IN THE SUPREME COURT OF FLORIDA

RANDY VON CARTER,

Petitioner,

v. CASE NO. 67,093

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Randy Von Carter is the petitioner in this case. The record on appeal consists of two volumes and a supplemental record. References to the record will be indicated by the letter "R." Reference to Carter's July 27, 1983, trial and subsequent sentencing will be indicated by the letter "T." Reference to the supplemental record will be indicated by the letters "SR."

II STATEMENT OF THE CASE

On October 8, 1982, a two count information was filed in the Circuit Court of Suwannee County. Count I alleged that the petitioner, Randy Von Carter, on August 3, 1982, did enter an occupied dwelling with intent to commit theft, and in the course of committing the burglary made an assault upon a Mrs. Lucia Walker while armed with a knife. Count II alleged that the petitioner, Randy Von Carter, on August 3, 1982, did unlawfully by force, violence, assault, or by putting in fear, rob, steal, and take away from Mrs. Lucia Walker, United States currency, checks, a purse and in the course of committing the robbery carried a knife (R-1-2).

Petitioner proceeded to a jury trial on July 27, 1983. During the presentation of the defense's case, defense counsel moved for a mistrial based on the fact that the prosecutor, in his cross examination of petitioner, said "Randy, I notice you have a nasty looking scar on your neck." (T-139-142). The court denied the motion for a mistrial (T-142), and the jury returned its verdict. As to Count I, the jury found petitioner guilty of burglary of a dwelling, and as to Count II the jury found petitioner guilty of the lesser offense of robbery (R-7, T-171).

On October 20, 1983, the petitioner was sentenced under the sentencing guidelines. However, the judge elected

to go outside the guidelines in this case, stating that his decision was based on many reasons which would be outlined in a later written opinion (R-15-16, T-191). Petitioner was sentenced to a term of ten years in the state penitentiary on each count to run concurrent and was assessed five hundred dollars in court costs[1] (R-12-13, T-191). At the close of the sentencing hearing petitioner objected to going outside the sentencing guidelines in that no reasons were stated at the time of sentencing by the court (T-194).

In its subsequent sentencing order, the court set forth 14 reasons justifying its departure from the recommended guideline sentence. On appeal, the First District rejected all of the court's reasons but one: The victim was an 86 year old female who lived alone. Carter v. State, Case No. AW-30, opinion filed March 13, 1985, 10 FLW 664, on motion for rehearing May 9, 1985, 10 FLW 1163. Rather than affirming the trial court's sentence, the First District Court of Appeal vacated the sentence and remanded the case to the trial court for resentencing. The court also certified as a question of great public importance the same question it certified in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984):

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[1]The petitioner under the sentencing guidelines received a score of sixty-two points, therefore the recommended sentence was twelve to thirty months in prison (SR-1).

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 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 A RESENTENCING.

III STATEMENT OF THE FACTS

About 10:00 p.m. on August 3, 1982, petitioner and Michael Sellers, a juvenile, entered the house of Mrs. Lucia Walker, an 86 year old woman, by cutting the screen on her door (T-47,49,52). When petitioner and Sellers were in the house one of them grabbed Mrs. Walker and told her they wanted her money (T-48). Mrs. Walker saw a knife and felt it against her skin (T-51). Both petitioner and Sellers snatched Mrs. Walker's shopping bag, which contained her purse with about $80.00 in it, from her (T-48-49). As soon as they got the bag both of them left out the door they came in (T-49). During the incident, one of them said several times that they would kill her and the other one said they were going to shoot her (T-49). Mrs. Walker did not get a look at the faces of the two intruders because they each had a ski mask on, however she could tell from their arms that they were black (T-50).

On August 4, 1982 (T-93), a friend of petitioner, Paul Washington, who at the time of trial was himself a prison inmate (T-98,103), flagged down Officer Harrington and asked the officer if he was looking for a purse, and the officer answered yes (T-95). Washington showed the officer where the purse was and stated that Randy Carter, petitioner, had told him he and Mike made a hit and that petitioner then showed him where the purse was (T-99).

On August 10, 1982, both petitioner and Sellers were taken to jail for this offense. Sellers was arrested, however petitioner was set free because while at the jail Sellers told the sheriff that it was Harold Swain and himself who had broken into Mrs. Walker's house (T-60,62, 67). However, a couple of months after the incident Sellers changed his story and said it was the petitioner and himself who had broken into the house (T-68).

IV 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" reasons, the harmless error doctrine must 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. In justifying departing from the recommended guideline sentence, the only permissible factor found by the First District Court of Appeal was that the victim was an 86 year old female who lived alone. This factor, however, without more, did not justify a departure. While implications of helplessness were suggested by this factor, without some clear indication that this was what the trial court intended, this reason was not clear and convincing. A victim's status, without more, does not justify departures from the recommended guideline sentence.

V 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,[2] 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

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

departure exists, any other reasons articulated by the trial judge as clear and convincing ones supporting the departure, even though 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 philogophy ignores that appellate review has always been available when sentencing has been based upon unreliable or improper factors.

Prior to the enactment of the sentencing guidelines and the concomitant appellate review of sentences imposed outside their presumptive range, it was well-settled that the imposition of a sentence was within the sole discretion of the trial judge so long as the statutory maximum was not exceeded. E.g., Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943); Walker v. State, 44 So.2d 814 (Fla. 1950); Infante v. State, 197 So.2d 542 (Fla. 3d DCA 1967). However, even under that system, sentencing decisions were not immune from appellate scrutiny. Rather, courts of this state did not hesitate to reverse a facially legal sentence 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 discretion, appellate review of a guideline departure must at a minimum include a determination whether prohibited reasons, such as those condemned by the foregoing cases, have been utilized to any degree. If the trial court's departure has been based, even in part, upon such a condemned factor, appellate reversal of the sentence is mandated, without

regard to the harmless error doctrine. As the foregoing cases demonstrate, a trial judge's reliance upon a prohibited factor in sentencing may not be ignored by the appellate court or regarded as mere surplusage. Rather, resentencing is in order.

However, 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),[3] certain factors, 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.

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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.

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

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

While the contours of the former rule have been variously defined, e.g. contrast Napoles v. State, 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), Florida Rules of Criminal Procedure. "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

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

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 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 So.2d

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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 scroe 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 [subjection (d)] and that the crime was committed for pecuniary gain [subsection

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....

5(cont'd.)

> (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, 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),

It appears to me that the design of the guidelines implicitly prohibits the second use of a defendant's prior record to further enhance his punishment. [ ] If uniformity in sentencing is to be achieved through use of the guidelines, Fla.R.Crim.P. 3.701(b), its mandates and exclusions should control the whole sentencing process. See Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984).

The trial judge in this case thought the presumptive sentence was too light a punishment for this crime and this defendant with his prior record. I agree. However, the degree of punishment afforded by the guidelines, or lack thereof, should not be grounds for enhancement. The basic problem is the generally light punishments programmed as presumptively correct in the guidelines. The legislature can remedy this problem. However, if in the meantime the courts render the guidelines meaningless by allowing departures in violation of the guidelines rules and mandates there will be nothing left to remedy.[3] Sentencing guidelines in Florida will become an interesting but failed social experiment.

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[3] The paramount goal of the guidelines is to reduce unwarranted disparity in sentencing. Fla.R.Crim.P. 3.701. Thus, the guidelines are designed to insure that similarly situated offenders convicted of similar crimes receive similar sentences. See Sundberg, Plante, Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Fla.St.U. L.Rev. 125 (1983). Similarly situated offenders would not be assured of equal treatment if each trial judge is allowed to sentence an offender based upon his or her ideas or philosophy regarding punishment.

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5 (cont'd.)
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).

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]

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" (as opposed to a "prohibited" reason)[7], 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,

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[6] Petitioner's sentence must be reversed because as discussed, infra, the reason articulated by the trial judge is, in fact, an impliedly prohibited one.

[7] 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.

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 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 So. 2d 639, 640 (Fla. 2d DCA 1980) ("Accordingly, we reverse the order of revocation and remand the cause to permit the court to consider whether the violation of Condition 1 warrants revocation."); Peterson v. State, 384 So.2d 965, 966 (Fla. 1st DCA 1980) ("We are unsure as to whether the trial court would have revoked appellant's probation in this case and imposed the same sentence for the sole reason that appellant failed to be gainfully employed during certain months of 1977 and 1978. Therefore, we decline to uphold the probation revocation on that ground alone and instead

remand for further consideration."); Page v. State, 363 So.2d 621, 622 (Fla. 1st DCA 1978) ("We do not know if the trial court would revoke probation and impose the same sentence for the sole reason that Page failed to file timely monthly reports. We, therefore, reverse and remand for proceedings consistent with this opinion."); McKeever v. State, 359 So.2d 905, 906 (Fla. 2d DCA 1978) ("While it is undisputed that appellant violated the terms of his probation by failing to file monthly reports and failing to make monthly payments, we are uncertain and impose the sentence it did solely on those grounds. Accordingly, the order of revocation is reversed and the cause is remanded for further proceedings"). The courts refused to indulge in the precarious presumption that the improper findings could be regarded as mere surplusage, affecting neither the decision to revoke nor the sentence imposed. Rather, these decisions reflect a proper application of the harmless error doctrine. When the appellate court can know that neither the decision to revoke nor the sentence was affected by the erroneous findings, the error is harmless and the cause properly affirmed. E.g. Sampson v. State, 375 So.2d 325 (Fla. 2d DCA 1979) (trial judge's remarks at sentencing explicitly 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.[8] Properly applied, the harmless error doctrine would support affirmance of a deviated sentence, without necessity of a remand for reconsideration by the sentencer, in only a limited number of cases - only when it is unequivocally clear that the erroneous reasons did not contribute to the sentence imposed by the trial judge. Any broader approach would result in appellate sentencing - the appellate court second-guessing the trial judge. The sentence recommended by the guidelines must be considered the 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

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[8] 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).

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 Court of Appeal adopted petitioner's position:

> Although the trial court has set forth proper reasons for deviation from the sentencing guidelines, the majority of its reasons are not clear and convincing. In accordance with Carney v. State, 9 FLW 2143 (Fla. 1st DCA Oct. 9, 1984), we should reverse and remand for resentencing unless we can hold that neither the court's decision to depart from the guidelines sentence nor the severity of the departure would have been affected by elimination of the impermissible reasons for departure. We cannot reach such conclusion in this case. We vacate the sentence and remand to the trial court for resentencing in accordance with this opinion.

Slip opinion at page 7.

But see Donald Wade v. State, Case No. AY-285 (Fla. 1st DCA opinion filed January 22, 1985) (on motion for rehearing, question certified April 2, 1985).

For the reasons stated above, petitioner asks this Honorable Court to adopt the First District Court of Appeal's decision in this case.

ISSUE II

THE FIRST DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE FACT THAT THE VICTIM WAS AN 86 YEAR OLD FEMALE WHO LIVED ALONE WAS A LEGITIMATE FACTOR JUSTIFYING DEPARTURE FROM THE RECOMMENDED GUIDELINE SENTENCE.

After the smoke settled in this case, the First District Court of Appeal found only one legitimate aggravating factor justifying the trial court's departure from the recommended guideline sentence. That factor was that the victim was an 86 year old female who lived alone. The court, either in its original opinion or in its opinion on rehearing, rejected the trial court's other 13 reasons for departure. Carter now asks this Court to complete the task started by the First District Court of Appeal by eliminating the remaining reason justifying departure from the recommended guideline sentence.

The basis for this argument is that the reason given for departure was not clear and convincing. That is, the victim's age, sex, and living arrangements without more were simply insufficient to per se justify a departure.

What this factor perhaps implies is that because of the victim's age, sex, and living arrangement, she was helpless. But that implication certainly is unclear from the trial court's sentencing order, and in any event, it is not necessarily true.

Knowlton v. State, Case No. 84-184 (Fla. 4th DCA opinion filed February 20, 1985) directly and expressly

conflicts with the First District's opinion in this case. In that case, a 63 year old woman was working alone at a catering service at the Palm Beach International Airport. Knowlton and an accomplice bound and gagged the victim and robbed her of over $10,000.00. During the robbery, the victim was cut and bruised, her glasses taken from her, and she was afraid she was going to be killed.

In justifying departing from the recommended guideline sentence, the trial court found, as one of the four aggravating factors, that the victim was 63 years old.

On appeal, however, the Fourth District Court of Appeal rejected that reason:

> The court's final reason for departure—the victim's age—could have been considered in determining whether the victim suffered great physical or psychological injury. However, the advanced age of the victim, without more, does not support a finding that the crime was committed in a "repugnant and odious manner." Mischler [v. State, 458 So.2d 37 (Fla. 4th DCA 1984] Id.

This Court should adopt the Fourth District's reasoning, and in other context, this Court has rejected status alone as a per se consideration for sentencing.

For example, in death penalty cases, this Court has said that low intelligence does not, without more or as a matter of law, amount to a non-statutory mitigating factor. Ruffin v. State, 397 So.2d 277 (Fla. 1981). Merely because someone is retarded does not mean he is incapable of

observing the law. Of course, low intelligence would be a valid consideration if, because of that low intelligence, he was easily led so that he was under the substantial domination of another §921.141 6 (d), Florida Statutes (1983) or that he lacked the capacity to appreciate the criminality of his conduct or to conform to the requirements of the law. Section 921.141(f), Florida Statutes (1983).

Similarly this Court has rejected a defendant's youth as a per se mitigating factor. Peek v. State, 395 So.2d 492 (Fla. 1981). The mere fact that a defendant was young does not imply he was easily swayed, immature, or lacking judgment. Brown v. State, 367 So.2d 616 (Fla. 1979); Hargrave v. State, 366 So.2d 1 (Fla. 1978).

In other instances, per se age restrictions have been removed. Unless provided by law, all persons are presumed competent to testify. Section 90.601, Florida Statutes (1983). Age without more does not disqualify a witness from testifying. Williams v. State, 400 So.2d 471 (Fla. 5th DCA 1981), affirmed, 406 So.2d 1115 (Fla. 1981).

Consequently, this trend away from per se acceptance of status as controlling the law has sprung from the experience that mere status of being young, old, or dumb does not necessarily imply some legally recognized limitation. Thus, courts have generally rejected the overly broad per se approach and required that additional considerations be presented to bolster a limitation suggested by some status

such as age or sex.

This case is a good example of the problem of the per se approach the First District Court has adopted. The implication of the court's finding of the victim's age, sex, and solitary living is that she was helpless. Yet there was no evidence of that. For all we know, she may have had pistols at hand, or an emergency telephone dialing service available. In this day, the debilitating effects of age are being reduced, and from what the record shows, there is nothing to suggest that the victim here suffered any more than a 26 year old soldier who lived in a barracks. Status, without more, does not justify departure from the sentencing guidelines and petitioner asks this Honorable Court to reverse the First District's order and remand for sentencing within the guidelines.

VI CONCLUSION

Based upon the arguments presented here, petitioner respectfully asks this Honorable Court to remand his case to the trial court with directions that it resentence him to a sentence within the guidelines, or that it reweigh the remaining aggravating factor to determine if departure from the recommended sentence is justified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Ms. Andrea Hillyer, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Randy Von Carter, #091710, Box #124, Post Office Box 448, Mayo, Florida, 32066, this 19 day of June, 1985.

DAVID A. DAVIS