IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,963

THE STATE OF FLORIDA,

Petitioner,

vs.

TERRENCE A. BAKER,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	2-3
ARGUMENT -- QUESTION CERTIFIED.....	4-19
CONCLUSION.....	20-21
CERTIFICATE OF SERVICE.....	22

TABLE OF CITATIONS

CASE	PAGE
Addison v. State, 452 So.2d 955, 956 (Fla. 2d DCA 1984).....	8,10,20
Albritton v. State, _____So.2d_____(Fla. 5th DCA 1984), 9 FLW 2088.....	10,11,12,13,21
Baker v. State, _____So.2d_____, 10 FLW 852 (Fla. 3rd DCA April 5, 1985).....	1,3
Banks v. State, 342 So.2d 469, 470 (Fla. 1976).....	13
Bell v. State, 435 So.2d 478 (Fla. 2d DCA 1984).....	18,19,20
Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984), clarified September 7, 1984.....	11,13,21
Brown v. State, 13 So.2d 458 (Fla. 1943).....	13
Calhoun v. State, 297 Md.563, 468 A.2d 45 (1983), cert. denied, ___U.S.____,104 S.Ct.2374, 80 L.Ed.2d 846 (1984).....	17
Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).....	8
Ex parte Dobard, 435 So.2d 1351 (Ala. 1983), cert. denied, __U.S.__104 S.Ct.749, 79 L.Ed.2d 203 (1984).....	17
Ex parte Murry, 455 So.2d 72 (Ala. 1984).....	16
Garcia v. State, 454 So.2d 714, 717, 718 (Fla. 1st DCA 1984).....	8,20

TABLE OF CITATIONS
(Continued)

CASE	PAGE
Hair v. Hair, 402 So.2d 1201, 1204 (Fla. 5th DCA 1981), pet. for rev. denied, 412 So.2d 465 (Fla. 1982)	7,8
Hankey v. State, _____So.2d_____(Fla.5th DCA 1984), 9 FLW 2212	13,21
Higgs v. State, 455 So.2d 451, 453 (Fla. 5th DCA 1984)	10,11,21
Johnson v. State, _____So.2d_____(Fla. 1st DCA December 21, 1984)	13,21
Jones v. State, 440 So.2d 570 (Fla. 1983)	17
Key v. State, 452 So.2d 1147 (Fla. 5th DCA 1984)	19,20
Landrau v. State, 365 So.2d 695 (Fla. 1978)	17
Lockett v. Ohio, 438 U.S.586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)	5,10,20
Martin v. State, 411 So.2d 987, 989 (Fla. 4th DCA 1982)	11,21
Mincey v. State, _____So.2d_____(Fla. 1st DCA 1984), 9 FLW 2341	13,21
Mischler v. State, 485 So.2d 37, 40 (Fla. 4th DCA 1984)	6
Mitchell v. State, _____So.2d_____(Fla. 1st DCA 1984), 9 FLW 2107	11,21
Murphy v. State, 459 So.2d 337 (Fla. 5th DCA 1984)	10,21

TABLE OF CITATIONS
(Continued)

CASE	PAGE
Roberts v. Louisiana, 431 U.S.633, 636, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637, 641 (1977)	17
Santiago v. State, ___So.2d___(Fla. 1st DCA 1984), 9 FLW 2479	10,21
Savage v. State, 156 So.2d 566, 568 (Fla. 1st DCA 1963), cert. denied, 158 So.2d 518 (Fla. 1963)	11,21
Soverino v. State, 356 So.2d 269 (Fla. 1978)	17
State ex rel Miller, 411 So.2d 875, 877 (Fla. 2d DCA 1981)	19,20
Street v. State, 383 So.2d 900 (Fla. 1980)	17,20
Swain v. State, _____So.2d___(Fla. 1st DCA 1984)	11,21
Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied, 455 U.S.983, 102 S.Ct.1492, 71 L.Ed.2d 694 (1982)	17
Tichnell v. State, 297 Md. 1, 468 A.2d 1 (1983), cert. denied, ___U.S.___104 S.Ct. 2374, 80 L.Ed.2d 846 (1984)	17
United States v. Grayson, 438 U.S.41, 98 S.Ct. 2610, 57 L.Ed.2d 582, 591, 592 (1978)	6,20
Weathington v. State, 262 So.2d 724 (Fla. 3d DCA 1972), cert. denied, 265 So.2d 330 (Fla. 1972), cert. denied, 411 U.S.968 (1973)	13
Webster v. State, ___So.2d___(Fla. 2d DCA 1984), 9 FLW 2419	11,12,21

TABLE OF CITATIONS
(Continued)

CASE	PAGE
Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), approved, Weems v. State, ____So.2d____, 10 FLW 268 (May 10, 1985)	5,20
Whitlock v. State, ____So.2d____(Fla. 5th DCA 1984), 9 FLW 2390	13,21
Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984)	14,15

OTHER AUTHORITIES

§775.082, Fla. Stat.	19
§921.005(5), Fla. Stat.	4
Rule 3.171(a), Fla.R.Crim.P.	18
Rule 3.701, Fla.R.Crim.P.	4,5,6,7,16
Florida's Initial Experience With Sentencing Guidelines	10

PRELIMINARY STATEMENT

Terrence A. Baker, the criminal defendant and appellant in Baker v. State, _____So.2d_____, 10 FLW 852 (Fla. 3rd DCA April 5, 1985) will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below will be referred to herein as Petitioner.

Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the supplemental record on appeal will be indicated parenthetically as "SR" with the appropriate page number(s). Citations to the transcript of proceedings will be indicated parenthetically as "T" with the appropriate page number(s). Citations to the Appendix attached hereto containing Petitioner's Notice to Invoke Discretionary Jurisdiction and a copy of the lower court's opinion rendered herein will be indicated parenthetically as "A" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information filed in Dade County, Florida, with six felonies, to wit: burglary of a structure, two counts of grand theft, resisting an officer with violence to his person, battery on a law enforcement officer and attempted first degree murder (R.10-15A). Subsequently, Respondent withdrew his previously entered not guilty plea and accepted a plea offer to the six (6) counts charged with the condition that there be a thirty-four (34) year cap and a presentence investigation (T.21). Following a plea colloquy and recitation of the factual basis for the plea (R.22-29), the trial court accepted the plea, finding that the plea had been freely, voluntarily, and intelligently made (T.29). Moreoever, Respondent affirmed the fact that in entering the plea offer that he was entering a plea to a cap of thirty-four (34) years and that he could receive no more than thirty-four (34) years with a three (3) year minimum mandatory provision for Count V, the attempted first degree murder charge (T.28).

At sentencing, June 12, 1984, the trial court having benefit of a Presentence Investigation Report (SR.1-9, T.45), testimony of witnesses and argument of counsel in aggravation and mitigation (T.40-67), determined that departure from the guidelines was warranted for the following written reasons:

1. Victim was uniformed police officer;
2. Act was done in wilful, aggressive, premeditated manner;

3. Act was done during commission of a theft and burglary;

4. Act was committed for pecuniary gain;

5. Victim did not provoke defendant's actions.

(R.59). The court expanded upon its written reasons during sentencing (T.68-73) and thereafter sentenced the defendant to a total "maximum sentence allowable of 34 years in the State Penitentiary" (T.73-74) pursuant to the State's offer and the defendant's accepted plea negotiation (T.28).

Respondent appealed the trial court's departure and the lower court, finding that the trial judge relied upon both permissible and impermissible reasons for departure, remanded the case for resentencing and certified the question before this Court for review as one of great public importance. Baker v. State, supra (A.7-10). Respondent filed on April 3, 1985 his Motion for Clarification (A. 5-6) which was denied by the lower court on April 22, 1985 (A. 4). Subsequently, Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction (A. 1-3) on the basis of the certified question. Petitioner's Brief on the Merits follows pursuant to this Court's Briefing Schedule issued on May 9, 1985.

ARGUMENT

QUESTION CERTIFIED

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.CRIM.P. 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFY DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR RESENTENCING.

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

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

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

In Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), approved, Weems v. State, ____So.2d____, 10 FLW 268 (May 10, 1985), the court held that:

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

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

> However, both the grammatical language and the logical import of the quoted rule [3.701(d)(11)] would appear to preclude deviation only when predicated upon factors, related to either prior arrests or the instant offense, for which conviction has not been obtained.

The foregoing decisions of the Second District is consistent with the views expressed by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) where the Court recognized that in discharging his duty of imposing a proper sentence, the trial judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime, and that the trial judge's possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant, if not essential to the selection of an appropriate sentence where sentencing discretion is granted (Emphasis added). Id. at 57

L.Ed.2d 988, 989. See also United States v. Grayson, 438 U.S.41, 98 S.Ct. 2610, 57 L.Ed.2d 582, 591, 592 (1978).

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

Florida Rule of Criminal Procedure 3.701(b)(6) provides:

> While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.

While the guidelines themselves do not define "clear and convincing reasons", the Fourth District reasoned in Mischler v. State, 485 So.2d 37, 40 (Fla. 4th DCA 1984) in dealing specifically with what constitutes clear and convincing reasons for departure from the guidelines that:

> Clear and convincing reasons for departure have been held in Florida to include violation of probation, repeated criminal convictions, crime "sprees" or "binges", "careers" of crime, extraordinary mental or physical distress inflicted on the victim and extreme risk to citizens and law enforcement officers. We ask ourselves: What do all these reasons have in common? The answer appears to be an excess in crime

> which either results in repetitive convictions, successive probation violations which decry the likelihood of rehabilitation or unusual physical or psychological trauma to the victim. To that, we now add crimes committed in a repugnant and odious manner.

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

Judicial discretion, in this sense, having been defined as the power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court, Hair v. Hair, 402 So.2d 1201, 1204 (Fla. 5th DCA 1981), pet. for rev. denied, 412 So.2d 465 (Fla. 1982), is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Hair v. Hair,

supra at 1204, citing with approval Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).

Some of the district courts have endorsed and applied this suggested standard holding:

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

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

> Decisions from our sister courts show that we are in accord in our views that the trial courts continue to have the same broad sentencing discretion conferred upon them under the general law, subject only to certain limitations or conditions imposed by the guidelines, which are to be narrowly construed so as to encroach as little as possible on the sentencing judge's discretion, but whose specific directives we are required to recognize and enforce in a manner consistent with the guidelines' stated goals and purposes.
>
> * * *
>
> In the final analysis, we reject the notion, implicit in this and the mounting deluge of guidelines appeals, that there reposes in the language of the guidelines, either in the "clear and convincing reasons" terminology or elsewhere, a set of sentencing departure absolutes only awaiting the proper occasion for the appellate courts to reveal them on a case-by-case basis. Rather, the guidelines are for the guidance of the trial court, as on the face thereof they are represented to be, and the appellate courts' function is simply to enforce their proper application and to review departures by the trial courts to determine if there has been an abuse of discretion warranting reversal.

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

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

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

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

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

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

Id. at 9 FLW 2479. See, also, Albritton v. State, ____So.2d ____(Fla. 5th DCA 1984), 9 FLW 2088 and Murphy v. State, 459 So.2d 337 (Fla. 5th DCA 1984), where the court applied the abuse of discretion standard.

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

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

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

Id. at 9 FLW 2088, 2089. Similarly, the court in Webster v. State, supra, Held:

> . . . a sentence departing from the guidelines can be upheld on appeal where supported by any

> valid clear and convincing reasons even though other improper reasons may be included. It is unnecessary to remand for resentencing, and the judgment and sentence are therefore affirmed. (Emphasis added)

Id, at 9 FLW 2419.

Thus, when a trial judge's departure from the sentencing guidelines is predicated upon at least one clear and convincing reason and the sentence imposed is within the statutory parameters for the convicted offense,[2] the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons. To hold otherwise would inhibit the listing of all reasons considered by the trial judge to constitute a bona fide basis for departure in the particular case and have the insalubrious effect of compelling the trial judge to search for and list only those reasons enjoying judicial approval in an effort to insure that his sentencing decision will withstand appellate scrutiny. This result would make a mockery of the guidelines and assign the highest priority to form rather than substance. In fact, this premise formed the basis for Judge Nimmons' well-reasoned dissent

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

in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), where he stated:

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

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

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

In the case at bar, the trial judge set forth the following written statement of reasons for departing from the guidelines, noting on the scoresheet this was a plea (R.59) which was also repeatedly reflected in the transcript of the proceedings (T.21-23, 29, 32-33, 44, 73-74):

1. Victim was a uniformed police officer;
2. Act was done in wilful, aggressive, premeditated manner;

3. Act was done during commission of a theft and burglary;

4. Act was committed for pecuniary gain;

5. Victim did not provoke defendant's actions.

(R.59)

Initially, Petitioner notes that the trial judge complied with the writing requirement of Fla.R.Crim.P. 3701(d)(11) and furthermore, on the record expanded emphatically on his reasons for departure (T.67-75). Petitioner submits that the one written reason which the lower court found to be a clear and convincing reason for departure was properly relied upon by the trial judge and formed an adequate basis upon which to predicate a departure. Indeed, the lower court emphatically found the trial court's statement that the victim was a police officer (A.7) shot by the Respondent with the police officer's own gun while the officer was attempting to arrest the Respondent to be a clear and convincing reason for departure as evidenced by its well-reasoned opinion:

> We come now to the trial court's statement that the victim was a uniformed police officer. While we have found no Florida case directly holding that this reason can justify a sentence in excess of the recommended guidelines, the fact that a law enforcement officer is the victim of the crime has been held to justify the crime being elevated to a higher degree, see, e.g., Ex parte Murry, 455 So.2d 72 (Ala. 1984) (murder of police officer capital offense), and affords a rational basis

for the reclassification of a crime to a higher offense, see, e.g., Street v. State, 383 So.2d 900 (Fla. 1980) (Section 784.07, Florida Statutes, making battery upon a law enforcement officer a felony, does not violate equal protection clause by the special treatment it gives to police officers as victims of batteries); Landrau v. State, 365 So.2d 695 (Fla. 1978) (same); Soverino v. State, 356 So.2d 269 (Fla. 1978) (same). Again, where the victim of a killing is a law enforcement officer on active duty, that fact is properly considered an aggravating circumstance supporting the imposition of the death penalty. See Jones v. State, 440 So.2d 570 (Fla. 1983) (an aggravating circumstance under Section 921.141(5)(g), Florida Statutes, is that capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws); Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied, 455 U.S.983, 102 S.Ct. 1492, 71 L.Ed.2d 694 (1982); see also Ex parte Dobard, 435 So.2d 1351 (Ala. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 749, 79 L.Ed.2d 203 (1984) (aggravating circumstance where capital felony committed for purpose of avoiding lawful arrest); Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983), cert. denied, ____ U.S. ____, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984) (aggravating circumstance where victim is law enforcement officer killed in performance of duties); Tichnell v. State, 297 Md. 1, 468 A.2d 1 (1983), cert. denied, ____ U.S. ____, 104 S.Ct. 2374 80 L.Ed. 2d 846 (1984) (same).

There thus appears to be little question "[t]here is a special interest in affording protection to . . . public servants who regularly must risk their lives in order to guard the safety of other persons and property." Roberts v. Louisiana, 431 U.S.633, 636, 97 S.Ct. 1993, 1995, 52 L.Ed. 2d 637, 641 (1977). Since, as can be seen, the

> the protection of police officers is a valid societal objective which justifies legislation making police officers a special class of crime victim, we see no reason why a court may not validly pronounce as a reason for departing from sentencing guidelines that a defendant who chooses to make a police officer acting in the line of duty the victim of his crime is to be treated different than a defendant who commits the same crime upon an ordinary citizen. Cf. Smith v. State, 682 P.2d 1125 (Alaska Ct. App. 1984) (where statute specified as aggravating factor justifying non-presumptive sentence that the defendant knowingly directed the conduct constituting the offense at, among others, a law enforcement officer, sentence in excess of presumptive sentence upheld).(A.9-10)

Petitioner further respectfully reminds this Honorable Court that the sentence imposed was also the result of a negotiated plea. The declared policy of this state is to encourage plea negotiations and agreements. Fla.R.Crim.P.3.171(a), Bell v. State, 435 So.2d 478 (Fla. 2d DCA 1984). In this instant case, Respondent accepted a plea, knowing and understanding that the

maximum sentence he could receive was thirty-four (34) years in the State Penitentiary with a three (3) year minimum mandatory provision as to Count V, the attempted first degree murder charge (T.23). In Bell, supra, the court held " . . . a departure from the guidelines is clearly warranted when there is a plea bargain which specifies the permissible sentence . . . the appellant was bound by his contract." This Honorable Court has long noted that "a bargained guilty plea is in large part similar to a contract between society and the accused, entered into on the basis of a perceived mutality of advantage." State ex rel Miller v. Swanson, 411 So.2d 875, 877 (Fla. 2d DCA 1981). Moreover, the court in Key v. State, 452 So.2d 1147 (Fla. 5th DCA 1984), a case which appears directly on point, most succinctly stated:

> A negotiated plea which includes an agreement that the defendant may be sentenced to imprisonment for a period of time in excess of the new sentencing guidelines (although within the minimum and maximum sentence limitations provided by law) is a clear and sufficient reason for departure from those guidelines. See, Fla.R. Crim.P. 3.701(b)(6).

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

CONCLUSION

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

Based on recent decisions of the district courts, Weems v. State, supra, Manning v. State, supra, and Garcia v. State, supra, the United States Supreme Court's decision in Lockett v. Ohio, supra, and United States v. Grayson, supra, and the proscriptions found in Fla.R.Crim.P. 3.701, Petitioner contends that for purposes of departure, the trial court may consider and rely upon plea negotiations and any factors concerning the nature and circumstances of the offense as well as the defendant's background, which is not precluded from consideration by Fla.R.Crim.P. 3.701(d)(6)(11). Bell v. State, supra, State ex rel Miller v. Swanson, supra, Key v. State, supra.

Since the sentencing function has been traditionally recognized as an area where the trial courts exercise discretion which, until the advent of the guidelines, was almost wholly unbridled, Respondent maintains that the only proper standard of review is whether the trial court, in departing, abused its discretion. Addison v. State, supra; Garcia v. State, supra;

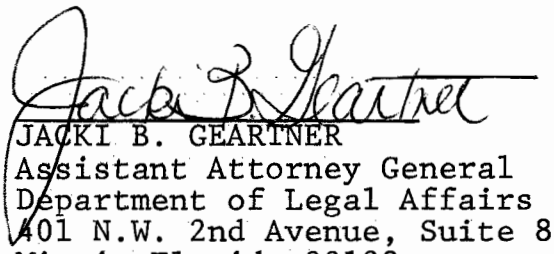
Higgs v. State, supra; Albritton v. State, supra; Murphy v. State, supra; Santiago v. State, supra. In applying this standard of review, a well established appellate principle, Savage v. State, supra, Martin v. State, supra, which has been employed in substance in recent guidelines cases decided by the district courts, Bogan v. State, supra, Swain v. State, supra, Mitchell v. State, supra, Webster v. State, supra, Albritton v. State, supra, Higgs v. State, supra, Hankey v. State, supra, Mincey v. State, supra, Whitlock v. State, supra, and Johnson v. State, supra, dictates that where a trial judge's departure from the sentencing guidelines is predicated upon at least one clear and convincing reason and the sentence imposed is within the statutory parameters for the convicted offense, the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons.

Accordingly, Petitioner respectfully urges this Court to quash the decision of the lower court, affirm Respondent's judgements and sentences, and answer the certified question as follows:

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

RESPECTFULLY SUBMITTED, on this 30th day of May, 1985, at Miami, Dade County, Florida.

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was furnished by mail to HAROLD MENDELOW, Special Assistant Public Defender, 2020 N.E. 163rd Street, Suite 300, North Miami Beach, Florida, this 30th day of May, 1985.

JACKI B. GEARTNER
Assistant Attorney General