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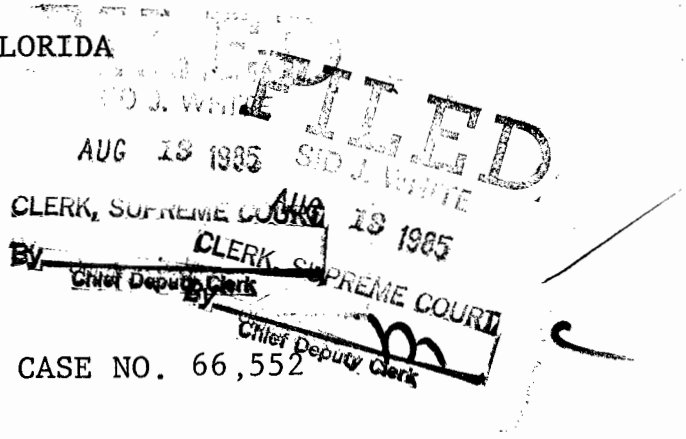
IN THE

SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner/Cross-Respondent,

vs.

CASE NO. 66,552

HERMAN JOHNSON, JR.,

Respondent/Cross-Petitioner.

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PETITIONER'S REPLY BRIEF ON THE MERITS
CROSS-RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS
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PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority in the trial court and the appellee in the First District Court of Appeal, will be referred to as "Petitioner," "Cross-Respondent" or "the State." Herman Johnson, Jr., the criminal defendant in the trial court and the appellant in the First District Court of Appeal, will be referred to as "Respondent," or "Cross-Petitioner."

The record on appeal consists of three volumes consecutively paginated and contains various transcripts and docket instruments. References thereto will be designated by "R" followed by the appropriate page number and enclosed in parentheses.

STATEMENT OF THE CASE AND FACTS

For purposes of responding to the issues raised in the Cross-Petitioner's Initial Brief on the Merits, the Petitioner/Cross-Respondent adopts its statement of the case and facts as set out in Petitioner's Initial Brief on the Merits.

SUMMARY OF ARGUMENT

The State asserts that, as to Issue I, despite the fact that the trial court complied with the First District's mandate requiring the court to reduce its oral reasons for departure to writing, the issue is still a viable one inasmuch as the district court's holding conflicts with other district courts and will continue to be followed by the trial courts within the First District's jurisdiction until the issue is resolved. As a result, the issue presented is one of great public importance and continuing conflict, requiring resolution by this Court.

With regard to Issue II, it is the State's position that there is no requirement that a knowing and intelligent election to be sentenced pursuant to the guidelines appear in the record because there is no recognized right to parole. As a stragetic decision, an election can be announced by counsel and is binding upon the accused. Furthermore, because the election was not challenged in the trial court, it cannot be challenged for the first time on direct appeal.

Finally, as to Issue III, the State contends that the reasons for departure are clear and convincing and that the extent of the court's departure is not subject to appellate review.

ARGUMENT

ISSUE I

THE DISTRICT COURT ERRED IN HOLDING THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DEPARTING FROM THE GUIDELINES WITHOUT REDUCING THE REASONS FOR DEPARTURE TO WRITING.

Respondent asserts that because the trial court, in compliance with a mandate issued by the First District Court of Appeal, has entered an order setting forth in writing its previous, orally stated reasons for departure, the issue raised by the State sub judice is moot. In support of this argument, the respondent cites Pace v. King, 38 So.2d 823 (Fla. 1949), and contends that because the resolution of the instant issue will allegedly have no practical impact upon the parties hereto, this Court should decline to reach the issue presented.

The State responds first that this Court has already decided the question of jurisdiction on this particular issue in favor of the State. Moreover, the fact that the trial court has reduced its oral reasons for departure to writing does not render the instant issue moot. Article V, § 3(b)(3), Fla. Const., provides that the supreme court:

> May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(Emphasis supplied). Thus, simply because the trial court has

followed the mandate of the district court does not erase the fact that the district court's decision, from which that mandate emanated, "expressly and directly conflicts with a decision of another district court of appeal," and, but for that district court's conflicting opinion, the mandate directing the trial court to reduce its reasons for departure to writing would never have been issued. As a result, the instant issue is not moot at all, but, rather, remains quite viable inasmuch as it still represents a decision in conflict with several opinions of other district courts and, as such, continues to warrant the consideration of this Court on its merits.

Even if this Court were to conclude that the instant issue is moot because of the trial court's action, "the rule is settled that although questions raised in a litigated case may before their adjudication in due course become moot insofar as they affect that case, the court is warranted in adjudicating them if they are of great public import and the real merits of the controversy are unsettled." Sadowski v. Shevin, 345 So.2d 330 (Fla. 1977); Tau Alpha Holding Corp. v. Board of Adjustments of City of Gainesville, 171 So 819, 820 (Fla. 1937). In the instant case, the question presented is both one of great public import and one in which the real merits have not been settled. As a result, the issue is still a viable one worthy of this Court's consideration.

As to the merits of the instant issue, the Petitioner stands on its previous argument as set forth in its initial brief on the merits.

ISSUE II

WHEN IT IS NOT REQUIRED THAT A KNOWING AND INTELLIGENT ELECTION TO BE SENTENCED PURSUANT TO THE GUIDELINES BE MADE TO AFFIRMATIVELY APPEAR IN THE RECORD, AND THAT ELECTION WAS NOT CHALLENGED IN THE TRIAL COURT, IT CANNOT BE CHALLENGED FOR THE FIRST TIME ON DIRECT APPEAL.

Cross-petitioner correctly states that this very same issue is currently pending in this Court in several cases, including Cochran v. State, No. 66,388 and Brown v. State, No. 66, 921.[1] As a result, cross-petitioner incorporates as if fully set forth in his brief the arguments made in the initial and reply briefs of the petitioner on the merits in Cochran and the initial brief of petitioner on the merits in Brown.

In response, cross-respondent can only reproduce for this Court, with some modification where the facts of the instant case must be substituted to make the argument relevant, the Respondent's Brief on the Merits in Cochran v. State, which argument cross-respondent adopts as its position, sub judice. That argument is as follows:

Cross-petitioner tried to challenge, for the first time on direct appeal, his election to be sentenced under the sentencing guidelines, Fla.R.Crim.P. 3.701. This challenge was predicated upon the argument that his election constituted a waiver of protection from ex post facto application of the guidelines, requiring

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1. Other cases in which this exact issue is pending in this Court are Gage v. State, No. 66,389 and Marquez v. State, No. 66,827.

a showing that the waiver was knowingly and intelligently made. There is no indication in the record that cross-petitioner moved the trial court to withdraw his election on these or any other grounds.

In essence, cross-petitioner is asking this Court to presume that defense counsel never informed him that one of the hazards of electing to be sentenced under the guidelines was that he would be ineligible for parole if the judge deviated from the guidelines by imposing a non-presumptive sentence.[2] The record reveals such a presumption is mere conjecture and reversible error cannot be predicated upon conjecture. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974).

Cross-petitioner relies upon State v. Williams, 397 So.2d 663 (Fla. 1981) for the proposition that application of the retention statute (Fla. Stat. § 947.16) to persons whose crimes occurred before the act became effective was proscribed by the prohibition against ex post facto laws. However, it has also been held that ex post facto application of section 947.16 is not fundamental error and objection must be made at trial to preserve the issue for appellate review. Fredericks v. State, 440 So.2d 433 (Fla. 1st DCA 1983); Springfield v. State, 443 So.2d 484 (Fla. 2d DCA 1983); Mobley v. State, 447 So.2d 328 (Fla. 2d DCA 1984). Likewise, if cross-petitioner is to be afforded review of the voluntariness of his election, then the issue must have been properly preserved in

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2. Cf. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), footnote 3, at 27 L.Ed.2d 166.

the trial court.

Cross-petitioner also cites Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), Peak v. State, 399 So.2d 1043 (Fla. 5th DCA 1981), Williams v. State, 316 So.2d 267 (Fla. 1975), and State v. Green, 421 So.2d 508(Fla. 1982), cases which hold that a defendant who enters a plea of guilty must be informed of andunderstand his eligibility for parole, and argues that a judge should make a similar set of inquiries to a defendant to assess the voluntariness of a sentencing election. This analogy is faulty in that this Court has mandated that specific inquiries be made in the former instance but not in the latter. See Fla.R. Crim.P. 3.172 and 3.701; In Re: Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983). If this Court had intended that inquiries be made to assess the voluntariness of a defendant's sentencing election, it would have said so. Moreover, the courts in the above cases recognized the need to preserve the issue for review.[3] In the face of a silent record, it is unreasonable to assume that trial counsel was ignorant of the law.

In the instant case, both the trial court and trial counsel went to great pains to ensure that the cross-petitioner understood the consequences of his election:

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3. Carnley v. Cochran, 369 U.S. 508, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962), also relied upon by petitioner, addressed the issue of waiver of the right to assistance of counsel. Here again, unlike Rule 3.701, Fla.R.Crim.P. 3.111 and 3.130 require an affirmative showing of a knowing and intelligent waiver.

Sentencing guidelines became effective October 1, 1983. You have the option to elect to be sentenced under the sentencing guidelines in both cases or decline or waive that right. I have been informed by your attorney that you wish to opt for the election to be sentenced under the guidelines; is that correct, sir?

THE DEFENDANT: Yes, sir.

THE COURT: There is a form that I have asked that defendant's [sic] go over with their attorneys and Mrs. Faircloth, do you have one for each case, please.

Have you had an opportunity to review that form?

[Defense counsel]: No, I have not, Your Honor.

THE COURT: Let's allow you some time to go over the form with him and would you fill in the blanks citing both cases and electing to be sentenced under those guidelines.

[Defense counsel]: Why don't I read it in open court.

THE COURT: I prefer you spend some time with your client and come back and advise me that he fully understands it and let me ask him questions about it.

[Defense counsel]: Okay. We'll go in the juryroom.

(Recess.

(Upon Resuming.

[Defense counsel]: I have discussed the election to be sentenced under the sentencing guidelines with Mr. Johnson and he has acknowledge [sic] to me that he wishes to continue his previous request to be sentenced according to those guidelines. He has not yet signed it because of the apparent need for a notary.

THE COURT: Would you raise your right hand, please.

(Defendant Sworn.

THE COURT: Mr. Johnson, you've heard the announcement of your attorney. Is that your desire?

THE DEFENDANT: Yes, sir.

THE COURT: If you can freely and voluntarily do so would you please sign that document.

(R 141-143).

It is the duty of the defense attorney to insure that a guilty plea is entered voluntarily and knowingly. United States v. Crook, 607 F.2d 670 (5th Cir. 1979); Bradbury v. Wainwright, 658 F.2d 1083 (5th Cir. 1981). It should be presumed that cross-petitioner's counsel acted in a professional manner, sub judice, by apprising him of the consequences of electing to be sentenced under the guidelines.

Given that neither Florida Statute § 921.001 nor Fla.R.Crim.P. 3.701 require that a knowing and intelligent election be made to appear in the record, cross-petitioner should not be heard to assert as reversible error the silence of a record concerning issues he never raised. See Richardson v. State, 247 So.2d 296 (Fla. 1971) where this Court held that a defendant who is unhappy with the results of a criminal proceeding at which he did not request the making of a record, should not be granted a new trial on the ground that no record was made. See also Rose v. State, 461 So.2d 84 (Fla. 1984), where it was held that a contemporaneous objection is necessary to preserve an issue for appeal of a sentencing error in a capital case.

Even if this Court were to review cross-petitioner's claim on the merits, it should affirm the lower court's decision. The

First District has correctly held that the "affirmative election" provided under the sentencing guidelines is qualitatively different from the "knowing and intelligent waiver" involved in cases where constitutional rights are at stake. Williams v. State, 454 So.2d 751 (Fla. 1st DCA 1984); Jones v. State, 459 So.2d 1151 (Fla. 1st DCA 1984), Coates v. State, 458 So.2d 1219 (Fla. 1st DCA 1984). Petitioner's argument that his "right" to parole must be knowingly and intelligently waived on the record is based on a false premise.

In Greenholtz v. Inmates at the Nebraska Penal and Correctional Complex, 442 U.S. 1, 60 L.Ed.2d 668 (1979), the Court reaffirmed its previous holding that there is no constitutional right to parole, and that the question of whether a state statute provides a protectable entitlement was one to be resolved on a case by case basis. Accordingly, Florida inmates have no right to release on parole. Daniels v. Parole and Probation Commission, 401 So.2d 1351 (Fla. 1st DCA 1981); Staton v. Wainwright, 665 F.2d 686 (5th Cir. 1982), cert. denied, 72 L.Ed.2d 166; Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla. 1974), cert. denied, 41 L.Ed.2d 239. Parole is not a termination of sentence or completion of sentence-it is merely a means for serving out the "balance" of a sentence outside the prison walls. Marsh v. Garwood, 65 So.2d 15 (Fla. 1953). Thus, a parolee can file habeas corpus petitions because he is in custody, not at liberty. Because of this, a waiver of parole is distinguishable from a waiver of a constitutional right. Boykin v. Alabama, supra.

Courts have refused to find "due process" (U.S.C.A. Const. Amends. 5, 14) violations in cases where parole interviews were untimely held, see Staton v. Wainwright, supra; and where prisoners have not been given notice of rule changes affecting presumptive parole release dates, see Woulard v. Florida Parole and Probation Commission, 426 So.2d 66 (Fla. 1st DCA 1983); Hunter v. Florida Parole and Probation Commission, 674 F.2d 847 (11th Cir. 1982). Had cross-petitioner been given a sentence entitling him to parole consideration, his only "right" would be a right to consideration itself, not parole, Moore v. Florida Parole and Probation Commission, supra, because the actual granting of parole is purely discretionary. Gaines v. Florida Parole and Probation Commission, 463 So.2d 1181 (Fla. 4th DCA 1985)

While it is undisputed that defendants may waive even constitutional rights, this must be distinguished from the waiver of a lesser right or privilege. "Waiver" is characterized as a voluntary or intentional relinquishment of a known right, an essentially unilateral act. 92 C.J.S. Waiver, pages 1041-1049, 1053-1055 and 1061-1062. See also Gilman v. Butzloff, 22 So.2d 263 (Fla. 1945). Of course, prisoners have a statutory right to be interviewed periodically and evaluated for parole, but this right may be waived either expressly or impliedly, by conduct or acquiescence. See Op. Att'y Gen. Fla. 078-29 (1978).

Assuming that a defendant may waive even a constitutional right, the question arises as to whether this "waiver" is sufficiently evidenced by an affirmative election, announced by

counsel, or whether further inquiry is required. In Wainwright v. Sykes, 433 U.S. 72 (1972), the ability of trial counsel to make and announce strategic decisions of, by and for his client was recognized. Similarly, in Castor v. State, 365 So.2d 406 (Fla. 1978); McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971) and Ray v. State, 403 So.2d 956 (Fla. 1981) it was held that because defendants are bound by the acts of counsel, they cannot challenge judicial acts done at counsel's request. In other words, defendants should not be free to exercise one strategic move at trial and then, if dissatisfied with the result, challenge it on appeal. Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968); Estelle v. Williams, 425 U.S. 501 (1976). In the instant case, defense counsel announced that cross-petitioner had affirmatively elected guidelines sentencing. (R 142). Since it must be assumed that defense counsel was competent, it follows that cross-petitioner was told there was no possibility of parole if a non-guidelines sentence was imposed.

Therefore, cross-petitioner elected guidelines sentencing with a complete understanding that he was sacrificing any statutory right to parole. Counsel announced this affirmative election on the record, and the court had an absolute right to act on this representation in the cross-petitioner's presence.

In summary, cross-respondent submits that this question was not properly before the First District Court of Appeal because of cross-petitioner's failure to object to the alleged sentencing error at the hearing. Rose v. State, supra; State v. Barber, 301 So.2d 7 (Fla. 1974). However, should this Court find it necessary to

review this cause on the merits, cross-respondent submits that the certified question must be answered in a manner consistent with the First District's declaration:

> (1) An election to accept guidelines sentencing is qualitatively different from a knowing and intelligent "waiver" of a "right" since no right is being waived as a result of the election.
>
> (2) Since this is not a "waiver" per se, but rather a strategic decision, counsel's announcement of this strategic choice is:
>
> (a) presumptively the result of competent advice to the client, and
>
> (b) binding upon the client.
>
> (3) There is no requirement that the court look behind the pronouncement of counsel and inquire of the defendant the "knowing" and "intelligent" nature of his strategic decision.

See Moore v. State, 455 So.2d 535 (Fla. 1st DCA 1984).

ISSUE III

THE TRIAL COURT'S DEPARTURE FROM THE RECOMMENDED SENTENCING GUIDELINES SENTENCE WAS BASED UPON CLEAR AND CONVINCING REASONS AND WAS OTHERWISE PROPER.

Cross-petitioner asserts that the district court erred in approving the reasons assigned by the trial court as a basis for departure from the recommended guidelines sentence. Specifically, cross-petitioner asserts that the reasons for departure were not clear and convincing and were improperly considered.[4]

Cross-petitioner looks first to what he calls "perhaps the major factor recited by the trial court for deviating from the guidelines," i.e., that persons in addition to the victim were placed in "fear"[5] as a result of cross-petitioner's conduct. It is the cross-petitioner's contention that this reason was not a

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4. Cross-petitioner begins this issue by noting the method by which cross-petitioner's offenses were scored and suggesting that the method utilized was improper, causing the cross-petitioner's presumptive sentence to be 7 to 9 years as opposed to the allegedly proper 5 1/2 to 7 years. In response, the State asserts that cross-petitioner is raising this point for the first time and did not object to the alleged scoring error below. As a result, he cannot now be heard to complain. However, assuming this Court considers this point, inasmuch as the guidelines allow for the scoring of multiple counts of a "primary offense," whether the trial court's scoring method was error depends upon how strictly the rule is construed. Finally, even if the trial court did err, the error is clearly harmless given the fact that the court imposed a life sentence.

5. Cross-petitioner states that the court's reason for departure was that persons other than the victim were "placed in fear." However, at no time does the trial court use the phrase "placed in fear;" rather, the court states that the cross-petitioner's conduct (in using a firearm) placed "innocent parties" in "extreme danger" (R 150), which the State submits is an altogether different statement.

proper basis for departure because cross-petitioner's conduct of pointing a firearm at persons other than the victim amounted to aggravated assault for which cross-petitioner was never charged and was, thus, a factor relating to the instant offense for which a conviction had not been obtained.

This argument, however, presumes that the "placing in fear" phrase is an accurate characterization of the trial court's basis for departure, and as noted previously, such an interpretation is not accurate. Rather, the court simply stated that the cross-petitioner's actions placed innocent people in "extreme danger." Thus, because the court did not rely for departure upon the cross-petitioner's "placing in fear" of persons other than the victim, the "fear" element being necessary to prove aggravated assault, cross-petitioner's argument has no merit.

Moreover, whichever interpretation is accepted by this Court, it is submitted that cross-petitioner's argument overlooks Fla.R.Crim.P. 3.701(b)(3) which provides that the "penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." Clearly, the act of the cross-petitioner and his co-defendant in pointing a firearm at Winn Dixie employees Edwards and Leuck was a "circumstance surrounding the offense"of armed robbery for which cross-petitioner was convicted and, thus, was a factor properly considered by the trial court in departing.

In this vein, the State urges this Court to adopt the rationale of the First District in Garcia v. State, 454 So.2d 714 (Fla.

1st DCA 1984). There, the defendants argued that nothing that had occurred during the entire criminal episode (robbery and subsequent apprehension) could be considered by the trial judge as justifying a departure from the guidelines unless a conviction for a specific offense resulted. Relying upon Rule 3.701(b)(3), the First District rejected this interpretation of Rule 3.701(d)(11) and held:

> In our view the traditional discretion of a sentencing court to consider all facts and circumstances surrounding the criminal conduct of the accused has not been abrogated by adoption of the sentencing guidelines. Our interpretation is supported by the language found within the guidelines themselves, as well as their underlying rationale . . .. Indeed, the intended function of the guidelines is reflected in Florida Rules of Criminal Procedure 3.701(b)(3): 'The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense. (Emphasis supplied).'

Id. at 716-717. See also Smith v. State, 454 So.2d 90, 91 (Fla. 2d DCA 1984) where the court held that Rule 3.701(d)(11) "did not prohibit the [trial] court from considering aggravating circumstances and actions of the accused in the commission of the offense . . ."

As another reason for departure, the trial court cited the substantial amount of money taken. Cross-petitioner asserts that this reason was not a proper one because most, if not all, of the money was recovered, and the taking of something of value is an element of robbery already contemplated in setting the presumptive sentence and cannot be considered again as a basis for departure.

However, the trial court was not simply relying upon the fact that money, which is something of value, was taken, but rather the court was considering the large amount of money involved, in this case, $13,000.. Thus, just as the use of excessive force was a valid reason for departure in Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984) (an armed robbery case, where use of force can be an element of the crime) and just as the large amount of marijuana involved was a valid factor supporting deviation in Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984) (a marijuana possession case), the trial court's consideration here of the substantial amount of money taken was likewise a proper basis for departure. The rationale behind these cases is clear: it is not the mere elements of the offense for which the defendant is being sentenced, trial courts are considering, rather, it is the excesses which the facts establish beyond the basic element of the offense. Sub judice, the amount of money taken was far beyond that normally involved in a robbery, and, as a result, was a "circumstance surrounding the offense" which the trial court properly utilized to aggravate cross-petitioner's presumptive sentence.

Finally, cross-petitioner cites as the trial court's last reason for departure the trial court's reference to the "utter disregard for the property rights and the welfare and safety of others." The district court, however, treated this statement as a summation of the court's earlier statement of factors already discussed above, and a reading of the court's statement of departure in context appears to support the district court's conclusion. Nevertheless,

assuming arguendo, that the cross-petitioner is correct, he asserts that this last reason is insufficient, first, because every robbery involves the taking of another's property and, second, because the reason, as stated, is so vague it amounts to no reason at all.

However, it is the State's position that when this reason is read in conjunction with the other reasons given by the court as well as the facts of the case, it is clear that the trial court was simply considering the circumstances surrounding the offense, and, in this regard, as argued earlier, the court was not simply limiting itself to the mere elements of robbery, but, rather, was considering the peculiar circumstances surrounding the instant offense.

As a result, in light of the foregoing, the State contends that the court's reasons for departure were clear and convincing and urges this Court to so find. However, should this Court determine that one or more of the reasons given is not permissible, the State urges this Court to find that where some but not all of the trial court's reasons for departure are impermissible, a defendant's aggravated sentence is still valid based upon the trial court's remaining permissible reasons for departure.

Should this Court find the trial court's reasons for departure to be sufficient, the cross-petitioner requests this Court to review the extent of the trial court's departure.

The State urges this Court to adopt the uniformly held position of the district courts on this issue, that the extent

of the sentence imposed is not subject to appellate review. See, e.g., Harris v. State, 465 So.2d 545 (Fla. 1st DCA 1985); Whitlock v. State, 458 So.2d 888 (Fla. 5th DCA 1984) and Hankey v. State, 458 So.2d 1143 (Fla. 5th DCA 1984).

These holdings are based upon the following rationale, as expressed by the court in Whitlock:

> Once there exists clear and convincing reasons to depart from the guidelines, we do not think the appellate courts have jurisdiction to review the extent of the departure, so long as the length of the sentence is one permissible under criminal statutes . . .

Id. at 889. See also Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984) and Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984), which hold that as long as the extent of departure is within the statutory limits, there is no error.

It is cross-petitioner's position, however, that this Court adopt the Minnesota approach which allows a sentencing court to depart up to double the presumptive sentence using Minnesota's statutory standard of "substantial and compelling." See State v. Givens, 332 NW.2d 187 (Minn. 1983); State v. Evans, 311 NW.2d 481 (Minn. 1981). Only when the facts of the case are "so unusually compelling" do the Minnesota courts allow deviations beyond the double departure. See, e.g., State v. Van Gorden, 326 NW.2d 633 (Minn. 1982). Cross-petitioner asserts that if Minnesota's approach were applied sub judice, the facts of the instant case would not even warrant a double departure.

The State responds, first, that the Florida Statute authorizing review of sentences under the guidelines only permits review

to determine whether the reasons for departure are clear and convincing and there is absolutely no authority to review the extent of a sentence imposed. See § 921.001(5), Fla. Stat. Absent legislative authority this Court is without jurisdiction to engage in such review.

Moreover, a review of Minnesota case law makes it clear that adopting that State's "standard" of double departure would be a grave mistake. The double departure standard, which developed judicially in State v. Evans, supra, was premised upon the supreme court's holding in the previous case of State v. Schantzen, 308 NW.2d 484, 487 (Minn. 1981). There, the court stated:

> While we conclude that departure was justified, we also conclude that the extent of the departure should be limited to that justified by the reason for departure. We are unable at this time to establish or articulate a standard by which to measure the sanction that should be imposed in those situations in which a departure from guidelines' presumptive sentence is proper. We must leave the problem to the trial court and modify any sanction imposed only when we, after consideration of the total record, have a strong feeling that the sanction imposed exceeds or is less than that "proportional to the severity of the offense of conviction and the extent of the offender's criminal history" as aggravated or mitigated by the circumstances of the offense and that the trial judge exceeded his discretion in assessing the sanction.

Based upon Schantzen, the court in Evans, citing its experience in reviewing sentences since deciding Schantzen, determined that "generally in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive

sentence length . . . . On the other hand, we cannot state that this is an absolute upper limit on the scope of departure because there may well be rare cases in which the facts are so unusually compelling that an even greater degree of departure will be justified." Evans at 483.

The State contends that an adoption of this standard would undermine the stated principle behind Florida's Sentencing Guidelines which provides that the guidelines are designed to aid the judge in sentencing decisions and are not intended to usurp judicial discretion." Rule 3.701(b)(6). To accept Minnesota's approach would be to take the discretionary aspect of sentencing intended to be preserved with the advent of the guidelines away from the trial courts and hand it to the appellate courts, which would then be in the position of disagreeing with the trial court's imposed sentence whenever they had "a strong feeling" that the sentence imposed was not proportionate given the offense. Thus, what is created is not a standard at all but amounts to appellate usurpation, based upon the "feelings" of the various appellate judges, of the trial courts' traditional sentencing duties. In the absence of a legislative mandate imposing such a judicial duty on this Court, it should leave that function to the trial judges of this State.

As a result, the State urges this Court to reject the Minnesota standard suggested by cross-petitioner and respectfully requests the that this Court affirm the district court's decision as it relates to this issue.

CONCLUSION

As to Issue I, the State asserts that the issue is still a viable one despite the trial court's compliance with the district court's mandate, and urges this Court to reverse the First District on this issue. With regard to issues II and III, the State requests that this Court affirm the First District decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Mr. Carl McGinnes, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32301, on this 13th day of August, 1985.

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