IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT
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STATE OF FLORIDA,

Petitioner,

v.

KAREN A. MISCHLER,

Respondent.

CASE NO. 66,191

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

LIST OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, STATE OF FLORIDA, was the prosecution, and Respondent, KAREN A. MISCHLER, was the defendant, in the trial, post-trial and sentencing proceedings held in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, the STATE OF FLORIDA and KAREN A. MISCHLER will be referred to as Petitioner and Respondent, respectively.

Additionally, the symbol "R" means Record-on-Appeal in the above-styled cause; "AR" means the Additional Record on Appeal; "e.a." means "emphasis added"; and "A" means the Appendix attached to Petitioner's brief.

STATEMENT OF THE CASE

On September 28, 1982, Respondent was charged, by information, with having committed the offense of grand theft, in violation of Section 812.014 of the Florida Statutes, between January and September, 1982, by using and permanently depriving Mellowe Construction, Inc. (M & L Construction) of money, in an amount between $100.00 and $20,000.00. (R, 503-504).

After a jury trial, Respondent was convicted of grand theft. (R, 542). Respondent elected to be sentenced under the guidelines. (AR, 17). The guidelines scoresheet indicated a recommended range of "any non-state prison sanction. (R, 548; AR, 38-39). After a sentencing hearing, Respondent was sentenced to three years in prison, and the trial court entered a written order, writing his reasons for deviating from the guidelines' "recommended range". (R, 548-550; AR, 29-30).

On direct appeal by Respondent of his sentence, the Fourth District reversed same, and remanded for re-sentencing within the guidelines. State v. Mischler, 9 FLW 2205 (Fla. 4th DCA, October 17, 1984)(A, 1-12).

Additionally, the Fourth District certified the entire case to the Florida Supreme Court, as well as the following question, as involving matters of great public importance:

> DOES THE THEFT BY A BOOKKEEPER OF A MAJOR PORTION OF HER ASSETS CONSTITUTE A CLEAR AND CONVINCING REASON TO DEPART FROM THE GUIDELINES AND AGGRAVATE A SENTENCE?

(A, 8).

Petitioner filed its Notice to Invoke Discretionary Jurisdiction on November 16, 1984.

STATEMENT OF FACTS

This appeal arises from the Fourth District Court of Appeal's opinion, reversing a criminal sentence imposed by the circuit court, in and for Palm Beach County, Florida, above the recommended range of Respondent's "guidelines" sentence. (A, 1-13).

After a defense continuance of the sentencing hearing (originally scheduled for December, 1983), the trial court held said hearing, as rescheduled, on January 17, 1984. (AR, 16-17). Appellant's counsel informed the trial court that Appellant was specifically electing to be sentenced by a court under the new Florida Sentencing Guidelines and that defense counsel would "defer" to the court on "every aspect of" the Guidelines. (AR, 18). Defense counsel generally asserted that Appellant's score under the Guidelines fell within a "recommended range" of "any non-state prison sanction", and that deviation from the Guidelines would require aggravation of twenty-three points in scoring. (AR, 20-21). The State contended that the amount of the theft was over nineteen thousand dollars, and recommended the imposition of a three year prison term, in accordance with the recommendations of the pre-sentence investigation (PSI) report, which included references to the exact amount stolen by Appellant, and that Appellant had violated a position of trust in a small business by her actions. (AR, 28). The trial court afforded Appellant the opportunity to present anything in possible mitigation of sentence, prior to and subsequent to the imposition

of sentence in open court. (AR, 28, 31). Furthermore, the trial court specifically recited its intention to allow defense counsel an additional opportunity to offer mitigation, and further respond to the trial court's reasons for deviation from the Guidelines Sentence, in the form of a "rehearing", and present any arguments not mentioned at sentencing. (AR, 23, 27). Defense counsel argued that Respondent was a first offender; that the crime was non-violent in nature; and that the Respondent was employed by Kimberly Barenz, Esquire, co-counsel for Respondent at said time. (AR, 28).

Subsequent to defense counsel's argument, and the State's recommendation, the trial court, having adjudicated Respondent guilty of a third degree felony grand theft (AR, 28), articulated its reasons for deviation from the Guidelines. (AR, 29-30). The trial court concluded, inter alia, that Respondent had committed a "flagrant and exceptional white collar crime," to wit, a "shocking and brazen" theft from her employer; that the theft from her employer was different from theft from a stranger or object; that a white collar crime "deserves a harsher sanction" than other property-related crimes, that the victim of the theft was a small business, which was "almost devastated and bankrupted" by Respondent's actions; that such actions had caused considerable losses from two separate banks, and that litigation resulting from said losses, between the victim and one of the banks, had further inconvenienced the victim; that the evidence of Respondent's guilt was "clear, convincing

and overwhelming"; and that the State had claimed the loss resulting from the theft to be in the amount of nineteen thousand, six hundred and eighty dollars and fifty-six cents ($19,680.56). (AR, 29-30). Said Order of deviation from the recommended sentence was further based upon Respondent's statements to those individuals preparing the PSI report (and reflected in said report), denying responsibility for any crime, protesting her innocence, allegations that the victim was the real "crook", and otherwise antagonistic statements that individuals such as the victim "ruled the world" with their money, and were allowed to escape without punishment. (AR, 29-30). The trial court concluded, on the basis of these statements, that there was no chance that Appellant could, or was willing to make restitution to the victim. (AR, 29-30). The trial court's written Order contained said findings, as expressed by the trial court at sentencing. (R, 549-550).

In response, defense counsel expressed some general disagreement with the inclusion of a factor based upon the particular nature of a crime as a "white collar" crime, and further asserted that the trial court had taken a "great step" in sentencing Appellant to three (3) years of incarceration, by allegedly upgrading Appellant's score from thirteen (13) to thirty-six (36) points (AR, 31).

In its ruling, on Respondent's appeal of her conviction and sentence, the Fourth District reversed said sentence. State v. Mischler, 9 FLW 2205 (Fla. 4th DCA, October 17, 1984)

(A, 1-12). In examining the written reasons the trial court relied upon in departing from the guidelines, the Fourth District independently reviewed each such factor. (A, 1-8). The appeals court rejected the trial court's belief that white-collar crime "deserved a harsher sanction" than other property-related crimes (R, 549), since the court found the definition of white-collar crime to be "virtually indistinguishable" with social status, which is expressly precluded from consideration in guidelines sentencing. (A, 1-2).

The Fourth District further rejected Respondent's "lack of remorse" as a proper basis for deviation from the guidelines, stating that Respondent's "protestations of innocence" were inconsistent with a demonstration of remorse, and that Respondent's right to maintain her innocence, even after a guilty verdict, could not be so penalized. (A, 2). The court further noted that its conclusion, on the use of lack of remorse as a factor in aggravating a guidelines sentence, was the same as that involved in this Court's treatment of such a factor in death penalty cases, as stated in Pope v. State, 441 So.2d 1073 (Fla. 1983). (A, 2-3). In a footnote, the Fourth District did concede that "[Respondent]'s statement, to the effect that the victim had money and people with money rule the world, does weaken her protestations of innocence". (A, 3, at n. 3).

In rejecting those circumstances of Respondent's offense, upon which the trial court based other reasons for de-

parture, the Fourth District concluded that the nature of the theft by Respondent of her employer's assets, resulting in the near bankruptcy of his business, was a "modest", "common" crime, which "does not excite repugnance or odium". (A, 3, 4). Although the Fourth District acknowledged that such distinctions were based on degree rather than substance, the court nevertheless concluded that the nature of the crime, and its attendant circumstances, did not support departure. (A, 3, 4, 7). In so ruling, the court certified the entire case, as well as the specific question quoted in the Statement of the Case, supra. (A, 7).

The Fourth District's view of the "abuse of discretion" standard of review of the trial court's sentence, was a subjective interpretation of whether or not, based on a de novo review, the reasons stated were sufficiently "clear and convincing" to warrant departure. (A, 4). Although not defining the "clear and convincing" standard, and rejecting an earlier decision which defined the standard in terms of evidence, the Fourth District reviewed a substantial number of guidelines appeals, to ascertain the most common and consistent bases for departure used by other courts. (A, 5-7, and n. 7-14). Furthermore, the court enunciated, as a new and proper basis or reason for departure, those "crimes committed in a repugnant and odious manner". (A, 7).

Evidence presented at trial, in the State's case-in-chief, clearly demonstrated Respondent's guilt, including inter

alia, testimony by Melvin Lowe, the owner of the business which employed Respondent, that Respondent was not an officer or stockholder listed in the corporate papers, or authorized to sign checks (R, 194-197); that Mellowe Construction had only one corporate bank account, with First State Bank of Lantana, and did not have a post office box during the term of Respondent's employment from April, 1982 to September, 1982 (R, 194-198); that payments were found to have been made to non-employees, from the Lantana bank account, not authorized by Lowe, who was the only one who could sign checks on the corporation's account (R, 196, 203, 204, 206); that Respondent broke into Lowe's desk to obtain the corporate papers (R, 246); that Mellowe Construction did not do any business with certain other corporations, to which checks were paid on said corporation's account (R, 211-212); and that Lowe never authorized deposits by Respondent into a separate account with Southeast Bank. (R, 279). Further, Lowe testified that the corporation was in "bad financial shape" when he fired Respondent, and that he was forced to borrow large sums of money from banks. (R, 198, 200, 201, 252).

Further testimony established that Respondent opened separate accounts at Southeast Bank, ostensibly under the name of the corporation ("M & L Construction"), with a post office box in Lake Worth as the corporate address (R, 46-60; 74-77); that Respondent's name as well as that of Melvin Lowe, was on the bank signature card; that the account was opened in July,

1982 and closed two months later; and that checks were cashed and deposited through said account. (R, 46-60). Bank officers also testified that similar activity occurred with respect to a corporate and personal account, for "Mr. and Mrs. Lowe", at the First State Bank of Florida, and that Respondent had a personal account at the same bank. (R, 91-123).

Finally, testimony from a document examiner, based on handwriting exemplars taken from Melvin Lowe and Respondent, demonstrated that Lowe did not sign various checks or bank cards in question, and that Respondent had signed and executed said checks. (R, 283-308).

In its Order, reciting departure reasons, the trial court noted that Respondent's theft caused Mr. Lowe to lose $3,319.00 from the Lantana Bank, and $13,680.00 from the Southeast Bank. (R, 549). The court further referred to the State's claim that the total loss was $19,680.56, caused by Respondent's theft (AR, 27; R, 550), but that Respondent agreed only to a total loss of $13,000. (R, 550).

POINTS ON APPEAL

POINT I

WHETHER THE FOURTH DISTRICT COURT OF APPEAL APPLIED ERRONEOUS STANDARD OF REVIEW, IN REJECTING TRIAL COURT'S REASONS FOR DEPARTURE; AND WHETHER STANDARD SHOULD BE ABUSE OF DISCRETION AND INVOLVE RE-EVALUATION OF TRIAL COURT'S REASONS FOR SENTENCE DEVIATION?

POINT II

WHETHER "THEFT BY BOOKKEEPER OF MAJOR PORTION OF HER EMPLOYER'S ASSETS" CONSTITUTES CIRCUMSTANCES OF OFFENSE, WHICH ARE CLEARLY PROPER GROUNDS FOR GUIDELINES-DEPARTURE SENTENCE; AND WHETHER CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE?

POINT III

WHETHER THE FOURTH DISTRICT ERRED IN FINDING THAT TRIAL COURT'S DEVIATION BECAUSE OF NATURE OF WHITE-COLLAR CRIME WAS EQUIVALENT TO INVALID CONSIDERATION OF SOCIAL STATUS?

POINT IV

WHETHER THE TRIAL COURT ERRED IN REJECTING NATURE OF RESPONDENT'S VOLUNTARY STATEMENTS TO PRE-SENTENCE INVESTIGATORS AS BASIS FOR DEPARTURE, SINCE, IN CONTEXT, SAID FACTOR DID NOT CONSTITUTE RELIANCE ON RESPONDENT'S CLAIMS OF INNOCENCE AS SOLE INDICATOR OF LACK OF REMORSE, THEREFORE NOT OFFENDING DUE PROCESS RIGHTS OF RESPONDENT?

ARGUMENT

POINT I

FOURTH DISTRICT COURT OF APPEAL APPLIED ERRONEOUS STANDARD OF REVIEW, IN REJECTING TRIAL COURT'S REASONS FOR DEPARTURE; STANDARD SHOULD BE ABUSE OF DISCRETION, AND SHOULD NOT INVOLVE RE-EVALUATION OF TRIAL COURT'S REASONS FOR SENTENCE DEVIATION.

In its review of the reasons given by the trial court in departing from the "recommended range" of sentences under the Florida sentencing guidelines, the Fourth District clearly employed a de novo approach, conducting its own evaluation of each factor relied upon by the trial court. Mischler v. State, slip op, at 1-8. Although the distinctions drawn by the appeals court were based on indepedently visceral reactions of the appeals court, Mischler v. State, slip op, at 4, the Fourth District nevertheless held the factors to be improper, stating in relevant part:

> ... somehow [Appellant's] crime does not excite repugnance or odium and we therefore, confess that our conclusion as to what supports departure from the guidelines may well depend on degree rather than principle. Nevertheless, we make no apology. After all, what constitutes abuse of discretion is little else than an overreaching of such magnitude or degree that it demands reversal in the eyes of the appellate beholders. Id. (e.a.).

In effect, the Fourth District's substitution of its own judgment of the offense and the offender, based on an independent re-evaluation of the factors used by the trial court to support

a departure sentence, represents an inappropriate appellate standard of review, contrary to the express provisions of the guidelines.

The conclusions of three other sister district courts further reinforce and mandate this conclusion. The First, Second and Fifth Districts have each adopted a standard of review of guidelines departure cases which proscribes the type of de novo re-examinations of a trial court's imposition of a departure sentence. Santiago v. State, 9 FLW 2479 (Fla. 1st DCA, November 28, 1984); Whitlock v. State, 9 FLW 2390 (Fla. 5th DCA, November 15, 1984); Townsend v. State, 9 FLW 2357 (Fla. 2nd DCA, November 9, 1984); Hankey v. State, 9 FLW 2212 (Fla. 5th DCA, October 18, 1984); Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984); Addison v. State, 452 So.2d 955 (Fla. 2nd DCA 1984). These cases have consistently concluded that if the stated reasons for departure are "clear and convincing", and the ultimate sentence is within the statutory parameters imposed by general law (as based on the classification of the nature and degree of the offense), no abuse of discretion has been demonstrated. Whitlock, supra; Townsend, supra; Hankey, supra, at 2213; Santiago, supra; Garcia, supra, at 717; Addison, supra, at 956. Therefore, the Fourth District's admission of its failure to be independently "moved" by the nature of Appellant's crime, and of its foundation of rejecting the trial court's factors as a matter of degree, more so than as a matter of substantive law, amounted to the exercise of a role of appellate review

not authorized or contemplated under the guidelines, according to other appellate courts.

The basis for the appropriate standard of relative deference to, rather than independent re-evaluation of, the trial court's sentence, is directly based upon the structure of the guidelines themselves, in assigning a continuing discretionary role to trial courts in sentencing. The initial intent of the guidelines, as espoused by the Florida Sentencing Study Committee created in 1978, was to continue to provide flexibility to trial courts, to exercise discretion in imposing a particular sentence to meet the particular characteristics of the crime and the defendant, by going outside the "recommended range" of a guidelines sentence, Spitzmiller, An Examination of Issues in the Florida Sentencing Guidelines, 8 Nova Law Journal 687, 699-700 (1984)(hereinafter cited as "Spitzmiller"); Sundberg, Plante & Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Florida State University Law Review 125, 142 (1983)("Sundberg"). As expressed by said commentators:

> Although the purpose of sentencing guidelines was the reduction of unwarranted sentence variation, the need for some variation was recognized and indeed promoted. It was anticipated that from 15-20% of the sentencing decisions routinely would fall outside of the recommended range [of the guidelines, according to a defendant's scoresheet]. 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 scoresheet 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 guideline range or, if the offense or 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. Sundberg, supra, at 142; (e.a.) also, see Spitzmiller, supra, at 700; Garcia, supra, at 717; Higgs v. State, 455 So.2d 451, 453, n.3 (Fla. 5th DCA 1984).

This continuation of judicial discretion in sentencing has been specifically mandated by those provisions of the guidelines which state that punishment be commensurate with the severity and circumstances of the offense, and permit discretionary departure from the guidelines sentence for "clear and convincing" reasons. Rule 3.701(b)(2); (b)(3); (b)(6); (d)(11); Florida Rules of Criminal Procedure (1983); Committee Note (d)(11), Florida Rules of Criminal Procedure (1984); Wesley, Robert, Director, Sentencing Guidelines Commission, Memorandum on Sentencing Guidelines Modification, Feb. 9, 1984.

Therefore, in view of the traditional grant to trial courts of the exercise of discretion in sentencing, as reinforced by the intent and scope of the guidelines, it is evident that the appropriate appellate standard of abuse of discretion, as apparently followed in the First, Second, and Fifth Districts, proscribes the level and scope of re-evaluation of factors under-

taken by the Fourth District in Mischler. Townsend; Hankey; Santiago; Garcia; Addison; Weems v. State, 454 So.2d 1027 (Fla. 2nd DCA 1984). Rather than independently determining the relative "repugnance" of a sentence to the appeals court, Mischler, supra, at 4, an appellate court's function is to merely review a trial court's exercise of discretion in determining whether a deviation factor was "clear and convincing". Garcia, at 717; Higgs, supra; Weems, supra.

In considering judicial definitions of the standard of review governing guidelines appeals, it is more apparent that the Fourth District's application of its own judgment of the import of the guidelines was inappropriate. The definition of the term "discretion" involves the disposition of questions not firmly governed by fixed rules of law, which by their nature will be controlled by the trial court's personal judgment, based upon the particular circumstances of a given case. Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980). A finding of "abuse of discretion" cannot be made if reasonable men could differ on the propriety of the trial court's act, unless the act is arbitrary or unreasonable, leading no reasonable man to take the trial court's view. State v. Reed, 421 So.2d 754, 756 (Fla. 4th DCA 1982); Canakaris, supra; Matire v. State, 232 So.2d 209, 211-212 (Fla. 4th DCA 1970). Thus, the intent in expressly retaining discretion in the trial court in the context of a guidelines sentence beyond the range, is to provide for appellate review of departure sentences as to reasonableness, a standard far different than that apparently used by the Fourth District in

Mischler. Weems, supra, at 1028-1029; Santiago; Garcia; Addison.

An additional significant error in the Fourth District's approach to review of the trial court's reasons for departure, was the court's evaluation and analysis of the "clear and convincing" nature of said reasons. The Fourth District expressly rejected the formulation and argument by Petitioner that the definition of such terms by said court in Slomowitz v. Walker, 429 So.2d 797 (Fla. 4th DCA 1983), as applied to evidence, stating it could not be applied to reasons for departure. Mischler, at 5-6. Although conceding that the Slomowitz definition of "clear and convincing" was a basis for the adoption of said standard to guidelines, Mischler, at 6, n. 6, the Court further declined to adopt any working definition of the standard, instead relying on those factors which have been held to be valid "clear and convincing" reasons for departure by other courts. Mischler, at 6-7, n. 7-13. This formulaic approach limits consideration and development of other appropriate bases for departure, in a manner not contemplated under the guidelines.

The Slomowitz language can and should be utilized in determining and evolving the meaning of the "clear and convincing" language, since said decision was the basis for the selection of said standard by the Florida Guidelines Commission in the first place. The relevant test would substantially read or include the following:

> Clear and convincing [reasons] require that the [reasons] must be

> found to be credible; the [facts upon which the reasons are based] must be distinctly remembered, [...] precise and explicit, and the witnesses must be lacking in confusion as to [such facts]. The [reasons] must be of such weight that it produces in the mind of the [sentencer] a firm belief or conviction, without hesitancy, as to the truth of the [reasons sought to be established or established.] Slomowitz, at 797.

It is submitted that such a working definition adequately outlines the limits to an appellate court's review, within the "abuse of discretion" standard, of a trial court's listed and specified reasons for departure.

The clear and fundamental concern is that this standard not be employed, as by the Fourth District, solely by reference to those reasons deemed valid by other courts. Such a judicial perspective tends to limit the discretion of trial courts to consider the unique circumstances of a given case, which is a legitimate interest expressly authorized by the guidelines. Rule 3.701(b), supra. This conclusion is reinforced by at least one commentator, who indicates that the eleventh-hour change of standards by the Commission from a "substantial and compelling" test to the less stringent "clear and convincing" test in August, 1983, was the result of potential difficulties and limitations in authorizing a standard of appellate review, of departure reasons, that would limit discretion and departure in too stringent a manner.[1] Thus, the dual goals of the guidelines to limit disparity to some degree, while continuing to encourage more than robot-like,

[1] Spitzmiller, supra, at 702-704.

formulaic sentencing, Santiago; Weems, would be more appropriately met by the Slomowitz-type criteria as adapted herein, discouraging the subjective review of departure reasons engaged in throughout the Mischler opinion.

The Fourth District's independent re-evaluation of the trial court's sentence, in a manner improperly beyond the parameters of abuse of discretion, appears to reflect a prevalent perception that the guidelines were designed to completely eliminate disparate sentencing, by rote application of the same sentence for the same crime. Santiago; Garcia; Weems. As argued herein, the traditional pre-guidelines discretion a trial court was afforded, in the criminal sentencing process, see Jones v. State, 387 So.2d 401 (Fla. 5th DCA 1981); Mikenas v. State, 367 So.2d 606 (Fla. 1978); Adams v. State, 347 So.2d 685 (Fla. 4th DCA 1977) has not been eliminated. Garcia, at 716-717. This discretion is to be exercised with regard to the "guidance" of the guidelines, subject only to those proscriptions expressed therein, and a standard of review which defers to the trial court's proper consideration of the unique nature of each criminal case, within the sole limits of those proscriptions; Garcia, at 718; Rule 3.701(b)(2); (b)(3); (b)(6); (d)(11), supra; Florida Sentencing Guidelines Commission, Guidelines Manual (1983), at 5. The guidelines contemplate an evolving process, through case law, of achieving the ultimate ends of reduction in unwarranted disparity, and discretionary consideration of these circumstances peculiar to each case. Rule 3.701(b)(2), (b)(3); (b)(6); Committee Note (d)(1), supra; Weems, supra; Spitzmiller, at 716,

717, citing State v. Givens, 332 NW 2d 187; 189 (Minn. 1983); Section 921.001(7), Florida Statutes (1982). Therefore, the Fourth District's mechanistic misinterpretation of the appropriate standard of appellate review should be reversed and remanded to the Fourth District, with instructions to employ the standard and criteria of review espoused in the First, Second and Fifth Districts, as argued herein.

POINT II

"THEFT BY BOOKKEEPER OF MAJOR PORTION OF HER EMPLOYER'S ASSETS" CONSTITUTES CIRCUMSTANCES OF OFFENSE, WHICH ARE CLEARLY PROPER GROUNDS FOR GUIDELINES-DEPARTURE SENTENCE; CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

As already argued, the trial court's discretion in departure sentencing is only limited by the specific limits of the guidelines, which are to be narrowly construed and applied consistent with the underlying purposes of the guidelines. Garcia, at 717. Since those factors used by the trial court to deviate, which specifically referred to the particular circumstances of the crime (namely the theft by a bookkeeper of a substantial amount of her employer's assets), were not proscribed by the guidelines, the appeals court erred in rejecting these reasons, and the question certified by the Fourth District should be answered affirmatively.

The specific limits of the guidelines are narrowly confined to two basic categories. In imposing sentence, a trial court cannot consider arbitrary, or historically discriminatory characteristics of a person (e.g. race, gender, sex), Rule 3.701(b)(1), Florida Rules of Criminal Procedure, and cannot evaluate prior arrests, offenses, or factors related to such arrests or offenses, for which there are no convictions. Rule 3.701(d)(11). The guidelines commission has indicated that "other factors, consistent and not in conflict with the Statement of Purpose may be considered and utilized by the sentencing

judge". Committee Note, Rule 3.701(d)(11), (1984), supra; Sentencing Guidelines Modification Memorandum, supra. The basic tenets of the Statement of Purpose demonstrate that the paramount purpose of sentencing is punishment and retribution. Rule 3.701(b), supra; In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983); Spitzmiller, at 688-689.

With these considerations in mind, there can be no question that the trial court correctly cited the scope and nature of the substantial theft by Appellant from the business which employed her, and the attendant litigation problems and further economic losses caused to the business, as a result of losses sustained by the banks where Appellant unlawfully committed her acts of theft, (AR, 29-30), as appropriate "circumstances of the offense". Manning, supra; Garcia, supra; Rule 3.701 (b)(3). Since these factors relied on by the trial court related to the offense for which Appellant was convicted (R, 542, 548-550; AR, 28), the trial court's reliance on the circumstances of Appellant's crime was permissible. Rule 3.701(d) (11); Committee Note, Rule 3.701(d)(11)(1984); Manning; Garcia; Kiser v. State, 9 FLW 1857 (Fla. 1st DCA, August 29, 1984).

Despite the trial court's valid consideration of the circumstances related and attendant to the grand theft Respondent committed, the Fourth District's reversal reflects a conclusion that Appellant's theft was a "common" crime, committed

by an "insignificant" bookkeeper, that did not "excite repugnance or odium". (A, 4, 7). Repugnance is defined, in Webster's Seventh New Collegiate Edition Dictionary, as "exciting distaste or aversion... implies being alien to one's ideas, principles or tastes and arousing existance or loathing". (e.a.) Odium is therein referred to as "hatred or condemnation marked by loathing or contempt... detestation; stigma". (e.a.) From these highly subjective definitions, it clearly appears that the Fourth District panel's threshold sense of distaste, aversion or detestation, was made the standard for reviewing the trial court's judgment. As thoroughly argued in Point I, such judgment went improperly beyond the parameters of the Fourth District's proper scope of review. Santiago; Garcia; Manning.

The Fourth District's further apprehension in rejecting the trial court's reasons was the fear that, if the characteristics of Respondent's "common" theft could be the basis for departure, so could "most instances of embezzlement" or theft, therefore defeating the goal of limited disparate sentencing. (A, 7). In the first instance, this is belied by available research data from the guidelines project of 1981-1982 in Florida, where, for Respondent's offense (Category 5 under Rule 3.988) statewide, less than 10% of such offenses resulted in deviations above the guidelines. Sundberg, at 148. Thus, based on presently available evidence, no overwhelming number of departures have been realized. Even so, as discussed, supra, Point I, the guidelines were formulated with anticipated departure

in 15-20% of all sentencing.

Secondly, it is certainly not entirely speculative to conclude that, of the "90% plus" Category 5 offenses where no departure occurred, Sundberg, at 148, all such offenses would not necessarily have met with approval as objectively "repugnant and odious". The Fourth District has employed a totally subjective standard, which would require appellate courts to second-guess and independently determine if a particular offense evokes a particular visceral and emotional response, to justify guidelines departure. Taking the "repugnant and odious" standard used in Mischler to its logical extreme, the characteristics of a "common crime" will not permit departure, where an offense committed more rarely will validly justify such deviation. Neither the guidelines' Statement of Purpose, or non-guidelines sentencing criteria established in conjunction therewith, suggests or endorses such an approach. Rule 3.701(b), supra; Section 921.005, Florida Statutes (1983).

Therefore, because the Fourth District's perspective on the validity of considering circumstances of the offense as a valid basis for guidelines departure, was erroneously based on the absence of any subjective emotional response to the facts and nature of Respondent's crime, this Court should vacate the Fourth District's opinion, affirm the trial court's consideration and judgment of the circumstances of Respondent's offense, as properly authorized under the guidelines, and affirmatively answer the Fourth District's certified question.

POINT III

FOURTH DISTRICT ERRED IN FINDING THAT TRIAL COURT'S DEVIATION BECAUSE OF NATURE OF WHITE-COLLAR CRIME WAS EQUIVALENT TO INVALID CONSIDERATION OF SOCIAL STATUS.

The Fourth District's rejection of the trial court's reliance on the conclusion that white collar crime "deserves a harsher sanction than other property crimes" (R, 549), as a reason for deviation, was wholly based on its conclusion that the term "white collar crime" is synonymous with "social status". (A, 1-2). Based on the District Court's own definition of white collar crime, it is entirely distinct from social status.

The Fourth District relied on the Black's Law Dictionary definition of white-collar crime, as "a crime involving theft, fraud or violation of trust made possible because of the relationship inherent in the form of the employment". (A, 2, n. 1). Thus, the essential aspect of Respondent's crime was that it was occasioned and facilitated by Respondent's fiduciary relationship of trust with the victim and his corporation.[2] These considerations cannot be said to be "virtually indistinguishable" with a defendant's social status, since it is the nature

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[2] In fact, a fiduciary relationship involving trust between the offender and the victim, which facilitates a loss, by theft or similar crime, that is a lot greater than the minimum required for proof of the substantive theft offense, are amongst those non-exclusive factors for aggravating a sentence, under the Minnesota sentencing guidelines. Minnesota Sentencing Guidelines and Commentary, Section II D(6)(4), Minnesota Rules of Court (1984). It is further instructive to note the existence of this "aggravation factor", despite the similar provision in the Minnesota (and Florida) guidelines, forbidding consideration of social or economic status. Compare Minnesota Sentencing Guidelines, supra, at Section I(1), to Rule 3.701 (b)(1), supra.

of the employment relationship, vis-a-vis trust and fiduciary duties, and not the relative status an employee has achieved by virtue of such employment, that was the relevant factor in the trial court's use of this reason. (A, 2).

Because of such erroneous interpretation and application of terms of act, and the fact that the Minnesota guidelines specifically permit such a factor for deviation, despite proscriptions against factoring in a criminal's social status, supra, note 2, the Fourth District's reversal of said factor should be vacated. Further, reliance upon the violation of the particular fiduciary relationship by Respondent herein, again amounts to permissible consideration of the circumstances surrounding the particular offense for which Respondent was convicted, in context with other such circumstances relied upon by the trial court. Since said factor does not otherwise violate the proscriptions of the guidelines, and is consistent with the Statement of Purpose, said factor was a proper basis for departure. Manning; Garcia; Kiser; Weems, supra; Mincey v. State, 9 FLW 2341 (Fla. 1st DCA, November 9, 1984).

POINT IV

TRIAL COURT ERRED IN REJECTING NATURE OF RESPONDENT'S VOLUNTARY STATEMENTS TO PRE-SENTENCE INVESTIGATORS AS BASIS FOR DEPARTURE, SINCE, IN CONTEXT, SAID FACTOR DID NOT CONSTITUTE RELIANCE ON RESPONDENT'S CLAIMS OF INNOCENCE AS SOLE INDICATOR OF LACK OF REMORSE, THEREFORE NOT OFFENDING DUE PROCESS RIGHTS OF RESPONDENT.

The Fourth District's view of the trial court's alleged reliance on Respondent's protestations of innocence, as evincing a lack of remorse so as to permit deviation from the guidelines, was inadvertently and erroneously misinterpreted, and taken out of relevant context. Contrary to the implications of the Fourth District, the trial court did not rely on said "protestations" as the sole reason for deviation or a finding of lack of remorse, and thus did not improperly deprive Respondent of her due process rights to be protected from self-incrimination. (A, 2-3).

The Fourth District's conclusion that the trial court relied on Respondent's "protestations of innocence" as a lack of remorse, involves a consolidation of terms which appear to have distinctive meanings. It appears that "remorse" necessarily implies and refers to a demonstration of satisfaction and glee over having committed an act, admitting the commission of the act.[3] It would thus appear that maintaining one's innocence is

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[3] Webster's Seventh Collegiate Dictionary (1965) defines "remorse" as "a gnawing distress arising from a sense of guilt for past wrongs", and "remorseless" as "merciless".

not per se synonymous with "mercilessness", supra, n. 3; therefore, it was inappropriate, in the first instance, for the appellate court to solely view Respondent's protests of innocence as exhibiting a lack of remorse.[4]

Additionally, the District Court's view of the circumstances relied upon by the trial court, inadvertently rejected the context of the trial court's finding. Far from mere sole reliance of Respondent's not-guilty claims, the trial court's departure was based, inter alia, on present and voluntary expressions and statements by Respondent herself (the substantive and voluntary nature of which was unchallenged at sentencing, AR, 28-31), included as part of the pre-sentence investigation (PSI) report, constituting feelings of persecution, placement of blame and culpability upon the victim, and personal antagonism for the victim as a "crook" and an individual among those who "rule the world with their money" (R, 549-550), which led the court to conclude that "I see absolutely no chance that this defendant can make restitution or is even willing to make restitution". (R, 549). Thus, the Fourth District's reduction of these circumstances to mere lack of remorse, is significantly incomplete.

The trial court's conclusion that Respondent could and would not make restitution to the victims, based on specific voluntary statements by Respondent, is closely akin to

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[4] In fact, the Fourth District acknowledged the validity of this distinction, by its statement that "To cruelly torture a victim and admit pleasure at having done so is altogether different from professing innocence to the bitter end. (A, 2)(e.a.)

those cases which permit departure from guidelines sentences, based on recidivism, violation of probation, or lack of amenability to rehabilitation, based on a past record. In Kiser, supra, the appeals court upheld a departure sentence by a trial court which relied on the defendant's past criminal record, evidencing a "life of crime" which indicated no hope of rehabilitation. Kiser, at 1072, 1073. Similarly, in cases such as Hall v. State, 9 FLW 2377 (Fla. 1st DCA, November 14, 1984); Whitlock v. State, 9 FLW 2390 (Fla. 5th DCA, November 15, 1984); and Bogan v. State, 454 So.2d 686, 688 (Fla. 1st DCA 1984), a record of repeated violations and abuse of the privilege of probation was held to be an appropriate basis for departure from the guidelines recommended range for a particular crime. Finally, in Keeley v. State, 9 FLW 2190 (Fla. 5th DCA, October 11, 1984), a pattern of escalating, repetitive criminal actions has been upheld as a valid basis for departure, as indicative of a lack of remorse. Keeley, supra, at 2190-2191; Keeley, supra, at 2191 (Sharp, J, concurring specially). The common and consistent thread of these cases is that a pattern of recidivism, or disregard of conditions of probation, exhibit a lack of remorse, over the commission of the initial offense, or of the offense which gave rise to the imposition of probation. In the same vein, Respondent's "lack of remorse" is exhibited by examination of her express statements, which reasonably and properly afforded the trial court a basis for concluding that such statements displayed a lack of any commitment to restitution,

and an overall contempt for the criminal justice system. (R, 549); Kiser, supra; Bogan; Keeley. It is additionally instructive that, amongst the criteria for non-guidelines sentences, for crimes committed before the effective date of the guidelines, a defendant's willingness to engage in restitution to the victim are grounds for withholding incarceration. Section 921.005(b)(5), Florida Statutes (1983). There appears to be no limitation in consideration of such unwillingness to compensate the victim for the crime, as a reason to impose imprisonment. Id.

It is apparent that the Fourth District's concern for a "lack of remorse" factor, is the potential penalizing of defendants for pleading and attempting to prove their innocence, and a resulting violation of a defendant's right to silence and to avoid self-incrimination. (A, 2). However, Respondent's voluntary testimony at trial (R, 379-441), and her voluntary statements in the PSI report, waived the application of any self-incrimination rights, which the Fourth District feared would be violated, by use of a "lack of remorse" factor. Williams v. State, 441 So.2d 653 (Fla. 3rd DCA 1983); State v. Caballero, 396 So.2d 1210 (Fla. 3rd DCA 1981). In the same way that volunteered statements by a defendant, unchallenged as such, cannot violate a defendant's self-incrimination rights, or right to silence, Williams, supra, Respondent's volunteered statements rendered inapposite any similar due-process and Fifth Amendment rights and safeguards that the court in Mischler

inferred would be violated.

This Court's decision in Pope v. State, 441 So.2d 1073 (Fla. 1983), as practically adopted by the Fourth District in rejecting "lack of remorse" in guidelines departure cases, instead substantiates the trial court's consideration of same herein. In Pope, supra, this Court rejected lack of remorse as a factor in determining the existence of the statutory aggravating factor of "heinous, atrocious and cruel" in death penalty cases. Pope, at 1078. However, this Court made it clear that such a factor was inappropriate when found to exist purely and solely on the basis of the defendant's denial of guilt in Pope. Id, at 1077. Significantly, Pope was distinguished from other death penalty cases, such as Sireci v. State, 399 So.2d 964 (Fla. 1981), cert.denied, 456 U.S. 984, 102 S.Ct 2257, 72 L.Ed.2d 682 (1982), in which the finding of lack of remorse was appropriately based upon "an examination of the defendant's own statements about the crime". Id. In Mischler, the same distinction can be made, to support the trial court's finding that Respondent was totally unamenable to restitution. Pope; Sireci, supra.

Furthermore, to the extent that this Court prospectively eliminated consideration of lack of remorse as a permissible aggravating factor in death penalty cases, it did so on the basis of a change in the 1981 standard criminal jury instruction on "heinous, atrocious and cruel", that eliminated all prior references to the "pitilessness" aspects of said fac-

tor. Pope, at 1077-78. This Court concluded that this substantive change had effectively removed the consideration of a defendant's "mindset" from consideration. Id. This rationale conveys a significant distinction between death penalty cases, and the treatment of guidelines sentencing. There is no question, as already argued, that various offense and offender characteristics, so long as such characteristics do not offend the specific proscriptions of the guidelines, are permissible reasons for deviation from the recommended range. Sundberg, at 148; Spitzmiller, at 700; Garcia; Higgs. The concentration and focus of death penalty cases on offense characteristics for aggravation on the basis of "heinous, atrocious and cruel", see 921.141(5)(h), Florida Statutes (1980), thus clearly distinguish such cases from sentencing for other crimes, which can be permissibly based on offender characteristics for deviation, if found to be clear and convincing. Sundberg, at 148; Keeley; Kiser; Hall; Garcia. Therefore, to the extent of the prospective effect of Pope, said decision is significantly distinguishable.

Based on these circumstances, the Fourth District erred in reversing, rather than affirming, Respondent's unwillingness and total unamenability to restitution, as a clear and convincing reason for departure.

Finally, assuming arguendo that either Point III or Point II is unavailing, the trial court's reliance on "circumstances of the offense" was clearly permissible as reasons for

departure, therefore requiring that the trial court's departure sentence be upheld. Carney v. State, 9 FLW 2143 (Fla. 1st DCA, October 9, 1984); Albritton v. State, 9 FLW 2088 (Fla. 5th DCA, September 27, 1984); but see, contra, Young v. State, 9 FLW 2107 (Fla. 1st DCA, August 24, 1984)(question certified). Since it was the obvious intent of the trial court that a departure sentence be imposed, if legally possible, and since at least one clear and convincing reason exists to justify the sentence, this Court should affirm said sentence. Albritton, supra, at 2088-2089.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, Petitioner respectfully requests that this Honorable Court AFFIRM the judgment and sentence of the trial court, quash the opinion of the Fourth District, and remand with instructions to re-instate the trial court's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been mailed to FRANK B. KESSLER, ESQUIRE, of Zwickel, Gross and Kessler, 2925 10th Avenue North, Plaza Ten, Suite 202, Lake Worth, Florida 33461, this 17th day of December, 1984.

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