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IN THE

SUPREME COURT OF FLORIDA

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SAMUEL T. WILLIAMS,

Petitioner,

vs. CASE NO. 67,380

STATE OF FLORIDA,

Respondent.

_____________________/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Samuel T. Williams, was the appellant in the First District Court of Appeal and the defendant in the trial court. The State of Florida, the Respondent here, was the appellee in the First District Court of Appeal and the prosecuting authority in the trial court. The parties will be referred to in this brief as "Petitioner" and "Respondent" or "the State" respectively.

References to the one-volume record on appeal will be designated by "R" followed by the appropriate page number and enclosed in parentheses. Attached hereto as an appendix is the First District Court of Appeal's opinion in Williams v. State, issued June 25, 1985.

STATEMENT OF THE CASE AND FACTS

The State, as it did in the First District, accepts as accurate though incomplete the Petitioner's statement of the case and facts and submits the following information:

At the sentencing hearing the State made reference to a letter it had earlier submitted to the trial judge with a carbon copy to defense counsel. (R 79-80, 86-88, 93). The letter, as the State noted at the sentencing hearing, dealt with the circumstances of the instant case and gave a detailed account of appellant's previous history of committing violent crimes, especially in domestic situations. (R 78-80, 86-88, 93). Specifically the letter stated the following:

> The defendant's past history demonstrates a series of violent acts perpetrated against women. On June 7, 1968 Samuel Williams shot three people with a firearm, one of which was his wife at the time. As a result of those actions Williams was convicted of aggravated assault on July 25, 1968 and was sentenced to 15 years in Florida State Prison. On August 2, 1975, the defendant was convicted of another aggravated assault of his then current wife, in which, adjudication was withheld. That conviction was based on an incident in which the defendant cut his wife with a butcher knife.

(R 78, 86).

Based upon his past history and the circumstances surrounding the instant crime, the State recommended that the trial court depart from the guidelines sentence (at that point erroneously calculated to place the appellant in the 5½ - to - 7 year sentence range). Referring to the Court's

worksheet of reasons for departure the State listed eight grounds, including the four ultimately relied upon by the court in sentencing appellant outside the corrected calculated range of thirty months to 3½ years. (R 21-25, 28-32, 79, 84, 87).

The First District Court of Appeal issued its opinion affirming Petitioner's sentence on June 25, 1985. In that opinion, the court upheld the trial judge's use of a checklist of reasons for departure and sustained three of the four reasons given for departure. In so doing, however, the court certified the following question to be one of great public importance:

> 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 A RESENTENCING.

(A 3). Petitioner's timely notice of discretionary review followed.

SUMMARY OF ARGUMENT

Petitioner's argument that no version of the harmless error rule can be applied must fail given this Court's recent decisions in Albritton, Young, William Brooks, Brinson, and Carney. Moreover, inasmuch as the First District properly applied a harmless error analysis sub judice to conclude that the elimination of the one version found impermissible would not have affected the trial court's decision to depart, this Court, should, as it did in the virtually identical case of William Brooks, approve the appellate court's decision sub judice to affirm.

As to Petitioner's second argument that the First District's sanctioning of the trial court's use of a checklist was error, the State responds that the sentencing guidelines were not intended to usurp judicial discretion in sentencing and that the First District was absolutely correct when it held that the use of a checklist is not grounds for reversal as long as the reasons checked bear some relation to the facts of the crime.

Finally, the State contends that, contrary to the Petitioner's assertion, the First District was correct in finding the three reasons Petitioner now challenges to be permissible grounds for departure.

ISSUE I

(RESTATED) 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 A RESENTENCING.

The certified question posed by the First District in the instant case is identical to the questions certified in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984); Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984); Brooks v. State, 456 So.2d 1305 (Fla. 1st DCA 1984); Brinson v. State, 463 So.2d 564 (Fla. 2d DCA 1985) and Wade v. State, 466 So.2d 1086 (Fla. 1st DCA 1985), among others. All of these cases, with the exception of Wade, have now been decided. State v. Young, 10 F.L.W. 463 (Fla. August 29, 1985); Brooks v. State, 10 F.L.W. 479 (Fla. August 29, 1985); Brinson v. State, 10 F.L.W. 479 (Fla. August 29, 1985). These decisions each follow this Court's initial opinion in Albritton v. State, 10 F.L.W. 426 (Fla. August 29, 1985), in which this Court decided a certified conflict in Young.

In Albritton, this Court adopted the harmless error analysis—essentially that of Chapman v. California, 386 U.S. 18 (1967)—placing "the burden on the beneficiary of the error to prove beyond a reasonable doubt that the error did not

contribute to the verdict." In so doing, the Court stated:

> We adopt this standard and hold that when a departure sentence is grounded on both valid and invalid reasons that the sentence should be reversed and the case remanded for resentencing unless the State is able to show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence.[1]

10 F.L.W. at 426. Applying this test in Young, Carney, Brooks, and Brinson, this Court disposed of those cases as follows: in Young and Carney the Court approved the First District's opinion, holding that "It is clear that the district court here was unable to determine beyond a reasonable doubt that the impermissible reasons did not affect the departure sentence;" in Brooks, this Court approved the First District's decision, wherein, contrary to Young and Carney, the court was able to conclude that "the elimination of these impermissible reasons for deviation would have no affect upon the trial judge's decision," and, finally, in Brinson, this Court quashed the Second District's decision and remanded the cause because it was unable to determine "the standard" applied by the district court.

Although filed prior to this Court's decision in Brooks, Young, Carney, Brinson, and Albritton, the Petitioner's brief on the merits frames the question presented under this issue

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1. Although Albritton also held that the extent of a departure sentence is reviewable, the length of Petitioner's sentence has never been a consideration sub judice either at the district court level or here.

in terms of whether the harmless error doctrine should be a consideration in reviewing sentencing departures. Specifically, Petitioner argues that there is no place in guidelines departure cases for the application of a harmless error rule, especially where such rule is applied by the appellate courts to determine whether the trial court's decision to depart would have been the same absent the impermissible grounds. The Petitioner recognizes only one exception to his position and that is that the "harmless error doctrine might be properly applied only in one situation: that the departure sentences based, in part, upon an improper reason can be affirmed only when the appellate court can unequivocally and unmistakably know that the impropriety affected neither the decision to depart nor the length of the departure." (Petitioner's brief at 10-11). However, the Petitioner goes on to say that the "only way this can occur is if the sentencing judge makes the statement that he would depart and he would impose the same sentence for any or all of the stated reasons for departure." (Petitioner's brief at 11).

Of course, the decisions rendered by this Court in Albritton, et al., hold contrary to Petitioner's desire to uniformly apply a rule of per se reversal where even one reason is found impermissible by an appellate court. Rather, this Court has adopted, through Albritton and the others, the harmless error rule which Petitioner states he

opposes except in one very narrow circumstance. Thus, to the extent that this Court has rejected the Petitioner's proposed rule of per se reversal, Petitioner's contentions in that regard are moot.

As to that portion of Petitioner's argument dealing with the harmless error rule, the Respondent's review of Albritton and its progeny indicates that, while the test to be applied is a strict one, its application is by no means limited to situtations where the trial court has stated that it would impose the same sentence for any or all of the stated reasons for departure.

Indeed, the decisions from this Court thus far reveal that as long as the district court is able to conclude beyond a reasonable doubt that the impermissible reasons did not affect the departure sentence, then a defendant's sentence can be affirmed. This is exactly what happened in Brooks, a case directly dispositive of the instant issue.

There, the First District Court of Appeal, dealing with the same sort of "checklist" situation as appears in the instant case, found three out of the eight reasons for departure not to be clear and convincing, but, nevertheless concluded "that elimination of these impermissible reasons for deviation would have no effect upon the trial judge's sentencing decision" and, thus, affirmed the defendant's sentence. Brooks, 456 So.2d at 1307. On certiorari to this Court, as noted above, this Court approved the appellate

court's opinion, stating that the appellate court had anticipated this Court's decision in Albritton when it applied a harmless error analysis to reach its decision.

Inasmuch as the holding in Brooks is virtually identical to the instant case, this Court should likewise approve the First District's opinion in this cause. Just as in Brooks, the district court, after finding only one of four reasons for departure to be impermissible, affirmed, concluding that:

> Although one of the reasons for departure is impermissible, we do not consider that elimination of this reason would have affected the trial judge's decision to depart from the guidelines.

(A-3). This holding illustrates that, as in Brooks, the First District correctly applied a harmless error analysis and, thus, in order to maintain a uniformity in its decisions on this issue, this Court must follow Brooks and dispose of this cause by affirming the district court's decision.

Moreover, that the elimination of the one reason found impermissible would not have affected the trial court's decision is firmly supported by the record. For example, at the sentencing hearing, defense counsel argued in mitigation of an upward departure that the victim, Petitioner's girlfriend, had not wanted to prosecute the Petitioner and did not want to see him incarcerated. Defense counsel also noted that Petitioner was the one who called for help for his girlfriend following the stabbing (R 90-92). Following the prosecutor's argument in favor of an upward departure, the court stated:

> Hearing no legal cause why sentence and judgment of the Court should not now be imposed, I'm going to adjudicate the defendant guilty of the offense of aggravated battery with a deadly weapon. I had intended, Ms. Cocheu, to sentence this defendant to ten years. Based on the presentation that has been made, based on the comments that have been made, I'm going to sentence him to five years at Department of Corrections, give him credit for 46 days in the Leon County Jail.
>
> That constitutes a departure from the sentencing guidelines. I do that on the basis that there's no pretence of any moral or legal justification for the commission of this offense, that he has engaged in a violent pattern of conduct which indicates that he's dangerous to society, and particularly that this defendant stabbed this lady while she was asleep and therefore particularly vunerable to any type of attack. Had no opportunity or basis upon which to defend herself at all.
>
> Whether she agrees with that or not, <u>it's the view of the Court that that type of action simply is not one that can be condoned in any civilized country</u>.

(R 94). (Emphasis supplied). Thus, given the fact that the court was originally going to impose a ten-year sentence and given the court's comment that "that type of action simply is not one that can be condoned in any civilized country," the record supports beyond a reasonable doubt the conclusion that one reason found by the First District to be impermissible would not have affected the trial court's departure sentence.

As a result, like <u>Brooks</u> and unlike <u>Carney</u> and <u>Young</u>, this Court <u>can</u> conclude in the instant case that the First District was able "to determine beyond a reasonable doubt

that the impermissible reason did not affect the departure sentence." Consequently, the Respondent urges this Court to approve the First District's opinion in Williams v. State and thus affirm Petitioner's sentence.

Finally, it is important to note that in making any argument regarding harmless error, one must assume there has been an error committed in the first instance. Although Respondent has made that assumption here, it by no means is conceding that the First District was correct in labeling as impermissible the trial court's reason for departure that there was an absence of moral or legal justification for the crime. There is support for such a conclusion in the record and the State therefore suggests that this Court first consider whether the reason held impermissible was indeed invalid before it scrutinizes this cause in terms of the harmless error rule. In this vein, then, the State urges this Court to recognize the absence of moral or legal justification as a proper reason to aggravate a defendant's sentence just as this Court has already recognized the same ground as an element of an aggravating factor in capital cases pursuant to § 921.141(5)(i), Florida Statutes. Cf. O'Callaghan v. State, 429 So.2d 691 (Fla. 1983); Cannady v. State, 427 So.2d 723 (Fla. 1983); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). Surely this Court can see the ludicrousness of allowing such an element to be considered in death cases (and it is recognized by

statute no less) and not allowing it to be considered by a trial court as a ground for deviation at sentencing in noncapital cases.

Of course, if this Court concludes that the absence of moral or legal justification is a valid ground for departure, then the foregoing argument on harmless error is moot, and, assuming Petitioner is not successful with his argument under Issue II, the Petitioner's sentence must be affirmed.

ISSUE II

THE FIRST DISTRICT DID NOT ERR IN SANCTIONING THE USE OF A CHECKLIST OF REASONS FOR DEPARTURE OR IN SUSTAINING THREE OF THE FOUR REASONS FOR DEPARTURE.

Petitioner bootstraps two additional issues to the issue raised by the certified question. Petitioner alternatively argues, first, that the First District erred in condoning the trial judge's use of a checklist of reasons for departure in the instant case, and, second, that, even if the use of a checklist is upheld by this Court, the First District still erred in finding three of the four reasons for departure given by the trial court to be valid.

The State recognizes that, under Tillman v. State, 471 So.2d 32 (Fla. 1985), once this Court has accepted a case containing a question certified as being of great public importance, it may review any issue arising in the case that has been properly preserved and presented. In Tillman, this Court defined an issue "properly preserved and presented" as follows:

> In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of the presentation if it is to be considered preserved.

Id. at 35. Sub judice, although it appears that Petitioner objected to the specific reasons for departure, there is no

indication in the record that appellant objected to the trial court's use of the checklist itself. As a result, even though the First District addressed the checklist issue, it is the State's position that, under Tillman, this Court should refrain from considering that particular issue because it was not adequately preserved at the trial level. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

However, should this Court reject the State's procedural default argument with regard to the checklist issue, it is the State's alternative argument that the Petitioner's contention as to the trial court's use of the checklist in the instant case is without merit. Petitioner basically asserts three grounds for his argument that the trial court's use of a checklist was improper. Specifically, Petitioner contends (1) that the use of a checklist was implicitly rejected by the Sentencing Guidelines Commission; (2) that the practice makes a mockery of the guidelines' purposes, one of which is to ensure uniformity of sentencing because it otherwise gives rise to unbridled and unreviewable sentencing discretion as a substitute for individualized and specific consideration of each criminal case; and (3) that the checklist's reasons are "so cryptic that they arguably might apply in every criminal case" and "no one can with assurance know the reason or how it fits the facts."

Petitioner's first assertion is based upon a comment to former Fla.R.Crim.P. 3.701(d)(11) and its accompanying

committee note.[2]

The comment provides:

> Recognizing the relative uniqueness of each criminal case, the commission elected not to include a list of factors which may be cited in aggravation or mitigation. Because the reasons for departure delineated by the sentencing judge are the primary source of information available to update the guidelines, it is extremely important that care should be taken in citing the circumstances used to aggravate or mitigate the presumptive sentence.

Florida Sentencing Guidelines Manual, page 5.

It is the State's contention that this comment cannot be interpreted as Petitioner suggests, to implicitly admonish a trial judge's use of a checklist in departing from a recommended guidelines sentence. Nothing in the foregoing proscribes the use of a checklist for purposes of complying with the writing requirement set forth in Fla.R.Crim.P. 3.701 (d)(11). Indeed, the State suggest that the foregoing comment is consistent with the Sentencing Commission's stated intention not to usurp judicial discretion, Fla.R.Crim.P. 3.701(b)(6), in that the comment indicates that the trial judiciary is to be given latitude to develop reasons for departure upon which subsequent amendments to the guidelines could be based. Moreover, the State notes that while the

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2. The amended rule and committee note were adopted by the Florida Supreme Court on May 8, 1984, The Florida Bar: Amendment to Rules of Criminal Procedure. (3.701, 3.988- Sentencing Guidelines), 451 So.2d 824 (Fla. 1984) effective July 1, 1984, Ch. 84-328, Laws of Florida.

committee notes were adopted as part of the Rules, the comments have not. The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines). Thus, the comments cannot be relied upon as authority for a mandatory proscription of the practice of which Petitioner complains.

Petitioner's second contention is likewise without merit. The record does not support Petitioner's argument that the use of a checklist undermines the stated purpose of the guidelines "to eliminate unwarranted variation in the sentencing process." Fla.R.Crm.P. 3.701(b). The fact that a checklist was used sub judice did not affect the trial court's decision to depart inasmuch as it is clear from the record that the trial judge, given the facts before him, intended to depart, was warranted in departing, and would have departed with or without using the checklist as the means by which he delineated his written reasons.

Additionally, Petitioner's comments regarding the alleged unbridled discretion that is allegedly unleashed by using a checklist go against the very premise upon which the guidelines operate. The Sentencing Guidelines Commission, as noted above, has unequivocally stated its intention not to usurp judicial discretion, Fla.R.Crim.P. 3.701(b)(6); See also Weems v. State, 451 So.2d 1028 (Fla. 2d DCA 1984), approved, Weems v. State, 469 So.2d 128 (Fla. 1985). Florida Rule of Criminal Procedure 3.701(d)(11) establishes the

parameters within which the trial court's inherent sentencing discretion must be exercised and Florida Statutes §§ 921.001(5), 924.06(1)(e), and 924.07(9) provide for appellate review of the exercise of that discretion. Petitioner's argument, if accepted, would usurp the discretion remaining with the trial courts under the guidelines and would restrict the sentencing judiciary to a far greater extent than envisioned by the Guidelines Commission. The discretion which exists now and which was exercised by the trial court below is neither unbridled nor unreviewable as Petitioner suggests. That discretion has not lost its place in sentencing was recognized in Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984), where the court held:

> 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 discretion. Here, the trial judge stated his basis for departing from the guidelines in writing and imposed a sentence within the statutory parameters. Given this factual situation, no abuse of discretion has been shown.

Id. at 956. Similarly, the First District, in Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984), held:

> In our view, the traditional discretion of a sentencing court to consider all facts and circumstances surrounding the criminal conduct of the accused has not been abrogated by adoption of the sentencing guidelines . . ..
>
> * * * * *

> 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 . . .
>
> * * * * *
>
> . . . 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 . . ..

Id. at 716-717; 717; 718.

This Court has likewise recognized the importance of maintaining a trial court's discretion in sentencing in its recent Albritton decision, where, in determining that appellate courts could review the extent of a departure sentence, the Court stated that the guidelines:

> . . . are not intended to usurp judicial discretion. Sentencing is still an individualized process. For that reason, the guidelines themselves provide for sentences which depart from the norm. To place a cap on the degree of departure from the guidelines sentence would severely restrict the trial judge's discretion to impose sentences, within statutory limits, based on the particular factors present in an individual sentencing.

10 F.L.W. at 426.

That the First District continues to adhere to the philosophy that sentencing is an individualized process, but, nevertheless, a judge must relate his particular reasons for departure to the facts of his case, is evident from the string of cases from that court dealing with the checklist issue. See, e.g., Dan Brooks v. State, 455 So.2d 1182 (Fla. 1st DCA 1985); Napoles v. State, 463 So.2d 478 (Fla. 1st DCA 1985); Alford v. State, 460 So.2d 1000 (Fla. 1st DCA 1984). A review of those cases indicates, as the court clarified in the instant case, that the use of a checklist when stating reasons for departure does not compel reversal as long as the reasons relate to the facts and circumstances of the crime in question. As will be seen infra, the reasons found permissible by the appellate court sub judice, do relate to the circumstances surrounding Petitioner's offense. Thus, inasmuch as the First District has correctly allowed the trial court its discretion in the use of a checklist and properly limited that use to instances where the reasons relate to the facts of the crime, this Court should approve the First District's position.

Finally, as to Petitioner's third argument, a similar contention was presented to the First District in Garcia. There, the trial judge's written reason for departure was the "extreme risk to the physical safety of both citizens and law enforcement officers caused by the [appellants] during the perpetration and apprehension for this offense."

On appeal, it was argued that the trial court failed to adequately delineate its reasons for departing from the sentencing guidelines; that the trial court's terse and conclusory assertion failed to inform with sufficient specificity all parties, as well as the public, of the reasons for departure; and that their right to appellate review had been curtailed by the trial court's alleged lack of written specificity as to the reasons for its departure from the guidelines. The First District flatly rejected these contentions, holding:

> Appellants' second ground on appeal is frivolous. Rule 3.701(d)(11) requires a "written statement" of the trial court's reasons for not sentencing within the guideline range that has "sufficient specificity" to inform the parties and the public of the trial court's reasons for said departure. Committee note to paragraph (d)(11). Examining the trial court's written statement, as well as the record as a whole, see Manning v. State, supra, at 1363-4 (Ervin, C.J. specially concurring), we find the rule to have been complied with here.

Id. at 719. It is submitted that the checklist used by the trial court in the instant case is sufficiently clear and unambigous, especially when viewed in conjunction with the record as a whole, to apprise the public, Petitioner, and defense counsel, both at trial and for purposes of appellate review, of the trial court's reasons for imposing a sentence that is outside the recommended range.

As part of Petitioner's argument in this regard, he cites to Abbott v. State, 421 So.2d 24 (Fla. 1st DCA 1982) a case easily distinguishable from the instant one. There, Abbott appealed the trial court's retention of jurisdiction pursuant to § 947.16(3), Florida Statutes, over one-third of his sentence for armed robbery. Abbott's argument was that, even though the trial judge did not state on the record his reasons for retaining jurisdiction, the statement of reasons given was legally insufficient. The district court in agreeing with Abbott and reversing the trial court's order, held that the trial judge's written ground for retaining jurisdiction did not satisfy the requirement of § 947.16(3)(a) that justification for retention of jurisdiction be stated with individual particularity. This statutory requirement of specificity is a far more stringent standard than the committee note requirement of "sufficient specificity to inform all parties, as well as the public" in the instant case. As a result, Abbott has no application to the instant case.

Based upon the foregoing, it is submitted that there is no indication that the use of a checklist in anyway undermines the purposes of the sentencing guidelines or the intentions of the Sentencing Guidelines Commission. Nor does it appear that the reasons on the checklist are so "cryptic" that they can be applied in every case especially when taken in the context of the record as a whole, as this Court suggests in Garcia. Indeed, even defense counsel below was able to

respond to the trial court's reasons for departure with specific objections. (R 96-97). Thus, it appears that the reasons given for departure below were adequately related to the facts to provide defense counsel with specific grounds for objection.

Turning to the Petitioner's assertion that the appellate court erred in finding the remaining three reasons for departure permissible, it is the State's response that the appellate court was correct in its determination. The first reason for departure was discussed in Issue I.

As to the second reason for departure given by the trial court—that Petitioner had "engaged in [a] violent pattern of conduct which indicates a serious danger to society"—Petitioner contends that the lower court did not sufficiently enumerate this ground, citing to Alford. However, although Alford involves the same checklist and the same trial judge as the instant case, the violent-pattern-of-conduct ground was not one checked in Alford. It was checked in Brooks, 455 So.2d 1305 (Fla. 1st DCA 1984), a case recently approved by this Court, supra, again involving the same trial judge and the same checklist—where it was accepted by this Court as a clear and convincing reason for departure inasmuch as the record revealed a clear pattern of criminality. Such is also the case sub judice; the record, particularly those portions revealing Petitioner's prior violence in domestic situations (R 76, 78-80, 86-88), clearly demonstrates a pattern of

criminality which could be, and was, properly considered by the trial court as a ground for departure. That the record supports the court's second ground distinguishes Alford from the instant case even further. Specifically, unlike the court's criticism in Alford, this second reason does relate to something within the context of the case, i.e., that Petitioner was convicted of a crime committed in the same context (domestic) as those for which he had been convicted before. Thus, there is a clear factual relationship between the reason for departure and the crime for which appellant was sentenced. As a result, the second reason for departure is a clear and convincing one.

The same argument applies with regard to the third ground for departure, i.e., that "a lesser sentence is not commensurate with the seriousness of the defendant's crime." Again, this identical ground was upheld by the First District in Brooks as clear and convincing. Likewise, it is clear from the record that the court gave great consideration to the serious nature of the offense in deciding to depart. (R 94). As a result, given the crime's potential seriousness, the trial court did not abuse its discretion in departing on this clear and convincing ground. Moreover, because the court's second ground for departure does relate to the facts of this case, the criticism in Alford has no application sub judice.

Turning to Petitioner's arguments as to this third

reason for departure, Petitioner contends that this reason is "not clear and convincing because it fails to explain why the length of time permitted by the guidelines for this crime is not sufficient punishment." This argument must fail inasmuch as a trial judge has the discretion under the guidelines to consider the facts before him and determine if the sentence fits the serious factual nature of the crime. Here, the judge, in his discretion, concluded that it did not, and no abuse of discretion has been demonstrated by Petitioner. For this same reason, Judge Sharp's dissent in Hendrix v. State, 455 So.2d 449, 451 (Fla. 5th DCA 1984), relied upon by Petitioner, has little meaning because one thing that cannot be taken away from sentencing judges is their subjective view of the facts surrounding the cases before them, i.e., how each judge reacts to the various facts before him. This is so, at least, where the judge's reason for departure finds support in the record as it does here. Appellate courts cannot remove a trial court's discretion; they can only determine if he has abused that discretion and such is not the case sub judice.

As to the trial court's fourth and final reason for departure, that the victim was asleep when she was stabbed (and obviously less able to defend herself than if she was awake), Petitioner notes that this finding is one that was added to the checklist by the judge in writing, and Petitioner then goes on to argue that if the victim had been

awake perhaps more bloodshed would have resulted. It is submitted that while that may or may not have been the case, a Petitioner cannot distort the facts from what actually occurred, especially where there is no factual basis for such a speculative argument in the record. Here, the victim was asleep, making her particularly vulnerable to, as well as compeletly defenseless against, Petitioner's attack. The facts clearly support the trial judge's fourth written reason for departure.

It should also be noted that the fact that the trial judge did add his own written reason, which clearly pertained to the factual scenario of the crime, is further support for the State's argument that simply because a "standardized" checklist exists does not mean that the trial court has not given fair and due consideration to the unique facts of the case before him in determining whether a departure from the recommended guidelines sentence is warranted.

As a result, because the Petitioner has failed to show that the First District erred in affirming the trial court's use of a checklist and in finding three of the trial court's four reasons to be permissible, the State urges this Court to approve the First District's decision.

CONCLUSION

Based on the foregoing, the State urges the Court to approve the First District's decision sub judice, and, thus, to affirm the Petitioner's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Mr. P. Douglas Brinkmeyer, Post Office Box 671, Tallahassee, Florida 32301, on this the 30th day of September, 1985.

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OF COUNSEL