IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 66,471

GEORGE W. BURCH,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner's brief will be referred to as "PB." Other references will be designated as set forth by the state.

The decision in the First District herein is also currently pending review on conflict grounds in Burch v. State, Case No. 66,493.

II STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts are accepted as substantially accurate, although incomplete. Additional facts are as follows:

On the guidelines scoresheet, respondent scored a total of 47 points [Petitioner scored 20 points for primary offense at conviction plus four points for his grand theft conviction, an additional offense at conviction (R 88-89). Thirteen points were added for two prior convictions (R 90). Also added was 10 points for legal constraint (R 90)], which resulted in a recommended sentence of "community control or 12-30 months incarceration." In deviating from the recommended guideline sentence, the trial judge did not enter a written statement delineating the reasons therefor,[1] but did orally indicate:

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[1] The record reveals that these "reasons" appear as numbers 9,10,26, and 27 of a printed form checklist Judge Hall utilizes for deviating from the guidelines (R 84,90). In his recommendation in the PSI, the assistant state attorney recommended departure based on "Judge Hall's list #10, #17, #26, #27, #28" (R 82). The probation officer completed this form and attached it to the PSI (R 82, 84). Respondent objected to the procedure employed here since the "determination of whether to go above or below the guidelines sentence is one for the Court, not the probation officer. And if anyone is to find clear and convincing reasons to go beyond or below the guidelines, I think that should be the Court, and not the probation officer (R 90-91). The use of such a form appears contrary to the intent of the guidelines. See Saname v. State, 448 So.2d 14 (Fla. 1st DCA 1984): "His incorporation by reference of defense counsel's memorandum regarding sentencing and appellant's presentence investigation in no way cures this deficiency, for to hold that it did would render meaningless the express statutory requirement that the reasons [for retention] be stated with particularity." See also, State v. Park, 305 N.W.2d 775, 776 (Minn. 1981)("Each case must be considered on its own and the mere fact that the agent who prepared the presentence investigation report states that the defendant is not amenable to probation does not necessarily justify departing from the stayed sentence and sending defendant to prison.").

> The basis for departure from the guidelines will be the following factors. First, no pretense of moral or legal justification to justify the commission of this offense. Secondly, in need of correctional rehabilitative treatment that can best be provided by commitment to a penal facility. It appears to me by reviewing this Defendant's record, almost every option that is available under our penal system has been explored and sought to be used. And it's been unsuccessful. His probation history, he's had it revoked once. He has been given probation a number of times and it hasn't worked. And also, his parole circumstance -- which may be a scoring factor and there is some doubts as to the validity of that exception for departure -- but I'm going to go ahead and use it anyway.

(R 99). Respondent's counsel objected to any deviation from the guidelines and specifically argued that the reasons recited by the probation officer and the judge were improper reasons for deviation (R 91,92,93-94,95,96,97,99-101).

With respect to the only reason found proper by the First District Court of Appeal - respondent's prior history of unsuccessful alternatives to commitment in a penal facility, i.e. his previous revocation of probation - respondent's objection was based upon Rule 3.701(d)(5)(c), Florida Rules of Criminal Procedure (1984). The record reveals that respondent was placed on juvenile probation January 2, 1978 (R 78). His probation was violated and he was adjudicated delinquent April 24, 1978 (R 78, see also R 91-92,95,96,100). This juvenile probation revocation, which occurred more than three years prior to the present offense, is the only probation revocation in respondent's "criminal" history.

III SUMMARY OF ARGUMENT

When the trial judge has deviated from the presumptive guideline sentence on the basis of "prohibited" reasons, respondent contends the appellate court must reverse the sentence and remand the cause for reconsideration by the trial judge, the sentencer. When the deviation has been based upon a reason not "clear and convincing," as opposed to a "prohibited" reason, the harmless error doctrine may be applied, but affirmance of the sentence is proper only when the appellate court can ascertain that neither the departure itself nor the extent of the departure was affected by the improper consideration.

Reversal of respondent's sentence was appropriate here since both "prohibited" and reasons not "clear and convincing" were relied upon by the trial judge. Moreover, reversal is appropriate since the sole reason upheld by the District Court is, in fact, a reason impliedly prohibited by the guidelines.

IV ARGUMENT

ISSUE I

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT HAS RELIED ON ONE OR MORE IMPERMISSIBLE REASONS FOR DEPARTING FROM THE SENTENCING GUIDELINES, AND HAS ALSO RELIED ON ONE OR MORE PERMISSIBLE REASONS MAY THE APPELLATE COURT APPLY THE HARMLESS ERROR RULE AND AFFIRM THE SENTENCE?

Respondent submits the certified question cannot be answered dispositively - quite frankly, the answer is "it depends." Where the trial judge has relied upon impermissible prohibited reasons in departing from the presumptive guideline sentence, respondent contends a remand for resentencing is required, without regard to the harmless error doctrine. Where an impermissible, but not prohibited, reason has been utilized, respondent submits that only in limited circumstances, unquestionably not present here,[2] can the appellate court apply the harmless error doctrine to such an error.

Petitioner's basic premise is that the enactment of the sentencing guidelines has, in reality, effectuated absolutely no change in the traditionally broad discretion reposed in Florida's trial judges in sentencing matters. From this premise, petitioner postulates that if one clear and convincing reason for departure exists, any other reasons articulated by the trial judge as clear and convincing ones supporting the departure, even though found

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[2] In departing from the guidelines, the trial judge articulated four reasons as justifying the deviation. The District Court invalidated three of those reasons. As discussed, infra (Issue II), in fact, none of the reasons articulated by the trial court constitutes a clear and convincing reason for departure from the presumptive guideline sentence.

by the appellate court to be improper and impermissible, may be regarded as mere surplusage and the sentence must be affirmed. This reasoning is flawed in at least two respects: firstly, this philosophy totally guts the guidelines rendering their enactment meaningless and the right to appeal afforded by Sections 921.001-(5) and 924.06(1)(e), Florida Statutes (1983) totally illusory; secondly, this philosophy ignores that appellate review has always been available when sentencing has been based upon unreliable or improper factors.

Prior to the enactment of the sentencing guidelines and the concomitant appellate review of sentences imposed outside their presumptive range, it was well-settled that the imposition of a sentence was within the sole discretion of the trial judge so long as the statutory maximum was not exceeded. E.g., Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943); Walker v. State, 44 So.2d 814 (Fla. 1950); Infante v. State, 197 So.2d 542 (Fla. 3d DCA 1967). However, even under that system, sentencing decisions were not immune from appellate scrutiny. Rather, courts of this state did not hesitate to reverse a facially legal sentence where it was apparent that the trial judge based the sentence upon unreliable evidence or upon impermissible factors. E.g., Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979)(defendant's sentence as an habitual offender vacated where trial court relied upon uncorroborated hearsay in determining that extended sentence necessary for protection of the public); McElveen v. State, 440 So.2d 636 (Fla. 1st DCA 1983)(same); Crosby v. State, 429 So.2d

421 (Fla. 1st DCA 1983)(juvenile defendant's sentence as an adult vacated where trial court improperly considered prior arrests not leading to convictions as evidence of guilt); Hector v. State, 370 So.2d 447 (Fla. 1st DCA 1979)(defendant's failure to confess to crime is an improper consideration in imposing a sentence); Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979)(defendant's choice of plea should not have played any part in the determination of his sentence); Owen v. State, 441 So.2d 1111 (Fla. 3d DCA 1983)(retention of jurisdiction reversed where based upon factors irrelevant and inconsistent with jury's verdict); R.A.B. v. State, 399 So.2d 16 (Fla. 3d DCA 1981)(decision to adjudicate juvenile delinquent based upon his assertion of fifth amendment right to remain silent and right to plead not guilty was improper); Fraley v. State, 426 So.2d 983 (Fla. 3d DCA 1983)(sentence which discourages assertion of Fifth Amendment right not to plead guilty and deters exercise of Sixth Amendment right to demand a jury trial is patently unconstitutional); Harden v. State, 428 So.2d 316 (Fla. 4th DCA 1983)(retention of jurisdiction vacated where based upon defendant's failure to confess); McEachern v. State, 388 So.2d 244 (Fla. 5th DCA 1980)(court could not impose a more severe sentence because of the costs and difficulty of proving the state's case); Webb v. State, 454 So.2d 616 (Fla. 5th DCA 1984)(fact that "we" had to bring witnesses from California when forced into trial position improper consideration in sentencing); Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984)(defendant's apparent lack of remorse, his failure to

plead guilty, and trial court's belief that defendant suborned perjury impermissible reasons in sentencing).

The standard of appellate review for guideline departures advocated by petitioner is clearly much too narrow and, in fact, ignores that appellate sentencing scrutiny has never been so superficial. In reviewing a guideline departure, the appellate court cannot merely ascertain if one clear and convincing reason for departure exists. Even assuming arguendo that the enactment of the sentencing guidelines system in no way limits a trial court's sentencing discretion, appellate review of a guideline departure must at a minimum include a determination whether prohibited reasons, such as those condemned by the foregoing cases, have been utilized to any degree. If the trial court's departure has been based, even in part, upon such a condemned factor, appellate reversal of the sentence is mandated, without regard to the harmless error doctrine. As the foregoing cases demonstrate, a trial judge's reliance upon a prohibited factor in sentencing may not be ignored by the appellate court or regarded as mere surplusage. Rather, resentencing is in order.

However, as even petitioner concedes (PB 6-7), the enactment of the sentencing guidelines system has curbed judicial discretion in sentencing at least to some extent. By the enactment of the sentencing guidelines system (and the accompanying development

of caselaw relative thereto), certain factors,[3] by legislative or judicial fiat, have been deemed impermissible and prohibited bases for sentencing decisions. Thus, analogously, when a trial judge has relied upon such a prohibited reason in departing from the presumptive guideline sentence, his improper reliance on such reason taints the entire sentencing process and necessitates an appellate reversal of the sentence without regard to harmless error.

As noted, reasons prohibited by the guidelines themselves fall within two categories: those expressly prohibited and those impliedly prohibited. The express prohibition is that contained in Rule 3.701(d)(11):

> Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.

While the contours of the former rule have been variously defined, e.g. contrast Napoles v. State, 10 FLW 337 (Fla. 1st DCA February 7, 1985) and Callaghan v. State, 10 FLW 8 (Fla. 4th

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[3] The precise delineation of these factors is perhaps beyond the scope of the certified question presented here. As discussed further, infra, respondent submits the factors now condemned by the guidelines fall within two categories: (1) reasons expressly prohibited by Rule 3.701(d)(11) and (2) reasons impliedly prohibited because inconsistent with the guidelines' statement of purpose. While the parameter of prohibited reasons may be subject to appellate debate, in determining the appropriate standard of appellate review, this Court should recognize a distinction between "prohibited" reasons as opposed to reasons which are simply "not clear and convincing" ones. With respect to a departure based, in part, upon a reason "not clear and convincing," rather than a "prohibited" reason, respondent concedes, as discussed infra, that in certain circumstances, the harmless error doctrine may be applied.

DCA December 19, 1984) with Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984) and Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984); it has been uniformly recognized that the rule precludes consideration of factors either relating to prior arrests without conviction or relating to the instant offenses for which convictions have not been obtained. In marked contrast to prior law, see Jansson v. State, 399 So.2d 1061 (Fla. 4th DCA 1981) and Crosby v. State, supra, the trial court is now absolutely prohibited from considering offenses for which the defendant has not been convicted. The second category of prohibited reasons includes those inconsistent with the guidelines' statement of purpose. Quite obviously, race, gender, or social and economic status of the defendant would be a prohibited consideration subsumed within this category. Rule 3.701(b)(1), Fla.R.Cr.P. "Sentencing should be neutral with respect to race, gender, and social and economic status." See Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984)(a sentence should not be aggravated simply on the basis of an individual's employment status). Factors inherent in the crime itself or factors already accounted for in the guideline scoring are impliedly prohibited as well since utilization of these factors is inconsistent with the stated guideline purpose "to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense - and offender - related criteria and in defining their relative importance in the sentencing decision." Rule 3.701(b).

The major impetus for the development of the guidelines

was the desire to eliminate or at least minimize unwarranted variations in sentencing.[4] The mechanism for carrying out the objectives and purposes of the sentencing guidelines is a series of nine categories of offenses graduated according to severity. See Rule 3.701(b)(3): "The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." Each category has five subdivisions, with points assigned to various factors in each subdivision. Rule 3.988. Among the factors for which points are assigned are the defendant's prior record and his legal status at the time of the offense. See Rule 3.701(b)(4). "The severity of the sanction should increase with the length and nature of the offender's criminal history." The total number of points determines the recommended sentencing range and presumptive sentence. The trial judge has discretion to impose and need not explain reasons for imposing any sentence within the range. Rule 3.701(d)(8). While the Rule does not eliminate judicial discretion in sentencing, it does seek to discourage departures from the guidelines. To that end, judges must explain departures in writing and may depart only for reasons that are "clear and convincing." Rule 3.701(b)(6), (d)(11). Moreover, the guidelines direct that departures "should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence." Rule 3.701(d)(11). The guidelines ranges have been constructed on the dual

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

foundations of "current sentencing theory" and "historic sentencing practices" in this state. Since the guideline ranges themselves embody specific offense - related criteria and specific offender-related criteria (i.e. these factors have already been used in setting the proper level of punishment), it would totally emasculate the objectives and purposes of the sentencing guidelines to allow these same factors to serve as a basis for departure. If departures were allowed for these same factors, each individual judge would be given the power to devise his own set of guidelines; a result which would render the guidelines themselves and the right of review of departures a total farce. Napoles v. State, supra; Callaghan v. State, supra; Knowlton v. State, 10 FLW 457 (Fla. 4th DCA February 20,1985).[5]

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[5] Two separate lines of authority in Florida suggest that penal sanctions cannot be increased by counting the same element of behavior more than once in aggravation.

A presumptive parole release date set under Chapter 947 cannot be increased for the same "factors" used in reaching the "salient factor score and severity of offense behavior category." §947.165, Fla.Stat. (1983). In Mattingly v. Fla. Parole and Probation Comm., 417 So.2d 1162 (Fla. 1st DCA 1982), the Court held that the commission's rules did not "permit additional aggravation for factors included in the definition of other convictions already used as aggravating elements."

The other similar sentencing process under Florida law is for capital offenses. §921.141, Fla.Stat. Like guidelines under Rule 3.701, Section 921.141 does not expressly prohibit taking account of the same aspect of behavior for aggravation more than once. Yet in Provence v. State, 337 So.2d 783, 786 (Fla. 1976), this Court did not allow the same conduct to be counted twice, stating:

> The State argues the existence of two aggravating circumstances, that the murder occurred in the commission of the robbery [subsection (d)] and that the crime was committed for pecuniary gain [subsection (f)]. While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts

See also Hendrix v. State, 455 So.2d 449, 451 (Fla. 5th DCA 1984) (Sharp, J., dissenting):

> The guidelines contain specific factors to be weighed in specific cases to arrive at a presumptive sentence range. The defendant's prior record is one of those specified areas ....
>
> It appears to me that the design of the guidelines implicitly prohibits the second use of a defendant's prior record to further enhance

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[5] (Continued)

> and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime.... We believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

[Emphasis supplied].

Decisions of the Minnesota Supreme Court also support the proposition that circumstances used in scoring cannot be used again in aggravation. In State v. Brusven, 327 N.W.2d 591, 593 (Minn. 1982), the Court explained:

> Ordinarily, it is inappropriate for the sentencing court to use as a basis for departure the same facts which are relied upon in determining the presumptive sentence.

Likewise, in State v. Mangan, 328 N.W.2d 147, 149 (Minn. 1983), the rule is stated as:

> 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 qualitative analysis of the history justifies using it as a ground for departure.

See also, State v. Gross, 332 N.W.2d 167 (Minn. 1983); State v. Barnes, 313 N.W.2d 1 (Minn. 1981).

These expressions of limitation on applying aggravating circumstances to a presumptive guideline sentence are in harmony with both the statement of principle in Florida's guidelines, Florida Rule of Criminal Procedure 3.701(b), and with Florida decisions in both the parole and capital sentencing context.

> his punishment.[] If uniformity in sentencing is to be achieved through use of the guidelines, Fla.R.CrimP. 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).
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> 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, or lack thereof, should not be grounds for enhancement. The basic problem is the generally light punishments 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.[3] Sentencing guidelines in Florida will become an interesting but failed social experiment.
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> [3] The paramount goal of the guidelines is to reduce unwarranted disparity in sentencing. Fla.R.Crim.P. 3.701. Thus, the guidelines are designed to insure that similarly situated offenders convicted of similar crimes receive similar sentences. See Sundberg, Plante, Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Fla.St.U.L.Rev. 125 (1983). Similarly situated offenders would not be assured of equal treatment if each trial judge is allowed to sentence an offender based upon his or her ideas or philosophy regarding punishment.

Even under traditional sentencing, a trial judge's reliance upon an impermissible prohibited reason mandated reversal of the facially legal sentence for resentencing, without regard to the harmless error doctrine. It should be readily evident that the enactment of the sentencing guidelines has added certain sentencing factors to the condemned and prohibited category. When a trial judge has departed from the presumptive guideline

sentence based upon such a prohibited reason, the harmless error doctrine should not be applied, but rather reversal of the sentence should be required.[6]

When a trial judge's departure decision has been based, in part, upon a reason which is improper because it is not "clear and convincing"[7] (as opposed to a "prohibited"

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[6] Although respondent disagrees with the analysis employed below, the proper result was reached -- reversal of the sentence. In the present case, reversal was required because at least one of the trial judge's reasons - that respondent was on parole - was an impliedly prohibited one. As discussed supra (Issue II), respondent contends that the sole reason approved by the District Court below is, in fact, an impliedly prohibited one as well.

[7] Two of the reasons articulated by the trial judge here would fall within this category: 1) No pretense of moral or legal justification to justify the commission of this offense and 2) In need of correctional rehabilitative treatment that can best be provided by commitment to a penal facility. The first is unconvincing for a variety of reasons. The record contains no evidence to support the finding. Further, the legislature has indicated the circumstance that "there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense, ... shall be accorded weight in favor of withholding a sentence of imprisonment." §921.005(1)(b)4, Fla.Stat. (1983). This evidences a legislative intent that this fact be treated as a mitigating factor. The absence of a mitigating circumstance, should not be used in aggravation. See Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). Moreover, this "reason" would make deviations the rule, rather than the exception, since in almost every crime, there is "no pretense of moral or legal justification" for its commission. This is particularly true in a crime such as that involved here -- it is difficult to imagine any "moral or legal justification" for a garden-variety burglary of a structure and a theft therein. The second reason fails because the recommended guideline sentence was in fact 12-30 months incarceration in a penal institution. In effect, the stated reason only articulates the trial judge's disagreement with the length of the presumed sentence under the guidelines, a reason repudiated by State v. Bellanger, 304 N.W.2d 282 (Minn. 1981)("General disagreement with the Guidelines or the legislative policy on which the Guidelines are based does not justify departure").

reason),[8] the harmless error doctrine might be properly applied. Respondent contends, however, that the departure sentence based, in part, upon an improper reason can be affirmed only when the appellate court can unequivocally and unmistakably know that the impropriety affected neither the decision to depart nor the length of the departure. In that circumstance, the appellate court can affirm the sentence without remanding the cause for reconsideration by the sentencer.

The standard of appellate review advocated by petitioner (which, admittedly also attracts the Second and Fifth District Courts of Appeal) is clearly an aberrant form of the harmless error doctrine and one finding no support in precedent. This per se harmless error rule totally ignores that the sentencing body in Florida is the trial judge. It is the trial judge who must decide whether to depart from the presumptive guideline sentence and he must decide the extent of departure. Under the guidelines, the decision to depart must be based upon "clear and convincing" reasons. When the trial court has departed from the guidelines based upon reasons which the appellate court determines to be insufficiently clear and convincing, the trial judge should be given the opportunity to reevaluate his decision. Despite the omniscience attributed to them by petitioner, the appellate courts

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[8] Thomas v. State, 461 So.2d 234 (Fla. 1st DCA 1984) recognizes the distinction between "prohibited" reasons (therein termed "facially impermissible") and reasons simply not "clear and convincing" given the facts of the case. The harmless error analysis was not applied therein, however, since none of the reasons given were clear and convincing or showed why the defendant should receive a more severe sentence than that recommended by the guidelines.

cannot presume as a matter of law (or fact) that the improper reasons, specifically articulated by the trial judge as a basis for the sentence, did not contribute to the trial judge's decision to depart or to the extent of his departure.

The decision to revoke probation has always been regarded as a highly discretionary one. Nevertheless, the appellate courts have reversed revocation orders and remanded the cause for reconsideration when the decision to revoke has been based, in part, upon an improper ground. E.g. Watts v. State, 410 So.2d 600, 601 (Fla. 1st DCA 1982)("We are unable to determine, however, whether the trial judge would have revoked probation and imposed the same sentence without a violation of Condition 4 and must reverse the order of revocation and remand this cause to the trial judge for such redetermination as may be warranted."); Aaron v. State, 400 So.2d 1033, 1035 (Fla. 3d DCA 1981)("[S]ince we do not know whether the trial court would have revoked his probation under the remaining grounds or whether the trial court would have imposed the remaining portion of the term of imprisonment; we reverse the judgment and sentence and remand the cause to the trial court, as we did in Jess v. State, 384 So.2d 328 (Fla. 3d DCA 1980), to make such findings and determinations and then to re-sentence the defendant as it is so advised."); Clemons v. State, 388 So.2d 639, 640 (Fla. 2d DCA 1980)("Accordingly, we reverse the order of revocation and remand the cause to permit the court to consider whether the violation of condition 1 warrants revocation."); Peterson v. State, 384 So.2d 965, 966

(Fla. 1st DCA 1980)("We are unsure as to whether the trial court would have revoked appellant's probation in this case and imposed the same sentence for the sole reason that appellant failed to be gainfully employed during certain months of 1977 and 1978. Therefore, we decline to uphold the probation revocation on that ground alone and instead remand for further consideration."); Page v. State, 363 So.2d 621, 622 (Fla. 1st DCA 1978)("We do not know if the trial court would revoke probation and impose the same sentence for the sole reason that Page failed to file timely monthly reports. We, therefore, reverse and remand for proceedings consistent with this opinion."); McKeever v. State, 359 So.2d 905, 906 (Fla. 2d DCA 1978)("While it is undisputed that appellant violated the terms of his probation by failing to file monthly reports and failing to make monthly payments, we are uncertain whether the trial court would have revoked probation and imposed the sentence it did solely on those grounds. Accordingly, the order of revocation is reversed and the cause is remanded for further proceedings."). The courts refused to indulge in the precarious presumption that the improper findings could be regarded as mere surplusage, affecting neither the decision to revoke nor the sentence imposed. Rather, these decisions reflect a proper application of the harmless error doctrine. When the appellate court can know that neither the decision to revoke nor the sentence was affected by the erroneous findings, the error is harmless and the cause properly affirmed. E.g. Sampson v. State, 375 So.2d 325 (Fla. 2d DCA 1979)(trial judge's

remarks at sentencing explicitly reveal that decision to revoke and sentence imposed would be unaffected by invalidity of one of reasons); Scherer v. State, 366 So.2d 840 (Fla. 2d DCA 1979) (remand not necessary where improper reason merely technical and revocation supported by other substantial violations, including commission of subsequent crime). When this determination cannot be made, a remand for reconsideration by the trial court is required.

A similar standard of review should apply to guideline departures. A sentence based, in part, upon improper (but not prohibited) grounds for deviation should not be affirmed unless the appellate court can determine that the improper grounds did not contribute to the decision to depart or to the actual sentence imposed.[9] Properly applied, the harmless error doctrine would support affirmance of a deviated sentence, without necessity of a remand for reconsideration by the sentencer, in only a limited number of cases - only when it is unequivocally clear that the erroneous reasons did not contribute to the sentence imposed by the trial judge. Any broader approach would result in appellate sentencing - the appellate court second-guessing the trial judge. The sentence recommended by the guidelines must be considered the

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

presumptively correct one. When a trial judge has imposed a sentence departing therefrom that decision has presumingly been based upon the reasons he has articulated - that due to these extraordinary factors, the presumptive guideline sentence is inappropriate. When certain of those factors have been deemed inappropriate by the appellate court, it should be exceedingly difficult to conclude that the trial judge would have departed, and to the same extent, had he known that many of the factors he found so significant (obviously so, since he is the one who articulated them) were improper ones.

In the present case, the First District properly ordered a remand for reconsideration of the sentence by the trial judge. Of the four reasons articulated by the trial judge as the basis for departure, the appellate court correctly found three of them to be improper. Even assuming the validity of the remaining reasons, it is impossible to determine whether or not the trial judge would have departed based solely on that reason. Likewise, it is impossible to ascertain whether the extent of departure would have been the same had the trial judge known that only one of the multitude of "clear and convincing" reasons for departure he found was proper. Clearly, the harmless error doctrine cannot be applied in these circumstances and reversal was therefore appropriate.[10] In that regard, the decision of the First District should be affirmed.

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[10] As argued, supra, since the trial judge relied upon a "prohibited" reason, reversal is required in any event, without regard to the harmless error doctrine.

ISSUE II

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE IN EXCESS OF THE SENTENCING GUIDELINES SINCE THE ARTICULATED REASONS FOR DEPARTURE WERE NEITHER CLEAR AND CONVINCING NOR BASED UPON EVIDENCE.

As respondent has demonstrated, supra (see n.5 and n.7), the District Court correctly invalidated three of the four reasons articulated by the trial court. The District Court found the following reason valid:

> Prior history of unsuccessful alternatives to commitment in a penal facility; i.e. previous revocation of probation.

Respondent contends this conclusion is erroneous, and accordingly, his sentence should be reversed and the cause remanded for imposition of a guideline sentence since none of the reasons found here are clear and convincing. Thomas v. State, supra; Knowlton v. State, 10 FLW 457 (Fla. 4th DCA February 20, 1985); Callaghan v. State, supra. The record reveals that respondent was placed on juvenile probation January 2, 1978 (R 78). His probation was violated and he was adjudicated delinquent April 24, 1978 (R 78, see also R 91-92,95,96,100). Since this offense occurred more than three years prior to his present conviction, respondent contends his past juvenile history cannot be used as an aggravating circumstance. Under Rule 3.701(d)(5)(c), prior juvenile dispositions are treated as prior convictions for the purpose of scoring the offender's prior record. [This appears to be a significant change because traditionally juvenile adjudications have been held not to constitute a conviction of a crime. See,

Jackson v. State, 336 So.2d 633 (Fla. 4th DCA 1976).] However, this rule expressly precludes consideration of juvenile dispositions occurring more than three years prior to the current conviction. See also, Committee Note (d)(5):

> Juvenile dispositions, with the exclusion of status offenses, are included and considered along with adult convictions by operation of this provision. However, each separate adjudication is discharged from consideration if three (3) years have passed between the date of disposition and the conviction of the instant offense.

[Emphasis supplied.] It is respondent's contention that since ancient juvenile adjudications are 'discharged from consideration," these discharged events may not then be utilized as a basis for aggravating a guideline sentence.[11] See, Falvey, Defense Perspectives on the Minnesota Sentencing Guidelines, 5 Hamline L. Rev. 257, 263 (1982)("Prior to the adoption of the Sentencing Guidelines, judges had a great deal of discretion as to whether an offender's juvenile record would become a factor in the sentencing determination. This discretion has been eliminated by the Guidelines . . . ."). As in Minnesota, Rule 3.701(d)(5)(c) severely limits consideration of ancient juvenile offenses. Since these offenses cannot be scored, they should not be a basis for

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[11] To allow deviation on this basis would permit the trial judge "to do through the back door that which he could not do through the front." Even had this ancient offense been scored, it would have added only 1 point, which would not have increased the presumptive sentence. See, State v. Barnes, 313 N.W.2d 1 (Minn. 1981) at 2. Even if the evidence could be deemed strong, that alone would not justify the tacking on of an additional 24 months because it is clear that even if defendant had an actual prior felony conviction for a prostitution-related offense, that would only add one point to his criminal history score and 3 months to his presumptive sentence."

aggravation.[12] Since respondent's probation revocation occurred when he was a juvenile and occurred more than five years ago, this factor is not a proper basis for aggravation.[13] In upholding this reason, the First District relied upon the decision of Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), pending review Case No. 65,593. Therein, the district court stated:

> The fact that appellant's juvenile record cannot be considered in calculating the applicable sentencing range does not mean that it cannot be considered by the court as a reason for departing from the guidelines. The only limitation on reasons for deviating from the guidelines is found in subsection (d)(11).... There is nothing in rule 3.701 to suggest that matters excluded for purposes of guideline computation cannot be considered as reasons for departure from the guidelines.

Id. at 1029. The Weems conclusion is directly contrary to that expressed in Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984). In Harvey, the Fourth District held that:

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[12] The absence of any affirmative indication that these "discharged" offenses may be considered in aggravation also indicates that the contrary was intended. For example, in establishing a PPRD, specific rules preclude juvenile status offenses or ancient criminal offenses from being counted on the salient factor scoring. Rule 23-21.07(1)(c) and (h), Florida Administrative Code. Those rules specifically provide, however, that "this shall not prevent consideration of such behavior as a negative indicant of parole prognosis." Since the guideline rule contains no such proviso, it is logical to presume that the "discharge" intended is absolute.

[13] Further, respondent's prior failure on probation is totally irrelevant. Respondent is not seeking probation. His nonamenability to probation does not justify a departure. State v. Gross, 332 N.W.2d 167 (Minn. 1983)(nonamenability to probation although a ground for a dispositional departure, i.e. execution of a sentence rather than a stayed sentence, is not a proper ground for a durational departure).

> [P]ast criminal conduct which cannot be considered in computing the scoresheet cannot be relied upon as justification for departure from the guidelines.

Id. at 928.

For the reasons discussed, respondent contends the Harvey approach is the more logical one. Weems is erroneously premised upon the theory that the only limitation on departures is for offenses for which convictions have not been obtained. As discussed, supra, and as now recognized by at least the First and Fourth District Courts, the guidelines themselves impliedly prohibit, as well, other considerations from being "clear and convincing" reasons for departure. With respect to ancient juvenile adjudications particularly, it is readily apparent that the prohibition against their use in scoring was based upon a policy decision that such ancient adjudications were simply not relevant to the sentencing decision.[14] To allow this irrelevant factor to then serve

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[14] The lack of relevancy of remote convictions has been recognized by courts of this state. E.g., Braswell v. State, 306 So.2d 609 (Fla. 1st DCA 1975), cert. denied, 328 So.2d 845 (Fla. 1976); Kelly v. State, 311 So.2d 124 (Fla. 3d DCA 1975). In Braswell, the court recognized that a remote conviction cannot be utilized to impeach a criminal defendant testifying in his own behalf. Therein, the defendant's conviction was reversed because a twenty-four year old larceny conviction in a military summary court martial proceeding was utilized to impeach him. Quoting Winn v. State, 54 Tex.Cr. 538, 113 S.W. 918 (1908), the noted:

> Testimony of this character [prior convictions] after a long lapse of years should not have introduced, where there was nothing in the record to show that defendant has not reformed. In other words, the law will not permit the early indiscretions of a witness to be brought into requisition to besmirch his subsequent life. To do so, as expressed by Judge Greenlief, ... would be to

as a basis for a deviation (here, the sole basis) would indeed be an anomaly.

Respondent contends therefore that none of the trial judge's stated reasons constitute "clear and convincing" reasons justifying departure from the recommended sentence. His sentence must be reversed and the cause remanded for entry of a sentence within the guidelines.

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[14] (Continued)

> preclude any possible chance of a reform, and would enable state's counsel to parade the early misdeeds of a subsequently useful life, to be introduced to becloud and discredit the subsequently honorable and useful life.

Id. at 613. [It has been suggested that the Braswell bar of the use of remote convictions for impeachment purposes retains its validity under the evidence code since Section 90.610, Florida Statutes (1981) is not in specific conflict with the common law, see Section 90.102, Florida Statutes (1981), and repeal by implication is not favored. Ehrhardt, Using Convictions to Impeach under the Florida Evidence Code, 10 Fla.S.U.L.Rev. 235, 246-247 (1982)].

V CONCLUSION

For the reasons set forth, respondent seeks reversal of his departure sentence and a remand for sentencing within the recommended guideline range.

Respectfully submitted,

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SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by ~~hand delivery~~ U.S. mail to Assistant Attorney General Gary Printy, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to respondent, George W. Burch, c/o Leon County Jail, 2825 Municipal Way, Tallahassee, Florida 32304 on this 11th day of March, 1985.

GLENNA JOYCE REEVES