IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 68,973

EDWARD LEON ROUSSEAU,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the appellant in the lower tribunal, and the defendant in the trial court. The parties will be referred to as they appear before this court. A one volume record on appeal, including transcripts, will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as an appendix is the opinion of the lower tribunal, a motion for rehearing, and the opinion on rehearing dated May 30, 1986. References to petitioner's brief will be by "B" and the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Respondent generally accepts petitioner's statement of the case and the facts. Any additional facts will be addressed as necessary in issue two, infra.

III SUMMARY OF ARGUMENT

Respondent will argue that certain reasons have been condemned as factors to be considered by a trial judge who departs from a presumptive guidelines range. Because these factors are totally improper, the harmless error doctrine has no applicability in appellate review. Respondent will argue that this court's holding in State v. Mischler, ___ So.2d ___, 11 FLW 139 (Fla. April 3, 1986), setting forth three categories of prohibited reasons is entirely consistent with the prior holding in Albritton v. State, 476 So.2d 158 (Fla. 1985). The court has merely said the obvious; in some situations, the state can never demonstrate beyond a reasonable doubt that the absence of the improper reason would not have affected the departure sentence. Therefore those narrow class of cases must automatically be reversed and remanded for reconsideration by the trial judge whether he should again depart; and if so, to what extent.

Additionally respondent will argue the remaining two reasons for departure approved by the District Court were not clear and convincing.

IV ARGUMENT

ISSUE ONE (RESTATED)

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON WITHIN THE THREE CATEGORIES CONDEMNED IN STATE V. MISCHLER 11 FLW 139 (FLA. 1986), A GUIDELINES DEPARTURE MUST BE REVERSED.

Once again the state seeks to apply a per se harmless error doctrine to sentencing guidelines departures in which at least one valid justification for deviation exists. Petitioner misinterprets the import of Albritton v. State, 476 So.2d 158 (Fla. 1985), wherein this court opined:

> [w]hen a departure sentence is grounded on both valid and invalid reasons...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. Id. at 160.

That decision quashed the Fifth District's holding that a remand was unnecessary in every case when a single clear and convincing reason exists concurrently with invalid reasons. Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984).

Because sentencing departures are not favored, any analysis which automatically presumes such action to be correct in light of facially wrong reasons in the decision-making process clearly misunderstands this court's plain English language. Once some reasons are stricken, the burden is not upon the person under sentence to demonstrate the

error is reversible or at least harmful. Instead the state must show beyond a reasonable doubt that the error was harmless.

State v. Mischler, ___ So.2d ___, 11 FLW 139 (Fla. April 3, 1986) in no way overruled Albritton as petitioner rhetorically suggests (B-7). When a trial judge departs in reliance upon factors in three categories: a) a reason prohibited by the guidelines; b) factors already taken into account in calculating the guidelines score; or c) inherent components of the crime in question, the appellate court is obligated to find such departure improper. Mischler, supra at 140.

Consistent with the Albritton standard, whenever a trial judge utilizes a condemned reason in exceeding the presumptive guideline, this dependence taints the entire proceeding. In certain instances, the state by definition cannot demonstrate harmless error. Unlike a reversal for a new trial in which a defendant might be acquitted, a reversal for a new sentencing still guarantees sentencing. A per se reversal for reasons prohibited in Mischler does not order imposition of a guidelines sentence. Indeed, the judge may again depart.

Mischler says the obvious: certain justifications are void under any circumstances. For a trial judge to depart because a robber was black manifestly is error. Since appellate courts are neither mind readers nor possessors of

mathematical formulas to determine how much credence the trial judge placed in otherwise valid, proven reasons, Albritton approves a remand.

Then, too, departure decisions are not simply a binary function -- to depart or not to depart. Albritton anticipates the extent of departure as an issue subject to appellate review. Should half the reasons to exceed the guidelines be improper, some for lack of evidence and others per se error under Mischler, an appellate court would have a difficult determination. It must infer the trial judge's intent in an individualized process -- imposing a sentence tailored to the specifics of a case. Not only does harmless error here eviserate the appellate right but also abrogates appellate responsibility. Appellate judges should not blithely approve trial judge's actions -- which may be mere political responses or dissatisfaction with the status quo -- when the legislature advises otherwise.

Petitioner advocates application of harmless error to uphold judicial discretion. Respondent urges limited application to uphold defendant's right to appeal as guaranteed by the legislature. Both Albritton and Mischler support this latter contention.

Albritton may be viewed as a scale. Ordinarily the weight of the crime on one side would balance out to a guidelines sentence on the other. If various stones of unknown size and

weight, representing aggravating factors, are added to the crime side, increasing weight representing sterner punishment must be added to the sentence side. Removal of some stones, that is, finding improper reasons, would affect the balance. Applying a harmless error analysis requires the appellate court to ignore the law of gravity (or human nature) to assume the scale remains fairly balanced. A better practice is to order the trial judge to recalibrate that balance.

The primary significance of Mischler is not to ponder possible offsetting factors but to analyze the quantum of proof required to establish a clear and convincing reason. Albritton considered the weight to be given reasons while Mischler addressed, as it were, their admissibility. As Justice Ehrlich accurately noted:

> a "clear and convincing reason" must pass two hurdles: (1) it must be a valid reason, i.e., one which, in the abstract, is an appropriate reason for departure for a particular crime; and (2) the facts of the particular case must establish the reason in that case beyond a reasonable doubt. Mischler, supra at 140.

Some reasons, the court noted, will never support a departure, i.e., they are never admissible. Petitioner argues, despite their absolute verboten nature, the condemned reasons may be thought to have no effect on the ultimate outcome. One may assume a tumor to be benign but the far better practice to examine it. Similarly blueprints for

a house may result in the construction of a well-built home. Erecting it on quicksand would be folly, erecting it on a nicely wooded acre would be fine, and erecting it on a flood plain might require reconsideration.

Granted, the enactment of the guidelines system curbed some judicial discretion. When the guidelines were adopted, Fla. R. Crim. P. 3.701(b) provided this statement:

> The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the state. Sentencing guidelines are intended 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.

The nine graduated categories of crime and the five subdivisions considering such factors as prior record and additional offenses at conviction are structured to provide objective standards. The judge then has a range within which he may impose a specific sentence. Fla. R. Crim. P. 3.701(d)(8). Although not eliminating judicial discretion, the rule seeks to discourage departures.

Florida Rule of Criminal Procedure 3.701(d)(11) reads:

> Departures from the guideline sentence: Departures from the guideline range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence.

> Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.

Since the guideline ranges embody factors already used in setting the level of punishment, to allow those same factors to serve as a basis for departure would emasculate the guidelines' objectives. That, in essence, is the danger this court recognized in Mischler.

Prior to the guidelines, 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); Infante v. State, 197 So.2d 542 (Fla. 3d DCA 1967). Then, as now, certain sentencing decisions were reviewable. If the trial judge based the sentence upon unreliable evidence or upon impermissible factors, such facially legal sentences were reversed. E.g., Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979) (defendant's habitual offender determination vacated where trial court relied upon uncorroborated hearsay in determining extended sentence necessary for protection of the public); Crosby v. State, 429 So.2d 421 (Fla. 1st DCA 1983) (juvenile's sentence as adult vacated where trial court improperly considered prior arrests not resulting in

convictions as evidence of guilt); Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984) (lack of remorse by defendant and exercise of a right to trial, and trial court's belief he suborned perjury); Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979) (defendant's refusal to enter a plea and demand for trial); Owen v. State, 441 So.2d 1111 (Fla. 3d DCA 1983) (retention of jurisdiction reversed where judge considered factor inconsistent with jury's verdict); McEachern v. State, 388 So.2d 244 (Fla. 5th DCA 1980) (court could not impose a more severe sentence because of costs and difficulty of proving the state's case); Sliger v. State, 382 So.2d 373, (Fla. 5th DCA 1980) (imposition of 5 year sentence when defendant rejected trial judge's offer of 5 year probation and $50,000 fine if he relinquished his right to appeal past rulings).

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.

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 guideline system in no way limits the trial court's sentencing discretion, appellate review of a guideline departure must at a minimum include a determination whether prohibited reasons, such as those condemned by Mischler, supra, 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.

Much of what a trial judge decides at the pretrial, trial, and post conviction level is discretionary. While harmless error as an appellate doctrine supplies the mechanism for finality that the system requires, it should not be abused to thrawart the intent of the legislature. Rarely do trial judges at the preadjudicatory level have to justify their rulings or provide written orders. At the trial level judges and juries, rightfully so, have broad discretion to resolve factual disputes. Appellate restraint dictates that the reviewing court should not sit as a second jury anymore than an acquitted defendant should have his case retried by a higher court. The jury has spoken.

After a conviction the defendant leaves the province of the trial judge, he enters the purview of a second branch of government, the Executive Branch. It is not surprising that a trial judge's discretion could be more restrained and more subject to review at this stage. Here his decision-making affects the decisions, authority, and responsibility of coequal governmental entities.

The legislature, not the courts, mandated articulation of reasons for certain sentencing decisions which the appellate courts have routinely upheld as a valid exercise of authority -- even is infringes upon judicial discretion. E.G. Walker v. State, 462 So.2d 452 (Fla. 1985) (the habitual offender statute under §775.084(d), Fla. Stat. mandates the judge find the enhanced sentence is necessary to protect the public in order to enable meaningful appellate review); State v. Rhoden, 448 So.2d 1013 (Fla. 1984) (a judge sentencing a juvenile to adult sanctions must provide written reasons under §39.111(6), Fla. Stat. to facilitate review); Cave v. State, 445 So.2d 341 (Fla. 1984) (a judge imposing a death sentence must set forth any aggravating and mitigating factors in a written order to justify his decision under §921.141(3)); Stacey v. State, 461 So.2d 1000 (Fla. 1st DCA 1984) (a judge retaining jurisdiction of a sentence under former §947.16(3), Fla. Stat. (Supp. 1978) must justify the reason in light of certain statutory criteria); Hill v. State, 438 So.2d 513

(Fla. 5th DCA 1983) (under former §958.05(3), Fla. Stat. (1979) a judge must provide a written order to explain his aggravation of a youthful offender sentence).

With the advent of sentencing guidelines, the legislature in part curbed the discretion of the trial judge by ordering valid justifications for departure be in writing, subject to review. Sections 921.001(5) and (6), Fla. Stat. (1983) provide:

> (5) Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to all other statutory provisions. The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to chapter 924.
> (6) The sentencing guidelines shall provide that any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial court judge. Emphasis added.

Once again this court had to remind lower courts that such a statute and the rules which plainly stated reasons for departure must be in writing meant precisely that. State v. Jackson, 478 So.2d 1054 (Fla. 1985); State v. Oden, 478 So.2d 51 (Fla. 1985). Despite such a simple concept trial judges must still be reversed for their failure to file contemporaneous written orders. See e.g. Fleming v. State, 480 So.2d 715 (Fla. 2d DCA 1986); Ludmin v. State, 480 So.2d 1389 (Fla. 1st DCA 1986); Corum v. State, 484 So.2d 102 (Fla. 1st DCA 1986); Mortimer v. State, ___ So.2d ___, 11 FLW 467

(Fla. 3d DCA Feb. 18, 1986); Brinson v. State, ___ So.2d ___, 11 FLW 1406 (Fla. 1st DCA June 20, 1986); Hall v. State, ___ So.2d ___, 11 FLW 1468 (Fla. 1st DCA July 2, 1986).

This combination of judicial and legislative revision of criminal sentencing doubtless caused much frustration at the trial and appellate levels. As one judge recognized there has been a "steady increase in the number of opinions in which sentencing guidelines issue have been raised and addressed". Williams v. State, 484 So.2d 71 (Fla. 1st DCA 1986). Judge Nimmons further calculated that 17% of all written opinions in the two months preceeding that opinion involved guidelines departures. Of those seventeen percent, eighty percent discussed no issue but the guidelines. No statistics are available on "per curiam affirmed" opinions.

From this one can logically, and cynically, conclude that many a trial judge has had a fundamental disagreement with the guidelines sentencing law. Perhaps the judge would ascertain the sentence he wants and then rationalize the departure by citing reasons the rules or the case law support. Rather than viewing the particulars of an individual case and formulating a sentence tailored to the specific instance, trial judges often appear to be working backwards; that is, disagree with the range for certain categories of crime and utilize buzz words and catch phrases to depart. The mere articulation of a single valid reason does not

automatically upon a departure. Albritton v. State, supra. Further reasons which have been approved in other situations may be inappropriate in others if the evidence in the individual case is lacking. State v. Mischler, supra.

Respondent fears that the adoption of the standard of review proposed by petitioner would grant unbridled discretion to trial judges who already have shown their reluctance in many instances to follow the law. Systemwide the appellate courts could cull out a vast majority of appeals which frankly involve intellectually simple issues[1]. This can be done in two ways: adopt "harmless error" as judicial convenience and destroy the guidelines theory of uniformity or follow the law and continue reversing trial judges. The former solution may be more expedient for many judges but only at the expense of principled justice.

When the legislature abolished parole, §921.001(8), Fla. Stat. (1983), continuing responsibility over the service of sentences shifted from the executive branch to the judiciary. Previously the Parole and Probation Commission had the obligation, after the fact, to provide uniformity and

[1]This court held that a defendant's prior record which had already been used in arriving at a presumptive sentence range cannot be a basis for departure in Hendrix v. State, 475 So.2d 1218 (Fla. 1985). Trial judges still use this improper reason and appellate courts often defend such practice. E.g. Cawthon v. State, 486 So.2d 90 (Fla. 5th DCA 1986) (escalating pattern of criminality); Fabelo v. State, ___ So.2d ___, 11 FLW 1193 (Fla. 2d DCA May 23, 1986) (narrative explanation of factors surrounding prior record); Fleming v. State, 480 So.2d 715 (Fla. 2d DCA 1986) (habitual offender); Contra Vicknair v. State, 482 So.2d 896 (Fla. 5th DCA 1986).

administer, in conjunction with the Department of Corrections, penal sanctions under fiscal restrictions imposed by the legislature and constitutional constraints imposed by the federal courts. With the creation of the Sentencing Guidelines Commission, the three branches of government presumably decided to attack the multifaceted problems with a policy shift. Now we will monitor entry into the prison system rather than agonize over who to release first. Prisons remain overcrowded in part due to some trial judges philosophical or political disagreement with the plan.

Such reactions are reminiscent of responses by the Parole and Probation Commission to the Objective Parole Act of 1978. Section 947.001 et. seq., Fla. Stat. (1979). See e.g. Baker v. Florida Parole and Probation Commission, 384 So.2d 746 (Fla. 1st DCA 1980) (reversal for failure to provide written explanation for aggravating the PPRD beyond the guidelines recommendation); Shulman v. Florida Parole and Probation Commission, 429 So.2d 755 (Fla. 1st DCA 1983) (reversal for considering factors in aggravation which are prohibited by the Fla. Admin. Code).

Respondent does not take the extreme position that harmless error has no applicability in guidelines departure. Indeed, when a trial judge exceeds the recommended guideline range based in part upon an otherwise valid ground which simply was not "clear and convincing", the harmless error

doctrine might be properly applied. When such a departure is predicated upon a prohibited reason such analysis should not apply.

Recently this court addressed harmless error analysis in State v. DiGuilio, ___ So.2d ___, 11 FLW 339 (Fla. July 18, 1986). There the doctrine was applied to comment on a defendant's remaining silent. Since the per se reversal rule was founded upon judicial interpretation under Miranda v. Arizona, 384 U.S. 436 (1966) of constitutional error, this court reexamined this doctrine of judicial convenience. Noteworthy is the recognition that previously the legislature had enacted a law prohibiting a prosecutor from commenting on the failure of an accused to testify. Due to the mandatory nature of the law, inter alia, the court declined to apply harmless error.

Because the guidelines are not strictly a creation of the judiciary but also of the legislature, respondent contends certain mandatory provisions[2] ought to be exempt from harmless error analysis. Presumably that was this court's intention in pronouncing the three improper categories of reasons in State v. Mischler, supra.

[2] e.g. "Reasons for deviating...shall not include factors relating to prior arrests without convictions...[or to] the instant offenses for which convictions have not been obtained." Fla. R. Crim. P. 3.701(d)(11). "Sentencing should be neutral with respect to race, gender, and social and economic status." Fla. R. Crim. P. 3.701(b)(1).

Respondent urges this court to reject petitioners proposed form of harmless error. Not only does it appear that trial judges often disagree with the guidelines but also the appellate judges often do. If reasons are prohibited, the trial judge must reevaluate his sentence. Contra Casteel v. State, 481 So.2d 72 (Fla. 1st DCA 1986); Gale v. State, 483 So.2d 53 (Fla. 1st DCA 1986); Crapps v. State, 483 So.2d 544 (Fla. 1st DCA 1986); Simmons v. State, 483 So.2d 530 (Fla. 1st DCA 1986). Factors which are clearly improper should demonstrate per se abuse of discretion mandating an automatic reversal. See Fleming v. State, 476 So.2d 292 (Fla. 3d DCA 1985).

Petitioner comments that it was "noteworthy to note that the lower appellate court has since receded from its holding that Mischler overruled or modified Albritton. See, Daniels v. State, 11 FLW 1433 (Fla. 1st DCA June 25, 1986)." (B-8) Such admissions by the state only support respondent's position that appellate courts, particularly the First District, refuse to accept the guidelines. With or without their agreement, district courts may not intentionally ignore Supreme Court rulings.

> To allow a District Court of Appeal to overrule controlling precedent of this court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level.

Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973).

We are a government of laws. Those who shirk their duties and responsibilities should not hide behind a shield of "harmless error". Respondent requests this court once again attempt to create order out of chaos by upholding its per se reversal rule in the limited categories enunciated in State v. Mischler, supra.

ISSUE TWO

NEITHER OF THE REMAINING TWO REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES ARE CLEAR AND CONVINCING.

Respondent argues that the two reasons upheld by the District Court are not clear and convincing justifications supported by the record. Because this was a plea rather than a trial, the trial judge did not have the benefit of any testimony about the events surrounding the crimes. He received a presentence investigation report (R 41-53) and a letter from one victim (R 54-55). At the sentencing hearing, the state did not present any witnesses to testify in aggravation (R 86-99).

Judge Winegeart's first reason[3] for departure was that Rousseau committed three burglaries within a three-week time span (R 98). The District Court held that the temporal circumstances of the crimes was an acceptable reason for departure, citing Decker v. State, 482 So.2d 511 (Fla. 1st DCA 1986) and Saab v. State, 479 So.2d 845 (Fla. 1st DCA 1985). Append. A at 2.

Respondent contends neither case is well-reasoned nor applicable sub judice. In Decker v. State, supra appellant committed an armed robbery and an attempted armed robbery

[3]Respondent notes that no written order was prepared pursuant to State v. Jackson, supra. The sentence was imposed March 22, 1985 (R 86) prior to this court's opinion. The issue was not raised on direct appeal.

within an hour and a quarter. Two months before that he burglarized a structure. All the trial judge had written was "in this one episode, [he] executed an armed robbery, another attempted armed robbery and burglarized another establishment". Id. at 511-512. There the court found:

> It is also somewhat unclear as to precisely what the trial court was considering... However, the reason given suggests the court either found the recommended sentence inappropriate due to the seriousness of the criminal episode, or due to the "temporal and geographical circumstances" of the offenses for which appellant was convicted. Given either explanation, though, the reason is valid.

Id. at 512.

In Saab v. State, supra, the appellate court merely held that 5 armed robberies with ten days is a sufficient temporal reason to depart.

Respondent cannot determine from the trial judge's language and the appellate decision and cited support whether the reason was that Rousseau was a one man crime wave or that timing somehow is important. If the former rationale is applied, respondent contends that is a violation of Hendrix v. State, supra. All three burglaries were scored as primary offenses (R 75). To say that the timing of the offenses is significant is meaningless. Those crimes were scored but were again used in aggravation which is wrong. Baker v. State, 466 So.2d 1144 (Fla. 3d DCA 1985).

This justification certainly is contrary to State v. Mischler, supra on two grounds. As a Hendrix violation, it is per se improper. Secondly this reason cannot be logically construed to "be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted." Id. at 140. See, Dawkins v. State, 479 So.2d 818 (Fla. 2d DCA 1985) (four cocaine transactions within eight days does not constitute a valid reason).

Judge Winegeart also stated that the victims reported extensive psychological trauma (R 98) presumably based upon a letter from one of three homeowners who outlined the effects the robbery (sic) had on the family (most of which discussed financial losses) (R 54-55). The burglary in question was to an unoccupied residence (R 42).

Granted, most crime victims feel violated, outraged, or afraid. A blanket assertion that a victim suffered trauma is insufficient to establish severe emotional impact. Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984). Such trauma must be something more than that usually associated with similar crimes. Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA) pet. for rev. den., 476 So.2d 675 (Fla. 1985); Tompkins v. State, 483 So.2d 115 (Fla. 2d DCA 1986); Campos v. State, ___ So.2d ___, 11 FLW 1080 (Fla. 4th DCA May 7, 1986). Emotional hardship, if the facts dictate, can support a departure, but

those facts must be proven beyond a reasonable doubt. Hankey v. State, ___ So.2d ___, 11 FLW 137 (Fla. April 3, 1986). Taking an objective view, the facts of this case demonstrate the one burglary which "traumatized" the Wilsons was fairly vin ordinaire.

Therefore respondent requests this court reexamine the record and strike the remaining reasons as invalid.

V CONCLUSION

Respondent respectfully asks this court to reiterate its prior holding that when prohibited reasons constitute justifications for a guidelines departure, such sentence must automatically be reversed and remanded for resentencing.

Secondly respondent seeks to have this court strike the remaining two reasons for departure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Inez Suber, Assistant Attorney General, The Capitol, Tallahassee, Florida, and by U.S. Mail to the respondent, Edward Leon Rousseau, #A-097229 E-98, Post Office Box 699, Sneads, Florida, 32460, this 7th day of August, 1986.

ANN COCHEU