adjustment". They stated that the reviewing panel must have the authority to reduce or increase sentences to the same extent as the trial court. The most important conclusion that can be drawn from the proposal is that the Commission which developed the guidelines expected the developement of a "common law of sentencing" at the appellate level. They could not have expected that the panels responsible for reviewing departure sentences would adopt the position taken by the District Court in Petitioner's case. The guidelines rule itself was never intended to answer every question on its face. The guidelines clearly need guidelines themselves. Mischler v. State, 458 So.2d 37,39 (Fla. 4th DCA 1984).

It is apparent from the report quoted above that the Guidelines Commission saw problems with assigning the task of review of departure sentences to the existing appellate courts. However, in its final form the guideline law does just that. Therefore, the appellate courts must accept this responsibility. The task of setting a standard for review of the length of departure sentences falls on this court.

Minnesota has adopted a sentencing guidelines system. The Minnesota guidelines do not specify any limitation on the length of a departure sentence. Therefore the Minnesota Supreme Court had to address the same issue raised

here. See Minn.Stat.appendix section 244 (1983). The court recognized the length of a departure sentence must be reviewed and adopted the following possition:

> We now have some experience in reviewing sentences imposed by judges in departing from the presumptive guidelines' sentence. After careful consideration of the problem in light of that experience, we conclude that generally in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length. This is only an upper limit and we do not intend to suggest that trial courts should automatically double the presumptive length in all cases in which upward departure is justified nor do we suggest that we will automatically approve all departures of this magnitude. On the other hand, we cannot state that this is an absolute upper limit on the scope of departure because there may well be rare cases in which the facts are so unusually compelling that an even greater degree of departure will be justified.

State v. Evans, 311 N.W. 2d 481 (Minn.1981)

Petitioner suggests that a similar standard might be appropriate in Florida. However, in view of the fact that not all guidelines sentences involve state prison sanctions, a more logical solution might involve a limit on the number of guidelines cells a departure may cover. Petitioner suggests that generally upward departures should be limited to one cell above the recommended range. Departures of more than one cell should be limited to very rare cases and subject to very strict scrutiny.

Petitioner does not contend that his suggestions

offer a perfect solution to the problem raised in this case. However, if some limitations on departure sentences are not adopted,the Florida Sentencing Guidelines will surely increase the "unwarranted variation in sentencing" that they were designed to eliminate.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal in this cause and remand the case for resentencing with appropriate instructions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General at 125 N. Ridgewood Avenue, Daytona Beach Florida 32014 and to Mr. Lloyd E. Albritton, Inmate No. 092741, Lake Correctional Institute, P.O. Box 99, Clermont Florida 32771 on this 28th day of March 1985.

Daniel J. Schafer

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER