

TOPICAL INDEX TO BRIEF

	<u>PAGE NO.</u>
STATEMENT OF THE CASE	1-2
STATEMENT OF THE FACTS	3-4
SUMMARY OF ARGUMENT	5
ARGUMENT	
WHEN THE SENTENCING JUDGE RELIED UPON IMPERMISSIBLE CRITERIA AS A BASIS TO EXCEED THE SENTENCE, AS CALCULATED BY THE SENTENCING GUIDE- LINES, THE CASE MUST BE REMANDED FOR A RESENTENCING.	6-8
CONCLUSION	9
CERTIFICATE OF SERVICE	9
APPENDIX	

TABLE OF CITATIONS

<u>CASES CITED</u>	<u>PAGE NO.</u>
<u>Albritton v. State</u> ___ So.2d ___, 10 F.L.W. 426 (Fla.1985)	8
<u>Davis v. State</u> 458 So.2d 42 (Fla.4th DCA 1984)	7
<u>Hendrix v. State</u> ___ So.2d ___, 10 F.L.W. 425 (Fla.1985)	8
<u>Lindsey v. State</u> 453 So.2d 485 (Fla.2d DCA 1984)	6
<u>Williard v. State</u> 462 So.2d 102 (Fla.2d DCA 1985)	7
<u>Wyman v. State</u> 459 So.2d 1118 (Fla.1st DCA 1984)	7
<u>Young v. State</u> 455 So.2d 551 (Fla.1st DCA 1984)	7
<u>OTHER AUTHORITIES</u>	
Florida Rule of Criminal Procedure 3.701	6

STATEMENT OF THE CASE

An information charging, MICHAEL ANGELO AGATONE, with first degree arson was filed by the State, September 22, 1982, in Lee County. (R1) On December 20, 1982, Petitioner entered a plea of guilty to that charge and was placed on probation for 30 years, ordered to serve time in county jail and make restitution. (R3)

A motion for mitigation of Petitioner's sentence was made December 29, 1982. (R5) It was subsequently denied. (R6) Another motion to mitigate was filed March 23, 1983. (R7) That motion was granted and Mr. Agatone's sentence of 364 days in county jail was reduced. (R8)

An affidavit and amended affidavit of violation of probation were filed in Lee County. (R11,12,17) It was alleged that Petitioner had violated two of the conditions of his probation: conviction of battery and failure to pay restitution. (R17)

A violation of probation hearing was held September 10, 1984, before Circuit Judge R. Wallace Pack. (R22) Mr Agatone admitted a violation of probation and was found in violation by the judge. (R24)

On October 8, 1984, Petitioner was sentenced to 30 years incarceration with credit for time served. (R45)

Notice of appeal was timely filed October 17, 1984. (R48) The public defender was appointed to represent Petitioner on appeal.

The decision of the District Court of Appeal was issued on August 17, 1985; a motion for rehearing was denied on August 29, 1985. This Court took jurisdiction on September 9, 1985.

STATEMENT OF THE FACTS

Following entry of a guilty plea to first degree arson, Mr. Agatone was placed on 30 years probation in 1982.

(R3) The conditions of his probation included requirement that Petitioner remain at liberty without violating any laws, and pay \$1,000 restitution per year. (R3)

In 1984 Mr. Agatone was convicted of battery and an affidavit alleging violation of probation was admitted at a hearing held September 10, 1984. (R24) The court found Petitioner guilty of violation of probation. A hearing in regard to sentencing was held on October 8, 1984. (R39)

Testimony was given on Petitioner's behalf by: Don Miller, Joann Bradley, and Seymour Rocke. Mr. Miller, vice president of production at the Ft. Myers News-Press, testified that Petitioner worked there, had been very loyal and willing worker, and that a job existed there for him. (R24,40) He said Petitioner was very conscientious and had not given any trouble to the employer. He also said Petitioner had been willing to work overtime and to come in to work any time they telephoned him. (R25) Mr. Miller also understood that Petitioner had been sentenced to a year in jail for another case, but would still be willing to re-employ him. (R41)

Joann Bradley, Human Resources Director at the Ft. Myers News-Press, testified. (R25,41) She said she works with most of the 500 employees there and Mr. Agatone was one of the most dependable people they had. (R26) Ms. Bradley testified

that Petitioner had always come to work on time and had rarely been absent. (R42)

Seymour Rocke, production manager of the News-Press, testified. He related that Petitioner always did a good job, knew his job, and that he would like to have him back in his employ. (R43)

The court was requested to sentence Petitioner under the sentencing guidelines. (R39) A sentencing guidelines score-sheet was prepared for Petitioner. It indicates 238 points and 10 years incarceration. (R15) The trial court exceeded the guidelines recommended sentence and imposed a sentence of 30 years incarceration on Petitioner. (R36) The trial court stated its reasons for exceeding the guidelines and they appear in the transcript. (R44) The Second District Court of Appeal affirmed, but certified the question.

SUMMARY OF ARGUMENT

There was a total lack of any valid reasons to justify a departure from sentence as calculated pursuant to the Florida Sentencing Guidelines. The first reason given for deuration was deemed invalid by the District Court of Appeal. The second reason is invalid pursuant to the decision of this court in : Hendrix v. State, ___ So.2d ___, 10 F.L.W. 425 (Fla.1985), Case No. 65,928, opinion rendered August 29, 1985.

ARGUMENT

WHEN THE SENTENCING JUDGE RELIED
UPON IMPERMISSIBLE CRITERIA AS A
BASIS TO EXCEED THE SENTENCE, AS
CALCULATED BY THE SENTENCING GUIDE-
LINES, THE CASE MUST BE REMANDED FOR
A RESENTENCING.

When the presumptive sentence, calculated pursuant to the Florida Sentencing Guidelines, is exceeded, and some of the reasons for departure are impermissible, what action should the appellate court take?

The Petitioner would submit that if any of the reasons given for departure are found to be improper, the cause must be remanded for resentencing, since the unacceptable reason for the departure may have been influenced the extent of the departure.^{1/}

The sentencing guidelines were established to provide uniformity in regard to standards to guide the sentencing judge, and to establish consistency in sentencing among the judicial circuits. To achieve the desired consistency departures from the Guidelines are to be avoided unless clear and convincing reasons exist to exceed or mitigate the sentence. Fla.R.Crim. 3.701; Lindsey v. State, 453 So.2d 485 (Fla.2d DCA 1984).

In regard to the imposed sentence, the question is twofold: was a departure proper, and, was the extent of departure proper?

^{1/}Petitioner's position is that the sentence imposed upon him was improper, and that none of the reasons cited by the trial judge are "acceptable" reasons to exceed the guidelines.

In the district court, it was argued that no proper reasons existed to exceed the guidelines presumptive sentence. The appellate court found one of the reasons "adequate," and one "invalid." The district court said the first ground for departure, "that Appellant was a devious person who committed perjury before the court," was improper, but, that the second reason was valid. The second reason, "that Appellant committed several violent crimes in the past, and this posed a danger to the community," was upheld. (Appendix A2).

Petitioner would question the validity of the reason the district court found acceptable. The reasoning, that he posed a danger to the community, is questioned, along with the assertion that he had prior convictions. The link between those two statements is also open to doubt. See, Wyman v. State, 459 So.2d 1118 (Fla.1st DCA 1984).

The extent of departure, considering one or more invalid reasons, is the basic question herein. In Young v. State, 455 So.2d 551 (Fla.1st DCA 1984), the appellate court found it "impossible to determine whether the trial judge would have come to the same conclusion" solely on the basis of the valid reasons. (at 552) However, in Williard v. State, 462 So.2d 102 (Fla.2d DCA 1985), a departure was affirmed when only one of the cited reasons for departure was valid.

In Davis v. State, 458 So.2d 42 (Fla.4th DCA 1984), the court ruled that impermissible reasons for departure could affect the extent of departure, and it would be equitable to reverse and remand for resentencing when invalid reasons were detected.

Finally, the question came to this court. In the recent case of Albritton v. State, ___ So.2d ___, 10 F.L.W. 426 (Fla.1985), Case No. 66,169, opinion reduced August 29, 1985, this forum ruled that when a departure sentence is grounded on both valid and invalid reasons, the sentence is to be reversed, unless a showing is made that the absence of invalid reasons would not have affected the departure sentence.

It should be noted that no valid reason seems to exist herein, as the district court ruled one reason invalid, and the other reason would likewise appear invalid, following the decision Hendrix v. State, ___ So.2d ___, 10 F.L.W. 425 (Fla.1985), Case No. 65,928, opinion rendered August 29, 1985. It would therefore most surely seem that no showing could be made that the absence of the "invalid" reason would not have affected the extent of departure.

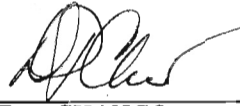
Petitioner would therefore submit that this case must be reversed and remanded to the trial court with directions that a guidelines sentence be imposed.

CONCLUSION

For the reasons and authorities hereinbefore stated, Petitioner respectfully requests this Honorable Court to reverse his sentence and remand this case with directions that sentence in accordance with the sentencing guidelines be imposed.

Respectfully submitted,

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TENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, this 19 day of September, 1985.



D.P. CHANCO