Corrected

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petititoner,

vs.

BRIAN ANTHONY YOUNG,

Respondent.

_____/

CASE NO. 66,257

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Brian Anthony Young, the criminal defendant and appellant in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below will be referred to herein as Petitioner.

Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the supplemental record on appeal will be indicated parenthetically as "SR" with the appropriate page number(s). Citations to the appendix attached hereto containing Petitioner's Notice to Invoke Discretionary Jurisdiction, a copy of the lower court's opinion rendered herein, and the lower court's order and clarified opinion in Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984), will be indicated parenthetically as "A" with the appropriate page number(s). It was necessary to provide this Court with copies of the Bogan materials since the modified

opinion was not published in Florida Law Weekly or the Southern Reporter as confirmed by Deputy Clerk, Karen Roberts, of the First District Court of Appeal, on December 17, 1984. (A 9-14).

STATEMENT OF THE CASE AND FACTS

Respondent was charged, by seven informations filed in Clay County, Florida, with twelve felonies, to-wit: six counts of grant theft, five counts of obtaining property in return for a worthless check, and one count of dealing in stolen property (R 28-36). Subsequently, Respondent entered a plea of no contest to all of the informations (R 77), and affirmatively elected to be sentenced under the guidelines (R 78). Following a plea colloquy and recitation of the factual basis for the pleas (R 78-93), the trial court accepted the pleas finding that they had been freely, voluntarily, and knowingly made (R 93).

At sentencing, on December 9, 1983, the trial court, having benefit of a Presentence Investigation Report (R 209-226) and argument of counsel in aggravation and mitigation (R 283-296), determined that departure from the guidelines was warranted for the following reasons:

> Total background defendant (Δ) shows he is an amoral person feeling he does not have to comply with the law. The guidelines don't make provision for but 4 other felonies at sentencing. They further do not make provision for consideration of the 27 felonies the S/A did not file on. This defendant (Δ) will be a criminal all his life. The longer he is segregated from society the better.

(SR 2). Thereafter the trial court imposed concurrent sentences of fifteen years for dealing in stolen property and five years for each of the remaining cases and counts (R 227-273, 298-302).

Respondent appealed the trial court's departure and the lower court, finding that the trial judge relied upon both permissible and impermissible reasons for departure, reversed and remanded the cause for resentencing and certified the question before this Court for review as one of great public importance. Young v. State, supra (A 2-8).

Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction (A 1) on the basis of the certified question. Petitioner's Brief on the Merits follows pursuant to this Court's Briefing Schedule issued on December 12, 1984.

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.

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

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

By adopting this position, this Court will leave intact the inherent sentencing discretion of the trial judge as narrowly modified by the sentencing guidelines while providing criminal defendants with the appellate review contemplated by Florida Statutes §921.005(5). Implicit in answering the question certified by the lower tribunal is a determination by this Court of what constitutes clear and convincing reasons for departure and what standard of review should be applied to sentencing guidelines cases.

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

> The only limitation on reasons for deviating from the guidelines is found in subsection (d)(11) which reads:
>
> > Reasons for deviating from the quidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

> sufficienty 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. (Empahsis added).
>
> Sundberg, Plante and Braziel. Florida's Initial Experience With Sentencing Guidelines, 11 Fla. St.U.L.Rev., 125, 142 (1983).

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

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

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

court applied the abuse of discretion standard.

Accordingly, where there is fair support in the record for one or more rational reasons advanced by the trial judge as a basis for imposition of a sentence outside of guidelines recommended range, it cannot be said that the trial judge, in departing, abused his discretion and the cause should therefore be affirmed. This proposition is nothing more than recognition of the well established principle that if a trial judge's order, judgment or decree is sustainable under any theory revealed by the record on appeal, notwithstanding that it may have been bottomed on an erroneous theory, an erroneous reason, or an erroneous ground, the order, judgment or decree will be affrimed. Savage v. State, 156 So.2d 566, 568 (Fla. 1st DCA 1963), cert. denied, 158 So.2d 518 (Fla. 1963). See also Martin v. State, 411 So.2d 987, 989 (Fla. 4th DCA 1982). While not specifically articulated, this principal has been employed by the lower court and other district courts to uphold departures where the trial court relied upon permissible as well as impermissible reasons for departure. See Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984), clarified September 7, 1984 (See A 9-14); Swain v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 1820; Mitchell v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 2107; Webster v. State, ___ So.2d ___ (Fla. 2d DCA 1984), 9 F.L.W. 2419; Albritton v. State, supra; Higgs v. State, supra.

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

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

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

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

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

Thus, when a trial judge's departure from the sentencing guidelines is predicated upon at least one clear and convincing reason and the sentence imposed is within the statutory parameters for the convicted offense,[1] the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons. To hold otherwise would inhibit the listing of all reasons considered by the trial judge to constitute a bona fide basis for departure in the particular case and have the insalubrious effect of compelling the trial judge to search for and list only those reasons enjoying judicial approval in an effort to insure that his sentencing decision will withstand appellate scrutiny. This result would make a mockery of the guidelines and assign the highest priority to form rather than substance. In fact, this premise formed the basis for Judge Nimmons'

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[1]The First and Fifth districts have evidently rejected the notion that the extent of departure is subject to appellate review so long as the sentence imposed is within the statutory parameters for the convicted offense. See Albritton v. State, supra; Bogan v. State, supra, as clarified September 7, 1984 (A 9-14); Hankey v. State, ___ So.2d ___ (Fla. 5th DCA 1984), 9 F.L.W. 2212; Mincey v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 2341; Whitlock v. State, ___ So.2d ___ (Fla. 5th DCA 1984), 9 F.L.W. 2390; Johnson v. State, ___ So.2d ___ (Fla. 1st DCA December 21, 1984), Case No. AW-172. This position is consistent with this Court's holding that ". . . this Court has long been committed to the proposition that if the sentence is within the limits prescribed by the Legislature, we have no jurisdiction to interfere." Banks v. State, 342 So.2d 469, 470 (Fla. 1976). Accord Brown v. State, 13 So.2d 458 (Fla. 1943); Weathington v. State, 262 So.2d 724 (Fla. 3d DCA 1972), cert. denied, 265 So.2d 330 (Fla. 1972), cert. denied, 411 U.S. 968 (1973).

well-reasoned dissent where he stated:

> Having concluded that there was a clear and convincing reason for the trial court to depart from the guidelines, I am of the view, contrary to the implications from the expressions in the majority's opinion, that we need not examine the other reasons articulated by the trial court for not imposing a sentence within the guidelines range. The majority seems to have been persuaded by the defendant's argument that if one or more of the reasons stated for departing from the guidelines was not "clear and convincing," then the case must be remanded for resentencing even though there was at least one clear and convincing reason stated by the trial court as to why the guidelines sentence was not appropriate. I totally disagree.
>
> Even though some of the articulated reasons may not qualify as clear and convincing reasons under Rule 3.701(d)(11), at least one was. Under such circumstances, I do not understand why this court should be expected to examine all of the other reasons in order to determine whether they, too, would permit departure from the guidelines. Once the appellate court determines that an articulated clear and convincing reason existed for the trial court's imposition of a sentence outside the guidelines, further inquiry into the reasons should not be required. I believe this approach is consistent with the law and comports with logic and reason. Moreover, I believe a contrary approach will be an invitation to resourceful defense counsel to urge the kind of flyspecking review which, I believe, even the framers and proponents of sentencing guidelines never intended. Frequently, conscientious trial judges articulate numerous reasons for imposition of a particular sentence, and it is healthy that they do so in order that all interested persons will know why the court did what it did. But if we adopt the appellant's approach to sentence review under the guidelines, we will be compelled to examine each and every reason mentioned by the trial court. And if, for example, only one of five reasons is found to be wanting, the case will have to be remanded for resentencing, with all of the attendant costs associated therewith including the costs of transporting the prisoner to the sentencing

> court from whatever state corrections institution to which he may have been assigned. Such further erosion of the goal of finality in the criminal judicial process is, in my view, uncalled for.
>
> A further argument advanced by appellant as to why this court should be required to scrutinize every reason stated by the trial court for departing from the guidelines is that a reason which does not receive this court's imprimatur as a clear and convincing reason for departure may, nevertheless, be reflected in the term of years imposed by the court. I would expressly reject that argument. Once it is determined that there was a clear and convincing reason for imposing a sentence under the guidelines, the trial court should be accorded the discretion, which it had prior to the advent of sentencing guidelines, to impose any sentence within the statutory range.
>
> Unless the appellate courts of this state are prepared to take over the sentencing function, we need to be vigilant in resisting various inroads now being urged in the present glut of cases wending their way through our system, which inroads would inexorably lead towards the development of the district courts of appeal as, for all practical purposes, the sentencing courts of this state. I regret the direction the majority has charted for this court. (Emphasis original)

Young v. State, supra, at 553, 554, Nimmons, J., dissenting.

In the case at bar, the trial judge set forth the following written statement of reasons for departing from the guidelines:

> Total background defendant (Δ) shows he is an amoral person feeling he does not have to comply with the law. The guidelines don't make provision for but 4 other felonies at sentencing. They further do not make provision for consideration of the 27 felonies the S/A did not file on. This defendant (Δ) will be a criminal all his life. The longer he is segregated from society the better.

(SR 2). Initially, Petitioner notes that the trial judge,

albeit somewhat illegibly (R 232, 238, 245, 253, 260, 266, 273), complied with the writing requirement of Fla.R.Crim.P. 3.701(d)(11). Consequently, the lower court should not have looked to the record for statements or commentary made by the trial judge during the sentencing proceeding as an additional basis for departure. Where a written statement of reasons has been provided, the reviewing court should look no further--the validity of the departure must necessarily stand or fall upon the written reasons set forth by the trial judge. Had the lower court adhered to this principle, Petitioner respectfully suggests that it would not have found the trial judge's reasons to have been "mired" in a confused record. Indeed, Petitioner submits that the only confusion in the instant record was a result of the illegibility of the written statement, which was cured by the clerk's transcript contained in the supplemental record on appeal (SR 2).

Petitioner further submits that the only invalid reason relied upon by the trial judge was the fact that the guidelines did not make provision for consideration of the 27 felonies the State Attorney did not file on--said reason being clearly precluded from consideration by Fla.R.Crim.P. 3.701(d)(11). The remaining reasons were properly relied upon by the trial judge and formed an adequate basis upon which to predicate departure.

First, as the lower court recognized, the trial judge's finding that Respondent's background demonstrated that he was an amoral person who felt that he did not have

to comply with the law, as well as the trial judge's determination that Respondent would be a criminal all his life and that the longer he is segregated from society the better, were supported by the instant record. Young v. State, supra, at 552. Moreover, these factors were not precluded from consideration by Fla.R.Crim.P. 3.701(d)(11), Weems v. State, supra, and are factors concerning Respondent's criminal history which should legitimately be considered for sentencing purposes. Lockett v. Ohio, supra. See also Manning v. State, supra, at 138, upholding departure predicated upon trial court's finding of "crime binge" and "two-man crime wave"; Kiser v. State, 455 So.2d 1071, 1072 (Fla. 1st DCA 1984), upholding departure predicated upon trial court's finding that defendant's criminal record evidenced total disregard for rights of others and propensity to continue a life of crime. Additionally, consideration of these factors is consistent with a stated purpose of the guidelines that the severity of the sanction should increase with the length and nature of the offender's criminal history, Fla.R.Crim.P. 3.701 (b)(4).

Finally, the fact that the guidelines, at the time of Respondent's sentencing, didn't make provision for but four of the felonies he was convicted of, has been found by the Second District to consitute a valid reason for departure. Russell v. State, ___ So.2d ___ (Fla. 2d DCA 1984), 9 F.L.W. 2361. In addition, consideration of this

factor was not precluded by Fla.R.Crim.P. 3.701(d)(11), and was at least consistent with, if not mandated by, the guidelines' stated purposes that the penalty imposed should be commensurate with the severity of the convicted offense, Fla.R.Crim.P. 3.701(b)(3), and should increase with the length and nature of the offender's criminal history, Fla.R.Crim.P. 3.701(b)(4). For, as Judge Nimmons put it so well:

> I know of no reason why these guidelines ought to be construed to preclude the trial court from relying upon the fact of the seven additional felonies, which were not counted in the scoring, as a clear and convincing reason for imposing a greater sentence than that called for by the guidelines. On the contrary, it would appear to me rather unusual for a trial judge to adhere slavishly to the guidelines sentence knowing that seven felonies committed by the defendant were not scored.

Young v. State, supra, at 553, Nimmons, J., dissenting. See also Smith v. State, 454 So.2d 90, 91 (Fla. 2d DCA 1984), capital felony may be considered as a reason for departing from the guidelines even though Rule 3.988 does not provide a means of scoring it as an additonal offense at conviction.

In sum, the trial judge relied upon valid reasons, as well as one invalid reason, to support his departure from the guidelines and concomitant imposition of sentences within the statutory parameters for the convicted offenses. See Florida Statutes §775.082. Accordingly, the decision of the lower tribunal should be quashed and the judgments and sentence imposed by the trial court should be affirmed.

CONCLUSION

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

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

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

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

Accordingly, Petitioner urges this Court to adopt Judge Nimmons' clear and cogent reasoning as set forth in his dissenting opinion, quash the decision of the lower court, affirm Respondent's judgments and sentences, and answer the certified question as follows:

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

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Kenneth L. Hosford, Assistant Public Defender, 345 Office Plaza, Tallahassee, Florida 32304, this 2nd day of January, 1985.

GREGORY G. COSTAS