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PRELIMINARY STATEMENT

Petitioner was the Appellee in the court below and the defendant in the trial court. Respondent was the Appellant in the court below and the prosecution in the trial court.

The following symbol will be used:

"R"

Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts as set forth in his initial brief on the merits.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DEPARTING FROM
THE GUIDELINES.

In its answer brief Respondent claims that the trial court's adoption of the reasoning of the alternative sentencing was an improper delegation of its sentencing responsibility. It is true that the delegation of responsibility of formulating reasons for departure is improper. Carnegie v. State, 473 So.2d 782 (Fla. 2d DCA 1985). However, there was no such delegation of responsibility in the present case. Here, the trial court adopted a written plan which was already in existence. The trial court adopted the plan in response to the prosecutor's request that the defense counsel not be permitted to submit written reasons for fear that she would write "... an order containing every possible reason for going below the guidelines ..." (R31-32). While he did object to the departure, the prosecutor never objected to the adoption of the alternative sentencing plan as the written reason for departure. The adoption of the pre-existing alternative sentencing plan is not an improper delegation of sentencing responsibility. See, Johnson v. State, 483 So.2d 839 (Fla. 2d DCA 1986). If this Court finds that the alternative sentencing plan is not sufficiently specific this cause should be remanded for the trial court to enter its specific reasons in writing.

Respondent also states that the trial court abused its discretion in sentencing Petitioner because the severity of the offense is represented by the recommended guideline sentence. However, the point germane to the present departure is that the


guidelines do not take into account the reasons that were given for departure. Petitioner's impaired mental capacity due to the abuse of alcohol should not be barred from being considered in mitigation of the sentence. See, Ross v. State, 474 So.2d 1170 (Fla. 1985); State v. Dixon, 283 So.2d 1 (Fla. 1973); The Florida Bar v. Headley, 475 So.2d 1213 (Fla. 1985); The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982). While rehabilitation is not the primary purpose of the guidelines, treatment plans should not be completely barred as a sentencing consideration. A downward departure in order to place a defendant in a specific treatment program, structured so he can be assisted by friends and family, is not an abuse of the trial court's discretion. See, State v. Twelves, 463 So.2d 493 (Fla. 2d DCA 1985). The guidelines were created to eliminate unwarranted subjectivity in the sentencing process, but were not created to usurp a trial court's discretion in utilizing alternative sentencing programs carefully tailored to the particular circumstances of a case. Petitioner relies on his initial brief for further argument on this point.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner respectfully requests the decision of the district court be reversed and that the sentence of the trial court be affirmed.

Respectfully submitted,

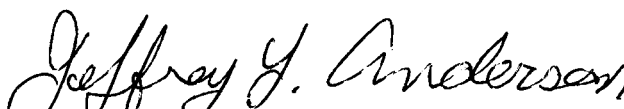
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to NOEL PELELLA, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 26th day of November, 1986.



Of Counsel