IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 66,288
	)	
EDWARD LEE WILLIAMS,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S BRIEF ON THE MERITS

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AUTHORITIES CITED

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PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida and the Appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and Appellee in the lower courts. In this brief, the parties will be referred to by name.

STATEMENT OF THE FACTS

Mr. Williams accepts the Statement of the Facts set out by the state, except that he objects to the somewhat inaccurate characterization that he "hit" Ms. Letts in the back with the ratchet. The pertinent portion of the trial transcript is duplicated below:

> Q What, if anything, happened at that point?
>
> A Then while he was doing that he said I want it all and then he asked me -- he told me to open up the jewelry counters and I opened them up for him and at that time he was hitting me in the back with the ratchet and --
>
> Q Okay, let me stop you right there. How was he -- how was he hitting you in the back with the ratchet?
>
> A He was just pushing it like to hurry me along I guess because he was telling me to hurry and not to scream cause I was trying to scream.
>
> Q Did he cause you pain when he was striking you with the wrench?
>
> A Yeah, I had a slight, you know, pain and bruise on my back. (R 113, emphasis added.)

Mr. Williams also denies that the record shows he hit anyone on the bridge with the ratchet:

> Q What happened then after you got in the vicinity of the park?
>
> A He went straight to the bridge and when he got to the bridge there was two or three people -- ladies on the bridge and he ran into them and then threw the ratchet and the money in the water.
>
> Q What, if anything, did you see him do with the other item that he had in his hand?

A He had -- there was one item, as we were running into the park that fell out of his pocket but we didn't stop to get the item, which later became a pair of socks.

Q Did you see him pass anything to anyone when he ran into the park?

A No, I didn't see him pass anything.

Q What happened at the -- at the bridge?

A When he got to the bridge there was three -- three ladies on the bridge and he ran into one of 'em and then as he hit the one he went over the side with the ratchet and the money that he had in his hand. (R 159-160).

ARGUMENT

POINT I

PRIOR CONVICTIONS WHICH HAVE ALREADY BEEN SCORED IN ARRIVING AT THE GUIDELINES SENTENCE CANNOT CONSTITUTE A CLEAR AND CONVINCING REASON TO DEPART FROM THE SENTENCING GUIDELINES.

The trial judge's reliance in the present case upon the fact that Mr. Williams "has a lengthy history of criminal activity" (R 239) as a reason to depart from the guidelines sentence was improper. The offender's prior record has already been taken into account in the scoring of his sentence, under an explicit category of its own. As observed in State v. Magnan, 328 N.W.2d 147, 149-150 (Minn. 1963):

> Generally the sentencing court cannot rely on a defendant's criminal history as a ground for departure. The Sentencing Guidelines take one's history into account in determining whether or not one has a criminal history score and, if so, what the score should be. Here defendant's criminal history was already taken into account in determining his criminal history score and there is no justification for concluding that a quantitative analysis of the history justifies using it as a ground for departure.

State v. Brusver, 327 N.W.2d 591 (Minn. 1982); State v. Barnes, 313 N.W.2d 1 (Minn. 1981). Furthermore, in State v. Hagen, 317 N.W.2d 701,703 (Minn. 1982), the Minnesota High Court also categorically rejected a trial judge's consideration of a defendant's likelihood of returning to criminal conduct as an aggravating factor. The Court reasoned:

> Such a factor potentially could be subject to serious abuse and logically couldbe used to justify indefinite confinement, something which

> is not permitted by law for any offense other than first-degree murder.

The courts of this State have applied similar analysis in refusing to countenance, for example, the Parole Commission's utilization of an element included within the crime for which sentence was imposed, which consequently formed the basis for computing the offender's presumptive parole release date, as a reason for aggravating that date. Mattingly v. Florida Parole and Probation Commission, 417 So.2d 1163 (Fla. 1st DCA 1982); Jacobson v. Florida Parole and Probation Commission, 407 So.2d 611 (Fla. 1st DCA 1981). See also, Provence v. State 327 So.2d 783, 786 (Fla. 1976), in which this Court held that it was improper to consider the same factor twice in aggravation of a defendant's death sentence. In the sentencing guidelines context, the First District Court of Appeals has recently reached the same conclusion:

> "We agree with appellant that the trial court adopted a number of reasons for departure from the guidelines that are inappropriate, For example, the factors that the robbery was premeditated and calculated and for pecuniary gain" and "[that] there was no provocation [for the robbery]" are, practically speaking, an inherent component of any robbery, and hence may properly be viewed as already embodied in the guidelines recommended sentencing range." Carney v. State 458 So.2d 13, 15 (Fla. 1st DCA 1984).

Patently, if the same factor is used to depart from a guideline sentence as was used to set the guideline sentence in the first place, the exercise of setting a guideline has been rendered nugatory: why bother to carefully calculate a sentencing range based on specific factors, when any trial judge can

then recalculate the entire equation based on exactly the same input? The result of such a process will be to nullify the fundamental purpose of the guidelines, "to eliminate unwarranted variation in the sentencing process." As observed by Judge Sharp n her dissent in Hendrix v. State, 455 So.2d 449, 451 (Fla. 5th DCA 1984):

> "It appears to me that the design of the guidelines implicitly prohibits the second use of a defendant's prior record to further enhance his punishment. If uniformity in sentencing is to be achieved through use of the guidelines, Fla.R.Crim.P. 3.701(b), its mandates and exclusions should control the whole sentencing process. See Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984).
>
> The trial judge in this case thought the presumptive sentence was too light a punishment for this crime and this defendant with his prior record. I agree. However, the degree of punishment afforded by the guidelines, of lack thereof, should not be grounds for enhancement. The basic problem is the generally light punishment programmed as presumptively correct in the guidelines.
>
> The legislature can remedy this problem. However, if in the meantime the courts render the guidelines meaningless by allowing departures in violation of the guidelines rules and mandates, there will be nothing left to remedy. Sentencing guidelines in Florida will become an interesting but failed social experiment, (footnotes omitted)."

The State's argument that the sentencing guidelines do not expressly exclude consideration of prior record as a reason for departure, see also, Hendrix, v. State, supra (majority opinion); Fleming v. State, 456 So.2d 1300 (Fla.2d DCA 1984) is, with all due respect, specious. The guidelines intentionally do not specify what may be used as a reason for departure, in order to

allow maximum flexibility to the sentencing judge. See, Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984), so long as the factors employed are "consistent and not in conflict with the Statement of Purpose". Committee Note, Fla.R.Cr.P. 3.170 (d)(11). But this circumscribed freedom does not mean that all common sense and rationality is cast aside. surely, nothing could be further from the avowed purpose of the sentencing guidelines than to allow their complete circumvention by authorizing trial courts to, in effect, ignore their carefully determined conclusions. It should not be forgotten:

> "The sentencing guidelines were not promulgated for the purpose of benefitting criminal defendants, but to promote uniformity in the punishment meted out to those convicted of the same offense, whose prior conviction records and other relevant factors are comparable. The point apparently disregarded by many as that those defendants choosing to be sentenced in accordance with the sentencing guidelines are required to serve the entire term of their sentences, reduced only by gain time, and are not eligible for parole. On the other hand, those who are not sentenced under the guidelines, although their sentences may initially be for a longer term, will be eligible for parole and may in fact receive an earlier release date than if sentenced under the guidelines. Knight v. State, 455 So.2d 457, 458 (Fla. 1st DCA 1984).

If the guidelines are to survive as originally conceived in this State, they must be interpreted in a manner consistent with their purpose, something which the district courts of appeal have to some extent as yet failed to do. By the Fourth District Court of Appeal's certification of a question in the present case, a vehicle has been given for this Court, the highest in the

State, to "give guidelines for the Guidelines." Davis v. State, 458 So.2d 42,44 (Fla. 4th DCA 1984). By ensuring that only truly "clear and convincing reasons" are upheld to justify a departure from the guidelines sentence, this Court will go a long way to both reducing the number of guidelines appeals as trial and appellate courts come to recognize the proper and necessary limits to departure, and to give life to the beneficial goal of the guidelines, namely, the appearance and actuality of fair and uniform sentencing throughout this State.

POINT II

WHERE CERTAIN OF THE REASONS GIVEN BY THE TRIAL COURT FOR DEPARTURE FROM THE SENTENCING GUIDELINES ARE NOT "CLEAR AND CONVINCING," THE SENTENCE MUST BE REMANDED FOR REDETERMINATION WITHOUT CONSIDERATION OF THE IMPROPER REASONS.

In death penalty cases, this court has repeatedly remanded for reconsideration of the sentence where aggravating circumstances relied on by the trial judge for imposition of the death penalty have been reversed and at least one mitigation factor existed, even though other aggravating factors are left standing. Elledge v. State, 346 So.2d 998 (Fla. 1977). And on a less extreme level, a trial court's determination that a defendant has committed a substantive violation of probation has been reversed, even though technical violations in themselves sufficient to justify revocation remain unchallenged. E.g., Jess v. State, 384 So.2d 328 (Fla. 3rd DCA 1980).

The basis for these decisions is exactly the same. In Elledge, this Court queried:

> "Would the result of the weighing process [leading to imposition of the death sentence] by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial..." 346 So.2d at 1003.

In Jess v. State, the appellate court likewise confessed itself in a quandary as to the trial judge's response had he considered only the legally established violations of probation:

> "We do not know, however, whether the trial judge would have revoked the probation or imposed the same sentence on just that [technical] ground, without consideration of the

> [unproven] burglary. We therefore think it appropriate to remand the cause so that the lower court may now make those considerations." 384 So.2d at 329.

The decision as to what sentence to impose is one with crucial impact on a defendant. Because the trial judge has enormous discretion as to the amount of time to impose, within legal limits, and some discretion as to whether to depart from the sentencing guidelines, it is essential that this discretion be exercised in an informed and proper manner, with consideration only of those factors which are proper. Because it is almost always difficult if not impossible to determine what weight has been given by the trial judge in his sentencing decision to any particular factor, it is imperative that a finding that certain factors considered were improper result in remand for reconsideration of the sentence in light of the correct facts. This remedy has uniformly been allowed in sentencing situations. See, e.g., McEachern v. State, 388 So.2d 244 (Fla. 5th DCA 1980) [defendant penalized for going to trial, case remanded for reconsideration of sentence]; Southall v. State, 353 So.2d 660 (Fla. 2d DCA 1977) [defendant's previous conviction set aside, case remanded for reconsideration of sentence]; Hicks v. State, 336 So.2d 1244 (Fla. 4th DCA 1976) [mistake as to extent of prior record, case remamded for reconsideration of sentence].

In the instant case, the Fourth District Court of Appeal remanded in order for the trial court to reconsider its sentence in light of the incorrectness of certain of its reasons for

departing from the guidelines sentence. See also, Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984). The appellate court in the instant case recognized that many factors go into the sentencing decision which affect both whether a departure is made and, crucially, the extent of that departure. Assuming that the trial judge will impose exactly the same sentence even after being advised that his reasons for setting the original term were improper suggests a cynicism on the part of the trial bench which is surely unwarranted. This is particularly true since, unlike in a death penalty case where no mitigating circumstances exist, or a probation revocation where a finding of one technical violation is reversed but several other technical violataions remain validly proven, there is in a sentencing guideline case no presumption in favor of departure from the guidelines to a specified degree. Rather, it is the propriety of the guideline sentence which is presumed. Fla.R.Crim.P. 3.710(d)(11).

Consequently, it is appropriate that the instant causes be remanded for resentencing, even should some of the reasons for departure from the guidelines be held proper by this Court.

CONCLUSION

Based on the foregoing argument and the authorities cited, Mr. Williams requests that this Court affirm the reversal of his sentence by the District Court of Appeal, and answer the certified question, as follows:

> IF THE GUIDELINES SCORESHEETS MAKE PROVISION FOR PRIOR CONVICTIONS, THOSE CONVICTIONS CANNOT ALSO CONSTITUTE CLEAR AND CONVINCING REASONS FOR AGGRAVATED PUNISHMENT OUTSIDE THE GUIDELINES.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOAN FOWLER ROSSIN, Assistant Attorney General, Counsel for Appellee, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 28th day of January, 1985.

Of Counsel