IN THE SUPREME COURT OF FLORIDA

DONALD WADE,

Petitioner,

v. CASE NO. 66,957

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner will designate references to the consecutively numbered pages in the one volume record by the symbol "R". References to the Appendix will be designated by the symbol "A".

II STATEMENT OF THE CASE AND FACTS

Petitioner pleaded guilty as charged to 12 counts in three separate informations which charged: two counts of robbery, two counts of burglary of a dwelling and one count of kidnapping all while armed with a firearm; two counts of escape; one count of auto theft; one count of theft of a firearm; two counts of use of a firearm in the commission of a felony; and one count of unlawfully killing a dog (R 5-8, 15-19).

When entering the pleas, petitioner's counsel said there was no plea agreement but the petitioner was taking the first step toward rehabilitation by admitting guilt (R 67). Petitioner again acknowledged he pled guilty because he "did it" (R 74).

The factual support for each of the charges was explained by the prosecutor as:

> The facts as they relate to 83-175, the State would allege that the facts that can be proved at trial are as follows: That on January 17, 1983, sometime during that day Mr. Wade, without permission or consent of the owner, Mr. Richard Harvell, entered his dwelling in Destin, Florida. Later that afternoon Mr. Harvell came home, entered his dwelling, went to sleep and sometime later was confronted by Mr. Wade who was at that time armed with a pistol and shotgun. After some conversation with Mr. Harvell, at gunpoint Mr. Wade took Mr. Harvell after not finding a satisfactory quantity of money in the house, took Mr. Harvell, instructed him to get into his van and go with him with Mr. Harvell driving, still at gunpoint to a bank in Destin, Florida, where at gunpoint Mr. Harvell cashed a check in the value of approximately twenty-seven or twenty-eight hundred dollars. That money went to Mr. Wade. At this point the van still driven by Mr. Harvell at Mr. Wade's direction was driven into the area of South Walton County at which time, at gunpoint, Mr. Harvell was

instructed to exit the van, which he did, he was taken to a wooded area and then Mr. Wade using two belts and some bindings and some nylon-enforced tape, taped and bound the hands and feet of Richard Harvell and then covered him with some pine straw, at which time, still armed, Mr. Harvell (sic) left the area in the van. Mr. Harvell was able to free himself, he went for help. He made contact with law enforcement authorities. A short time later -- several days later -- the van was recovered in Pensacola, Florida, at the bus station, based on a statement made by Mr. Wade. In the meantime Mr. Wade who had gone to the State of Colorado was taken into custody. In his possession were found a quantity of coins that bear the name and phone number of Mr. Harvell, as well as the pistol belonging to Mr. Harvell. After he was taken into custody in Colorado there was certain property seized. He was advised of his Miranda rights on these two occasions and he gave a full and complete statement reiterating the same facts I just reiterated to the Court. Further, during the course of the armed burglary Mr. Harvell's dog, according to Mr. Wade's statement, was barking at him and he could not make him quiet and he shot the dog and killed the dog.

* * * *

As it relates to Case No. 84-338, single count of escape, on the 16th of March of 1983 while Mr. Wade was in custody on multiple felony charges stemming from an armed burglary and other related charges in Destin, he was in the custody of the Okaloosa County Sheriff's Department. On that date he was brought to the courthouse here in Shalimar. He asked to go to the restroom which he was allowed to do. The security officer turned his back for a short period of time, after which time he noticed that Mr. Wade was gone. A search was begun and Mr. Wade was captured approximately four or five hours later in a swampy area here in Shalimar.

* * * *

As to Case No. 83-1343, on October 28, 1983 while in custody of the Okaloosa County

> Sheriff's Department on multiple felony charges stemming from a previous escape, as well as previous life felony offenses occurring in Destin, Florida, Mr. Wade was once again brought to the courthouse here in Shalimar. Through an oversight of the Sheriff's Department he was left in an unlocked security holding cell from which he escaped. Later on after he escaped a neighbor of the victim, Henry V. Rhine, observed an individual later identified as Mr. Wade, exit from Mr. Rhine's home. It was discovered that while in the Rhine home which he did not have permission or consent to enter, he took from the Rhine home a .45 automatic pistol. Mr. Wade then secured a ride with a taxicab. The whole incident had been reported to the Sheriff's Department, they were able to catch up with the taxicab and stop the taxicab. Mr. Wade got out of the cab and began to flee and further facilitating his escape he was found to be armed with .45 automatic which had been taken during the course of the burglary of the Rhine home.

(R 74-77).

Petitioner's counsel filed a sentencing memorandum, which opted for sentencing under Fla.R.Cr.P. 3.701 (sentencing guidelines) on the offenses which occurred before October 1, 1983. (One armed burglary, two armed robberies, armed kidnapping, auto theft, one use of a firearm in commission of a felony and killing a dog, all involving Richard Harvell and one escape.) The other offenses occurred after October 1, 1983, and guideline sentencing was mandatory.

The prosecutor submitted a proposed guideline scoresheet for all 12 offenses. The guidelines range was seven-nine years and the recommended sentence was eight years (R 32-33). In a letter accompanying the scoresheet, the prosecutor recommended a departure to 40 years based on these proposed aggravating

circumstances:

1. The recommended guidelines sentence is totally inadequate for the nature and the magnitude of the Defendant's crimes. Even if the Court were to impose the maximum sentence under guidelines, the actual time served would be approximately four and one-half years if the Defendant gets minimum gain time. The Defendant could be released before the age of twenty-five years.

2. The initial criminal transaction was calculated and premeditated. He entered the victim's home by cutting a hole into a roof and walls; he was armed with a knife and firearm; needlessly killed a small, old dog; laid in wait for the victim's return. The loss of the small dog was a very emotional and traumatic experience for the victim.

3. At gunpoint, Mr. Harvell was robbed, threatened and kidnapped. The victim was taken to an isolated area, tied up and covered with pine straw. He sincerely believed that he was going to die. The emotional trauma will be with him forever.

4. By the Defendant's own statement, the motive was revenge and money.

5. The Defendant's propensity to commit crimes is evidenced by the fact that while incarcerated for the primary offense, he escaped twice. During the second escape, he committed an armed burglary among other crimes.

6. As is evidenced by the attached reports, the Defendant, while not meeting the legal test for insanity and not being incompetent, as some psychological and emotional disturbances. These appear to long-term chronic problems and contribute to his criminal conduct. Therefore, the Defendant would pose a very serious long-term threat to society.

7. There appears to be no remorse on the part of the Defendant for any of his criminal conduct. The nature of the crimes indicates that whenever the economic need arises or the emotion flares, then the Defendant will resort to violent criminal activity. His track

> record indicates he has never succeeded in a lawful, civilized society and his prospects for doing so are dim at best. For the long-term protection of society, which is mandated by the facts of this case, departure from the Guidelines must be made in this case.

(R 34-35, 44-45, 51-52).

Petitioner's written response to the state's recommendation was, in part:

> It is difficult for me, on a personal level, to "accept" the requested departure of the State - which would be without possibility of parole - with my three years of experience as an Assistant Public Defender. Since starting work as an Assistant in the latter part of 1981, I have represented over ten individuals charged with various forms of homicide. In only two cases has the State of Florida demanded more, in terms of sentence, then it seeks in the instant case. Yet, Lamar Wade took no one's life.
>
> At the onset of my representation of Lamar, I told him that the relative merit of the case indicated that this would not be a good case to try. I told him that for the charges he was facing, the Court could sentence him to literally hundreds of years. This statement to him may well have played a part in his decision to take the opportunity provided by the Sheriff's Department to escape on October 28, 1983. As pointed out to me by Dennis Hayes, Lamar's stepfather, when I told him that, I took away his hope. After spending many hours talking with Lamar, I have no doubt that I did just that ... took away his hope.
>
> Both the author of the PSI and the State conclude that the guidelines range is inadequate for the crime to which Lamar entered his plea. Obviously the Sentencing Guidelines Commission felt that the sentence was adequate. It is important to note that before the instant offenses, the Defendant had no significant criminal history; this is an important factor which should be considered by the Court.
>
> The State alleges that the initial criminal

transaction was calculated and premeditated. Certainly, this is an aspect which could be said with regard to almost all criminal acts and particularly with respect to robbery which is the primary offense.

Both the PSI and the State's recommendations highlight the fact that Mr. Harvell was tied to a tree, covered with pine straw and abandoned. The author of the PSI opines that Mr. Harvell was left to die. In my opinion, Lamar had no intention of killing Mr. Harvell. The reason for the pine staw was Lamar's attempt to protect Mr. Harvell from the cold. Although it cannot be confirmed, Lamar indicated early on that after leaving Mr. Harvell he later phoned Harvell's business anonymously with the intent to tell them where Mr. Harvell was located. He was told that Mr. Harvell had been robbed and was at the police department ... he hung up. If Lamar had any intent to kill Mr. Harvell, he had a myriad of opportunities. Further, because he knew Mr. Harvell could identify him, he might have had a greater opportunity to escape detection had he taken Mr. Harvell's life.

The State reasons that the acts were done for revenge and money; further that Mr. Harvell will be traumatized for life. All robberies are committed for money. As for the revenge aspect of the argument, I am not sure but that there is more "mitigation" in this statement than "aggravation." Lamar did not commit these acts on some total stanger. He felt that part of his problems were brought on by his termination from Mr. Harvell's employ.

The State argues that the Defendant has a propensity to commit crimes and cites as examples the subsequent escapes which it should be noted were scored on the guidelines score sheet. As previously discussed, the Defendant prior to the instant offenses had had little contact with the criminal justice system.

The Defendant has had a long history of mental illness, but unlike the assertion of the State, his track record does not indicate that he had <u>never</u> succeeded in a lawful society. He had not always been institutionalized.

> Ms. Catherine Horton, ACSW, fomerly with Psychiatric Associates, worked with Lamar and his mother for a number of years. She also knows Dennis Hayes, Lamar's step-father (since divorced from Lamar's mother). According to Ms. Horton, Lamar needs a structured environment and needs to be isolated from the career violent type inmate.
>
> The State asserts that there is no remorse on Lamar's part. How that conclusion can be reached without ever talking on a personal level to Lamar is difficult for me to understand. He acknowledges that he has a debt to pay to society.
>
> Few of the asserted reasons for departure, even if all were true, are reasons that are peculiar to this case. The State asserts reasons that logic dictates were considered in the implementation of the guidelines.

(R 113-115).

At the sentencing hearing, petitioner's former stepfather, who had helped raise him almost from infancy, said petitioner had psychological illnesses all his life. He had been hyperkinetic and had childhood schizophrenia. Petitioner's mother often acted irrationally and mistreated him. Eventually she had a nervous breakdown. Petitioner was enrolled in various treatment programs, placed in a foster home, and was confined in Florida State Hospital (R 82-89).

Petitioner had talked with a minister named Spears who said petitioner told him he regretted what he had done, realized it was wrong, and was willing to pay his debt (R 92).

When called to speak for himself, petitioner told the court he was sorry the victim, Mr. Harvell, was not in court because he wanted to apologize to him (R 97).

The trial judge made these comments in departing from the guidelines in sentencing petitioner to 50 years:

> This Court has spent, as it does in most cases, but in this one particularly because of the nature of the charges and because of the fact that this Defendant is only nineteen years of age, or he was -- rather he was -- he is now twenty, his birthdate being in February, but because of his youth and because of the circumstances and because of the series of events which have been testified to here today by Mr. Hayes and which, of course, have been contained in the report of the psychiatrists who previously examined this Defendant back early on during the series of this first case. All of those factors, the young man's prior background. At one time it was my thinking that perhaps pursuant to the Guidelines if he chose to be sentenced through the Guidelines that he should be incarcerated for the remainder of his life as punishment for the offense, and if he chose to be sentenced under pre-guidelines the sentence to be imposed to the extent so that with this Court retaining jurisdiction it would be tantamount to a life sentence. I've changed my thinking in that regard, not here this morning, but I have changed my thinking to the extent that perhaps a long sentence would be more appropriate for incarceration. Under the present status of the law with gain time, the sentence which the Court's about the impose could be reduced by forty to fifty percent if the gain time law is not changed.

(R 102-103).

The reasons given for departure were those stated by the prosecutor in the letter to the court "together with the oral comments that the state has made here today" (R 105, 106).

Petitioner objected to the departure and "the insufficiency of the articulation" (R 108).

At petitioner's request, the trial judge included in

the sentence a recommendation that petitioner be placed in an institution in which he could receive psychiatric treatment (R 110).

In his appeal to the First District Court of Appeal, petitioner contended that the departure from the recommended guideline sentence should be reversed since the reasons given were neither clear nor convincing and since the departure was excessive. In its opinion dated January 22, 1985, the First District apparently rejected these contentions by its p.c.a. (A 1). In response to petitioner's timely motion for rehearing (A 2-3), the First District issued its opinion on rehearing dated April 2, 1985, certifying the following as a question of great public importance:

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLORIDA RULE OF CRIMINAL RPOCEDURE 3.701 IN MAKING ITS DECISION TO DEPART FROM THE GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFY DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR A RESENTENCING?

(A 4). This Court's jurisdiction was timely invoked (A 5).

III SUMMARY OF ARGUMENT

When the trial judge has deviated from the presumptive guideline sentence on the basis of "prohibited" reasons, petitioner 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 petitioner's sentences is mandated since both "prohibited" and reasons not "clear and convincing" were relied upon by the trial judge in deviating from the recommended guideline sentence of 7-9 years and in imposing incarceration without parole for 50 years.

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?

Petitioner 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, petitioner contends a remand for resentencing is required, without regard to the harmless doctrine. Where an impermissible, but not prohibited, reason has been utilized, petitioner submits that only in limited circumstances, unquestionably not present here,[1] can the appellate court apply the harmless error doctrine to such an error.

The basic premise which has been repeatedly argued by the state 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, the state has postulated 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

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[1] The inadequacy of the trial judge's reasons for departure are discussed in Issue II, infra.

found by the appellate court to be improper and impermissible, may be regarded as mere surplusage and the sentence must be affirmed. While this view admittedly has attracted both the Second and Fifth Districts, 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 921.011(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 appellant 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 the state 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 guideline system in no way limits the 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.[2]

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[2] As discussed further, infra, in the present case, the trial judge relied upon two such traditionally condemned reasons in deviating from the guidelines - lack of remorse and petitioner's mental illness, see Robinson v. California, 370 U.S. 660 (1962).

However, 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 prohibitive 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.

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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, petitioner 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, petitioner concedes, as discussed infra, that in certain circumstances, the harmless error doctrine may be applied.

While the contours of the former rule have been variously defined, e.g. contrast Napoles v. State, 463 So.2d 478 (Fla. 1st DCA 1985) and Callaghan v. State, 462 So.2d 832 (Fla. 4th DCA 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.Crim.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); Norman v. State, ___ So.2d ___ (Fla. 1st DCA May 14, 1985) Case Nos. BA-9 and BC-427 (departure based solely on the social or economic status occupied by the defendant would be improper). 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 additional offenses committed along with the primary offense. The total number of points determines the recommended 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

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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)

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 foundations of "current sentencing theory" and "historic sentencing practices" in this State. Since the guidelines 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 the 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. Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984), pending on certified question, State v. Carney, 66,163 (factors that "the robbery was premeditated and calculated and for pecuniary gain" and "[that] there was no provocation [for the robbery]" are inherent components of robbery and hence already embodied in the guidelines recommended sentencing range; factors thus impermissible basis for departure); Burch v. State, 462 So.2d 548 (Fla. 1st DCA 1985), pending on certified question State v. Burch, Case No. 66,471 (fact that defendant on parole not proper basis

for departure since "legal status" at time of offense already scored); Napoles v. State, 463 So.2d 478 (Fla. 1st DCA 1985) (fact that defendant on probation improper basis for departure since that fact already taken into consideration in computing recommended sentence); Sarvis v. State, 465 So.2d 573 (Fla. 1st DCA 1985) (improper to deviate based upon facts which have already been included within the determination of the guideline sentence); Lyons v. State, 462 So.2d 883 (Fla. 2d DCA 1985) (reasons which do no more than refer to elements of the offense for which the defendant was convicted not clear and convincing); Baker v. State, 10 FLW 852 (Fla. 3d DCA March 26, 1985) (fact that defendant committed additional offenses along with the primary offense insufficient basis for departure since already scored); Callaghan v. State, 462 So.2d 832 (Fla. 4th DCA 1985) (court not at liberty to aggravate a sentence by using elements which go to make up the crime for which the defendant is being sentenced; use of firearm improper reason for deviation since crime of shooting in a dwelling necessarily involves use of a firearm); Bowdoin v. State, 464 So.2d 596 (Fla. 4th DCA 1985) (defendant's use of a firearm during commission of robbery with a deadly weapon improper ground for departure since use of firearm already factored into the presumptive sentence); Knowlton v. State, 10 FLW 457 (Fla. 4th DCA February 20, 1985) (following Carney v. State, supra; fact that robbery planned in advance improper ground for deviation since inherent in robbery); Fletcher

v. State, 457 So.2d 570 (Fla. 5th DCA 1984) (improper to deviate based upon defendant's prior criminal record and legal status at time of conviction).[5] See also, Hendrix v. State, 455

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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 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.

[Cited with approval in Fletcher v. State, supra]. Likewise,

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 implicitely prohibits the second use of a defendant's prior record to further enhance his punishment.[5] 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, or lack thereof, should not be grounds for enhancement. The basis problem is the generally

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5 (Continued)

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. See Callaghan v. State, supra (analogizing rule applicable in determining presumptive parole release dates to the rule applicable to aggravating presumptive sentence).

light punishments programed 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 guidelines 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]

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[6] Petitioner's sentence must be reversed because as discussed, infra, the majority of the reasons articulated by the trial judge are, in fact, impliedly prohibited ones.

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" reason),[8] the harmless error doctrine might be properly applied. Petitioner contends, however, that the departure sentence based, in part, upon an improper reason can be affirmed only when the appellate court 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 the state and apparently followed by the Second and Fifth District Court 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

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[7] As discussed infra, reason 1 assigned by the trial judge herein would fall within this category.

[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.

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 their self-proclaimed omniscience, the appellate courts cannot presume as a matter of law (or fact) that the improper reasons, specifically articulated by the trial 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, 388 639, 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 impose the sentence it did solely on those grounds. Accordingly, the order or

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 revealed 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

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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).

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 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 totally shirked their appellate responsibilities in approving the departure sentence without any discussion or consideration of the fact that many, if not all, of the reasons articulated by the trial court have been explicitly disapproved by that Court as well as courts in other districts. Since the decision to depart was based, in part, upon traditionally condemned factors as well as factors prohibited by the guidelines themselves, peti-

tioner's sentence should be reversed, as argued, supra, without regard to the harmless error doctrine. Even assuming that some of the trial judge's stated reasons were proper and even if the trial judge's reliance upon "prohibited" reasons does not preclude application of the harmless error doctrine, given the multitude of improper reasons, it is impossible to determine whether or not the trial judge would have departed based solely on the proper aggravations. Likewise, it is impossible to ascertain whether the extent of departure would have been so extreme had the trial judge known that so many of his "clear and convincing" reasons were, in fact, improper. Clearly, the harmless error doctrine should not be applied in these circumstances and the First District's affirmance of the departed sentence must therefore be reversed.

ISSUE II

THE DEPARTURE FROM THE RECOMMENDED SENTENCE MUST BE REVERSED BECAUSE THE REASONS GIVEN WERE NEITHER CLEAR NOR CONVINCING AND THE AMOUNT OF DEPARTURE WAS EXCESSIVE.

This case is a magnificant illustration of sentencing gone awry. A special commission recommended and this Court approved, sentencing guidelines. In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983); Fla.R.Crim.P. 3.701. In conjunction with this new rule, the legislature abolished parole. §921.001(8), Fla.Stat. (1983). The trial judge in this case virtually ignored these reforms by ordering petitioner confined for 50 years with no parole for offenses which the guidelines provided no more than nine years incarceration.

The reasons given for departure did not even originate with the judge. He adopted reasons written by the prosecutor. Almost all of them are mere restatements of elements that are inherent in the offenses for which petitioner was convicted. The rest are excessively subjective, or based on substantial misinterpretations of law, or not supported by adequate facts.

The total sentence of 50 years is grossly disproportionate to the recommended eight year sentence. The trial judge did not justify the magnitude of this departure, which is six times the guideline sentence. If the guidelines can be circumvented with the ease and in the amount attempted in this case they will become meaningless.

The trial judge's sentencing order is clearly inadequate to support the departure. Even if the prosecutor's letter is equivalent to reasons given by the judge himself, a point petitioner

disputes, see Saname v. State, 448 So.2d 14 (Fla. 1st DCA 1984), the overall import is merely a disagreement with the guidelines range. The first sentence of the first paragraph expresses this sentiment, by stating that the recommended sentence is "totally inadequate for the nature and magnitude of Defendant's crime." That is the crux of the case.[10] And a departure for that primary reason, with others annexed largely as makeweights and rationalizations, contradicts the entire purpose and philosophy of the guidelines.[11]

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[10] State v. Bellanger, 304 N.W.2d 282 (Minn. 1981) repudiates this practice. Reducing an aggravated sentence to a guideline sentence the Court said:

> Here, the trial court expressed the view that "there is a great deal too much made of regularity and conformity in sentencing" and his belief that the presumptive sentence of 30 months in prison adopted by the Sentencing Guidelines for one who commits a simple robbery and has a criminal history score of 3 is too lenient. For that primary reason, the court departed from the presumptive sentence and imposed a 48-month prison term. General disagreement with the Guidelines or the legislative policy on which the Guidelines are based does not justify departure. (Emphasis added).

Id. at 283. Accord, Sarvis v. State, supra at 576. ("This reason for departure [chances of rehabilitation in thirty months non-existent] merely suggests the court's disagreement with the guidelines sentence and is not 'clear and convincing'").

[11] The rest of paragraph 1 says minimum gain time credits are equal to one half the guidelines sentence. That is an error of law. Section 944.275(4)(a), Fla.Stat. (1983) allows basic gain time of 10 days for each month of a sentence. This amounts to one third, not one half. Prisoners may, in addition, earn incentive gain time but only by fulfilling work, training or other requirements. §944.275(4)(b). Thus, the maximum possible combination of basic and incentive gain time would be 30 days for each month, but to receive that much petitioner would have to earn it, and not incur any disciplinary violations. §944.275(5). It was therefore inaccurate for the judge to adopt as a fact that the minimum credit allowed by the existing gain time law would reduce the guideline sentence to four and one half years.

The transparency of this as a basis for departure is evidenced by the 50 years actually imposed. Had the judge intended to compensate for expected gain time deductions, he would have doubled the guideline sentence, thus enhancing the probability that petitioner would spend the entire nine years in prison. A sentence of 18 years would have accomplished this purpose.

The reasons given in paragraphs 2-4 are just a repetition of the facts of the crimes. They fail to demonstrate that the offenses involved conduct more egregious than is normally associated with armed robbery, kidnapping, burglary, or cruelty to animals.[12] Paragraph 5 of the reasons relies upon petitioner's escape and other offenses committed after the Harvell crimes. But all these offenses were scored under the guidelines. Petitioner's counsel made sure the judge knew that each offense received some points. None were in a four plus category (R 104, 105). The reasons in paragraph 5 are just additional quarreling with the guidelines and an insufficient basis for departure.

As noted supra, n.5 and accompanying text, numerous cases have condemned deviations based upon the elements of the crimes charged. As noted in Baker v. State, 10 F.L.W. 852 (Fla. 3d DCA March 26, 1985):

> It is well established that an inherent component of the crime, being already built into the guideline range, will not justify a guideline departure. See Bowdoin v. State, ___ So.2d ___ (Fla. 4th DCA 1985) (Case no. 83-2764, opinion filed February 20, 1985) [10 F.L.W. 472] (use of gun inherent component of robbery with a deadly weapon); Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984) (premeditation, calculation, objective of pecuniary gain, and lack of provocation inherent components of armed robbery). Thus, that the act of attempted first-degree murder was unprovoked and done in a "willful, aggressive, and premeditated manner," common ingredients of all attempted first-degree murders,

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[12] Actual physical injury to the victim was scored as slight. There was no evidence to support a finding that the victim suffered unusual psychological trauma. See, Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984). Moreover, since the guidelines permit scoring only physical injury, it would be incongruous to allow emotional trauma to serve as an aggravation. See, Committee Note to Rule 3.701(d)(7).

are not proper reasons for departure.

Therefore, the trial judge's reasons referring to the elements of the offenses for which petitioner was convicted cannot be considered clear and convincing. Likewise, reliance upon petitioner's other offenses, all of which were scored, was improper as well. Again, as the Third District has noted:

> Likewise, that the act (referring to the act of attempted first-degree murder, that is, the primary offense) was committed "for pecuniary gain" and "done during the commission of a theft or burglary" are not justifiable reasons for departing from the guidelines. The burglary and theft were, as we have noted, see n. 1 supra, additional offenses at conviction for which points were already assessed against the defendant. Were these, or any, underlying or additional offenses again used to support guideline departure, then departure would be justified in any instance where multiple offenses are charged. Otherwise stated, the fact that the additional offenses were committed along with the primary offense is, as the guidelines already state, a reason to increase the score on the defendant's guideline scoresheet, but not a reason to aggravate the defendant's sentence outside of the guidelines.

[Emphasis supplied]. Id.

Paragraph 6 uses mental illness as an aggravating circumstance. The state is prohibited by the United States Constitution from imposing criminal penalties on a person because of illness. Robinson v. California, 370 U.S. 660 (1962). Further, as properly recognized in the death penalty statute, mental illness or emotional disturbance not amounting to legal insanity is a factor which mitigates punishment. §921.141(6)(b), (f), Fla.Stat. (1983); State v. Dixon, 283 So.2d 1 (Fla. 1973). See also §921.005(1)(b)4, Fla.Stat. (1983) indicating 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." Moreover, as this Court has repeatedly recognized, it is improper to utilize a mitigating circumstance, or its absence, as an aggravating factor. Miller v. State, 373 So.2d 882 (Fla. 1979) (trial judge's use of defendant's mental illness as aggravating factor contrary to legislative intent). Here, the trial judge even accepted as a fact that petitioner suffered from mental illness by recommending that he be imprisoned where he could receive treatment. But petitioner's mental illness should not and constitutionally cannot support an increase in the punishment prescribed by the guidelines.

Paragraph 7 illustrates vividly the fallacy of allowing a prosecutor to write a judge's reasons. The first line dredges up the familiar (and overused) refrain of "no remorse." But the prosecutor wrote too soon. Petitioner was remorseful. He told his pastor he was; he wanted to apologize to the victim; he pled guilty as charged to 11 felonies and one misdemeanor as the first step in rehabilitation; he admitted that he "did it" under oath in open court. Even if all this is discarded as self serving there remains absolutely no evidence to support the statement that there was no remorse on petitioner's part. Since any reasons for departure must be "clear and convincing: and since a deviation is subject to appellate review, Rule 3.701(d)(11), Florida Rules of Criminal Procedure and Section

921.001(5), Florida Statutes (1983), there must be an evidentiary basis to support the trial judge's reason for deviation. See, Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979); Eutsey v. State, 383 So.2d 219 (Fla. 1980); Abbott v. State, 421 So.2d 24 (Fla. 1st DCA 1982). Cf. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) (in capital sentencing context, an aggravating circumstance must be proved by the evidence beyond a reasonable doubt before being considered by the judge). Since the trial judge's reason was not supported by any evidence, surely a clear and convincing reason cannot be so "based." Moreover, lack of remorse is not a factor justifying an aggravation in any event. As stated by this Court in Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983):

> We have held that lack of remorse is not an aggravating factor in and of itself. McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Its use as additional evidence of an especially heinous, atrocious or cruel manner of killing only when the facts of the crime support the finding of that aggravating factor without reference to remorse is, at best, redundant and unnecessary. Unfortunately, remorse is an act of emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invites the sort of mistake which occurred in the case now before us -- inferring lack of remorse from the exercise of constitutional rights. This sort of mistake may, in an extreme case, raise a question as to whether the defendant has been denied some measure of due process, thus mandating a remand for reconsideration of the sentence. For these reasons, we hold that henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor, nor as an enhancement of an aggravating factor.

The same principles must apply to consideration of remorse as

a factor in deviating from the sentencing guidelines.

Taken as a whole, the reasons for departure (either the judge's or the prosecutor's) fall back on subjectivity, which is inconsistent with the guidelines statement of purpose.

Petitioner does not concede at all that any departure was proper. But if it were, certainly a departure greater than six times the guidelines sentence is unsupportable. To curb arbitrariness and preserve uniformity some principles of proportionality must be applied to departures.[13]

For example, when a judge aggravates a sentence there should be some limitation on the amount of the departure. Without a limit which bears some reasonable relationship to the recommended sentence the guidelines will have failed to achieve their primary goal, uniformity. With introduction of guidelines, the corrective parole mechanism has been dismantled, thus removing a needed safeguard that traditionally protected against aberrent sentences. That duty has now been entrusted to the appellate courts.

Considering the carefully constructed guidelines apparatus, it is certainly anomalous for a trial judge to push all that mechanism aside by finding some reasons to depart and imposing arbitraily any sentence within the statutory limit. At the same time that departures are justified in writing by clear and convincing reasons, those reasons should elucidate the basis for

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[13] This is yet another reason for appellate courts to discourage any departures. The extent of departures as well as the reasons supporting them will become the subject of ever increasing appellate review and comparison. Considerable restraint on trial judges is needed to cut down on the sheer volume of the proportionality issues that will ensue.

the extent of the departure. Without reasons, appellate review of the extent of departures will be incomplete. If, on the other hand, trial judges will not be required to justify the extent of departures, aggravated sentences will become rife with arbitrariness.

The extent of the court's departure here, to 50 years without parole, is not adequately explained and is so disproportionate to the eight year recommended sentence that it is arbitrary.[14] This case well illustrates the wild fluctuations that should be controlled by proportionality review.

The final question is, assuming the trial judge erred, what is the proper remedy on appeal. Using the death penalty cases as an analogy, the correct result here is to order the trial judge to impose a sentence within the guidelines.

Assuming that the recommended guideline sentence is substantially equivalent to a life recommendation, the absence of the requisite clear and convincing reasons to depart from either should bring about the same result. In death cases, this means the imposition of a life sentence in conformity with the jury's recommendation. E.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). Walsh v. State, 418 So.2d 1000 (Fla. 1982); Stokes v. State, 403 So.2d 377 (Fla. 1981); Richardson v. State, 437 So.2d 1091 (Fla. 1983). Likewise, after a trial judge's reasons for departure

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[14] By comparison, the legislature has authorized a sentence of only 25 years without parole for a first degree murder. §§782.04, 775.082, Fla. Stat.

have been found not to be clear and convincing, the appellate court should order a sentence within the guidelines. The aggravations used by the court were insufficient for departure here and, therefore, the guidelines should prevail in this case.

Since the reasons for departure were insufficient, petitioner's sentences should be reversed and the cause remanded for imposition of the guidelines sentences.

V CONCLUSION

Since the trial court failed to articulate clear and convincing reasons justifying departure from the recommended guideline sentence, petitioner's sentences must be reversed and the cause remanded for entry of the guideline sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Wallace E. Allbritton, The Capitol, Tallahassee, Florida, 32302, this 31st day of May, 1985.

Glenna Joyce Reeves
GLENNA JOYCE REEVES
Assistant Public Defender