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IN THE SUPREME COURT OF FLORIDA

DON WHITE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

Case No 69,948

JUL 29 1987

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ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEALS THIRD DISTRICT OF FLORIDA

INITIAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

	<u>Pages</u>
Table of Contents-----	i
Table of Citations-----	ii-iii
Epilogue-----	1
Statement of the Case and Facts-----	2
Summary of the Argument-----	4
Argument One	
WHETHER THE DISTRICT COURT'S OPINION BASED ON <u>ROWE v. STATE</u> , 496 So.2d 857 (Fla. 2nd DCA 478 (Fla. 2nd DCA 1984), CONFLICTS WITH THIS COURTS DECISION OF <u>WILLIAMS v. STATE</u> , 500 So.2d 501 (Fla. 1986), AND OTHER DISTRICT COURT DECISIONS ON THE SAME POINT OF LAW.-----	6
Argument Two	
WHETHER THE CONSTITUTION OF THE UNITED STATES PROHIBITS A TRIAL COURT FROM CONSIDERING VICTIM IMPACT TEST- TIMONY DURING THE SENTENCING PHASE OF A MURDER TRIAL WHICH WAS THE PRI- MARY REASON THE TRIAL COURT DEPARTED FROM THE SENTENCING GUIDELINES-----	12
Conclusion-----	20
Certificate of Service-----	21
Appendix "A"-----	App."A"-1
Appendix "B"-----	App."B"-2

TABLE OF CITATIONS

	<u>Pages</u>
<u>Albritton v. State</u> 476 So.2d 158 (Fla. 1985).....	10, 17
<u>Bell v. State,</u> 311 So.2d 179 (Fla. 1st DCA 1975).....	17
<u>Bell v. State,</u> 453 So.2d 478 (Fla. 2nd DCA 1984).....	3
<u>Booth v. Maryland</u> ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (Slip Opinion June 15, 1987).....	12
<u>Connecticut v. Johnson</u> 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983)....	17
<u>Dunn v. State</u> ____ So.2d ____ (12 FLW 389)(Fla. 5th DCA 1987).....	8
<u>Furman v. Georgia</u> 408 U.S. at 429, 92 S.Ct. at 2823 (1972).....	18
<u>Hendrix v. State</u> 475 So.2d 1218 (Fla. 1985).....	17
<u>Henry v. State</u> ____ So.2d ____, (12 FLW 68)(Fla. 2nd DCA 1987).....	7
<u>In re: Rules of Criminal Procedure, Rule 3.701,</u> 482 So.2d 311 (Fla. 1985).....-.....	10
<u>Jones v. State</u> 92 So.2d 261 (1957).....	17
<u>Kozakoff v. State</u> 323 So.2d 28 (Fla. 4th DCA 1975).....	17
<u>Lerma v. State</u> 497 So.2d 736 (Fla. 1986).....	17
<u>Rodriguez v. State</u> 462 So.2d 1175 (Fla. 3rd DCA 1985).....	17
<u>Rowe v. State</u> 496 So.2d 857 (Fla. 2nd DCA 1986).....	3, 9
<u>State v. Jackson</u> 478 So.2d 1054 (Fla. 1985).....	8

TABLE OF CITATIONS CON'T

	<u>Pages</u>
<u>Trop v. Dulles</u> 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958).....	18
<u>Warren v. State,</u> 498 So.2d 472 (Fla. 3rd DCA 1986).....	17
<u>Weems v. United States</u> 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910).....	18
<u>White v. State</u> 499 So.2d 14 (Fla. 3rd DCA 1986).....	20
<u>Williams v. State</u> 500 So.2d 501 (Fla. 1986).....	6
 <u>OTHER AUTHORITIES:</u>	
Rule 3.850, <u>Florida Rules of Criminal Procedure</u> ,.....	2
Rule 3.701, <u>Florida Rules of Criminal Procedure</u> ,.....	10
<u>Florida Statute</u> , Section 810.02(3).....	7
<u>Florida Statute</u> , Sections 812.014(2)(b)(1).....	7
<u>U.S. Constitution</u> , Amendment Eight-.....	13

EPILOGUE

The Petitioner, Mr. Don White, was the Appellant in the District Court of Appeals for the Third District of Florida, and will be referred to as Petitioner.

The Respondent, STATE OF FLORIDA, was the Appellee below, and will be referred to as Respondent in this brief.

Record Reference will be found in the Appendixs attached hereto, and will specifically be referred to as such in this brief, with appropriate page numbers in sequence.

The Sentencing Hearing held in the trial court of the 16th Judicial Circuit is attached as Appendix "A" to this brief and will be noted in this brief as such with appropriate page number citation.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Don White, was convicted of Second Degree murder of one John Mealy, on May 30, 1985. The crimes were committed in 1984.

Petitioner pled guilty to the Second Degree Murder charge under a plea agreement with the State of Florida, stemming from April 25th 1985 in the Circuit Court of the 16th Judicial Circuit of Florida. (See Appendix A (T-1, 2)).

The trial court received extensive information concerning the petitioner in a PSI, report along with various submissions from the Defense counsel which were all reviewed (See Appendix A, (T-2)).

The Court subsequently heard testimony from the victims family members consisting of the victims, mother, father and sister during the sentencing hearing (See Appendix A (T-11-13)).

The Trial court then proceeded to sentence the Petitioner to thirty (30) years incarceration, departing from the sentencing guidelines of the recommendation of 12-17 years in prisonment. (T-15).

On July 17th, 1986, Petitioner submitted a Motion for Post-Conviction Relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure, in the trial court before the Honorable David P. Kirwin, Circuit Judge, alleging that he had been denied the effective assistance of counsel, that his sentence as imposed by the trial court was constitutionally illegal, and that his guilty plea was involuntary based upon an illegal sentence (See Appendix A pages 5-6).

The trial court, denied the Petitioners Motion for Post-Conviction Relief, and the Petitioner appealed to the District Court of Appeals for the Third District of Florida.

The District Court of Appeals affirmed the denial of the motion for Post-Conviction relief without an evidentiary hearing on December 9, 1986 based on the authority of Rowe v. State, 496 So.2d 857 (Fla. 2nd DCA 1986), and Bell v. State, 453 So.2d 478 (Fla. 2nd DCA 1984).

The Petitioner filed a Motion for Rehearing but was subsequently denied by the District Court on January 13, 1987, (See Appendix A pages 8-9).

Petitioner filed for discretionary review in this court which was granted on July 6, 1987 Case No. 69,948.

This brief on the merits follows.

SUMMARY OF THE ARGUMENT

The Petitioners arguments before this Honorable Court is that the district courts decision below, which relies on the authority of Rowe v. State, 496 So.2d 857 (Fla. 2nd DCA 1986) is in direct conflict with this Courts opinion of Williams v. State, 500 So.2d 501 (Fla. 1986), and the Fifth District Court-opinion of Dunn v. State, ___ So.2d ___ (12 FLW 389)(Fla. 5th DCA 1987), and Henry v. State, ___ So.2d ___ (12 FLW 68)(Fla. 2nd DCA 1987), which the lower opinion clearly holds that a criminal defendant nor the sentencing court may waive the sentencing guidlines for imposition of sentence of crimes that occured after it's effective date of October 1, 1983.

The district courts opinion in White, supra., also is in contrivance to the legislative intent governing the purpose of the sentencing guidlines scheme. The error of the district court in departing from the recommended guidline sentence of 12-17 eyears for imposition of a 30 year sentence without having made the reason for departure in writing, was fundamental error in the substantive sense.

Also, the sentencing court allowance for the victims family to testify at sentencing violated the Eighth Amendment of the U.S. Constitution, for the testimony was irrelevant, prejudicial and highly emotionally charged.

The effect of their testimony took the sentencer away from consideration of the crime and the history of the Defendant to determine the appropriate sentence in his case.

The Court's departure from the recommended sentencing guidelines, shows the prejudicial impact of the victims family testimony on the sentencer. These issues and error require this court to make an informed evaluation of this case, and after a thorough review, reverse and remand the decision below for further proceedings.

ARGUMENT ONE

WHETHER THE DISTRICT COURT'S OPINION
BASED ON ROWE v. STATE, 496 So.2d
857 (Fla. 2nd DCA 1986); and Bell
v. State, 453 So.2d 478 (Fla. 2nd
DCA 1984), CONFLICTS WITH THIS COURTS
DECISION OF WILLIAMS v. STATE, 500
So.2d 501 (Fla. 1986), AND OTHER
DISTRICT COURT DECISIONS ON THE SAME
POINT OF LAW.

The decision of Rowe, supra., and Bell, supra., directly conflicts with the decision of this Court in Williams, supra., regarding the validity of waiving the Sentencing Guidelines of a crime and conviction after the effective date of the Guideline Sentences, i.e., October 1st 1983.

In Williams v. State, supra., the defendant was convicted of burglary of a dwelling and petit theft upon a plea of guilty and sentenced outside the guidelines before the trial court. The District Court of Appeals affirmed the action of the trial court in that case, Williams, at 500 So.2d at 501 (Fla. 1986).

This court determined first, that a trial judge is obligated to sentence within the sentencing guidelines unless he gives clear and convincing reasons for his departure, second, the trial court is clearly prohibited from imposing an illegal sentence pursuant to a plea bargain, and third, a defendant cannot by agreement confer on the court the authority to impose an illegal sentence, so that if a departure from the sentencing guidelines is not supported by clear and convincing reasons, the mere fact that a defendant agrees to it, will not make it a legal sentence. Williams v. State, supra. at 500 So.2d at 503 (Fla. 1986).

The rationale of the courts opinion though not cited in Henry v. State, ___So.2d___ (12 FLW 68) (Fla. 2nd DCA 1987) supports the proposition of the courts reasoning.

In Henry, the defendant there was originally placed on probation after pleading guilty to burglary in violation of section 810.02(3), Florida Statutes (1983) and grand theft in violation of section 812.014(2)(b)(1), Florida Statutes (1983). The guidelines scoresheet indicated a recommended sentence of any non-state prison sentence. The court (trial), prior to placing the defendant on probation required him, in exchange for not being incarcerated at that time, to waive his right to be sentenced under the guidelines in the event he violated his probation. Appellant then was placed on probation for two consecutive five year terms. Henry v. State, supra., at (12 FLW at 68).

The Appellant there, was subsequently charged with, and found guilty of, violating his probation. An updated guidelines scoresheet, which included a one cell enhancement for probation violation, indicated a presumptive sentence of community control or twelve to thirty months incarceration. The trial court, after stating that Appellant had waived his right to be sentenced under the guidelines by violating his probation and giving other reasons for departure, revoked appellants probation, adjudicated him guilty and sentenced him to serve two consecutive five year prison terms. The court did not file any written statement setting forth the reasons it had departed from the guidelines presumptive sentence. Henry v. State, supra. at (12 FLW at 68).

The District Court of Appeals agreed with the Appellant Henery, that the trial court erred in sentencing him outside the guidelines without entering a written reason or statement setting forth clear and convincing reasons for departure, citing State v. Jackson, 478 So.2d 1054 (Fla. 1985). But more importantly which is the issue in this case per se, the District Court stated "that appellants waiver of his right to be sentenced under the guidelines cannot constitute a clear and convincing reason for departure". Stated in an even clearer context:

"Guidelines sentencing cannot be waived. If Appellants waiver was intended to be an agreement to allow the court to depart from the appellants presumptive sentence, rather than a waiver of guidelines sentencing, it was still invalid. We cannot approve an agreement which could frustrate guidelines sentencing"

Henry v. State, supra. at (12 FLW at 68, 69)(Fla. 2nd DCA 1987).

See also Appendix A at pages 14 and 15.

The Fifth District Court of Appeals in Dunn v. State, ___ So.2d ___, (12 FLW 389)(Fla. 5th DCA 1987), citing this Court opinion of Williams v. State, 500 So.2d 501 (Fla. 1986) held:

"Because the crime of which Appellant was convicted occurred after October 1, 1983, the sentencing guidelines are applicable and the court must impose a guideline sentence. The Appellant cannot waive this requirement, (citing case), If a departure from the guidelines is unwarranted then the sentencing judge must clearly state, in writing, the reasons for the departure"

See Dunn, supra., Id. at (12 FLW at 389)(Fla. 5th DCA 1987).

These case all clearly show, that a guideline sentence for crimes after October 1, 1983, cannot be waived either by the Defendant or the trial sentencing court. Otherwise, we are permitting the courts to frustrate the guideline sentencing scheme, and actually without clear and convincing reasons imposing a illegal sentence, Williams v. State supra. This is in actual conflict with the opinion of Rowe v. State, 496 So.2d 857 (Fla. 2nd DCA 1986).

In Rowe, supra., the appellant alleged several errors by the trial sentencing court. First, that the trial court based its departure on impermissible reasons, Second that it failed to put any reasons in writing for the departure. Rowe supra., at 858.

The District Court particularly held outside its many reason for affirmance of the trial court, that the Appellant in that case had bargained for the sentence that subsequently exceeded the sentencing guidelines or in better terms, waived the sentencing guidelines, and that such waiver did not require the trial court to use a score sheet so that the parties would be aware of the presumptive guideline sentence. The District Court grounded its reasoning for the above by a further claim that the Appellant failed to show prejudice to himself by the actions of the trial court, Rowe, supra, at 859

This is a clear, and direct conflict with not only Williams v. State, supra., but also Henry, supra., and Dunn, supra. Notwithstanding the legal precedents, the decision below is conflict with the legislative intent of the Sentencing Guidelines.,

see Rule 3.701, Florida Rules of Criminal Procedure, (1985).

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-related and offender-related criteria and in defining their relative importance in the sentencing decision, In re Rule of Criminal Procedure (Amendments) 482 So.2d 311 (Fla. 1985).

One of the principles that the Rowe decision also conflicts with is the sixth principle stated in Rule 3.701. Fla.R.Cr.P

"While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion departures from the presumptive sentencing established in the guidelines shall be articulated in writing and made only for clear and convincing reasons"

See Rule 3.701., Florida Rules of Criminal Procedure, (1985).

As noted in the Rules and court precedents there is nothing mention that the action can be deemed harmless error, Albritton v. State, 476 So.2d 158 (Fla. 1985), or that the defendants must making a showing of prejudice by the courts action. Quite the contrary, this court and the decisions of the district courts have literally held such errors fundamental, and requiring immediate

reversal. The Rowe opinion conflicts with Henry, and Dunn and this Courts opinion of Williams v. State, supra.¹ The judgment of the District Court expressly conflicts with the legislative intent governing the sentencing guidelines and should be reversed and remanded with directions that the Petitioners sentence be imposed with accordance to Rule 3.701., Florida Rules of Criminal Procedure, (1985)

¹ It should also be noted that the decisions of Williams, Henry and Dunn, and Rowe dealt with guilty pleas the same as the Petitioner clearly, the Sentencing Guidelines are to be made applicable regardless of how the conviction is obtain, whether by jury trial and subsequent adjudication of guilt, or by open plea by the defendant and imposition of sentence.

ARGUMENT TWO

WHETHER THE CONSTITUTION OF THE UNITED STATES PROHIBITS A TRIAL COURT FROM CONSIDERING VICTIM IMPACT TESTIMONY DURING THE SENTENCING PHASE OF A MURDER TRIAL WHICH WAS THE PRIMARY REASON THE TRIAL COURT DEPARTED FROM THE SENTENCING GUIDLINES.

The fundamental nature of the issue above is new and ripe for consideration by this court which has now accepted review of this case, in light of the U.S. Supreme Court opinion of Booth v. Maryland, ___ U.S. ___, 107 S.Ct. ___, ___ L.Ed.2d ___, (Slip Opinion, June 15, 1987)(See Appendix, B).

In Booth, supra., the prisoner was found guilty of two counts of First-Degree Murder and related crimes, the jury sentenced him to death after considering a presentence report prepared by the State of Maryland. The report included a victim impact statement (VIS), as required by state statute. The VIS was based on interviews with the family of two victims, and it provided the jury with two types of information. (Slip Opinion at 2).

First, it described the severe emotional impact of the crimes on the family, and the personal characteristics of the victims. Second, it set forth the family members opinions and characterization of the crimes and of the petitioner. The State trial court denied Petitioners motion to suppress the VIS, rejecting the argument that this information was irrelevant, unduly in-

flamatory, therefore violative of the Eighth Amendment. (Slip Opinion at 4-5). The Maryland Court of Appeals affirmed petitioners conviction and sentence, finding no violation of the Eighth Amendment.

The Supreme Court rejected the argument, that the emotional distress of the victims family and the victims personal characteristics are proper sentencing considerations. (Slip Opinion at 7 and 8). The Supreme Court articulated that the sentencer should and must focus on the background and record of the accused and the particular circumstances of the crime and that the information considered in the case i.e., Booth, may be wholly unrelated to the blameworthiness of a particular defendant, and may cause the sentencing decision to turn on irrelevant factors such as the degree to which the victims family is willing and able to articulate it's grief, or the relative worth of the victims character. Further, it would be difficult, if not impossible, to provide a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, (Slip Opinion at 9-11).

Finally, the Supreme Court determined, that the admission of family members emotiaonally charged opinions and characterization of the crimes could serv no other purpose than to inflame the sentencer and divert it from deciding the issue on the relevant evidence concerning the crime and the defendant (Slip Opinion at 11-12).

Without question, Booth, supra., was a Capital Case decided upon fundamental dictates of the Eighth Amendment of the U.S. Constitution. But the relevant issue applicable to the Petitioner was the impact of the victims family statement on the sentencing court in this case:

(THE COURT): Tell me your name.

(MRS. MEALY): Karen Mealy. John's mother. My son John was a decent, loving person and he never hur no one in his life and he was a good member of society I do think justice should be done and that the man should be in jail and that he shouldn't be turned lose on society. . . .

* * * * *

(THE COURT): Tell me your name.

(MR. MEALY): Joseph Mealy, John's dad. We lived together for a long time and he was really a decent, decent guy, you know, by him not fighting back with him and not --- he was an awful tough person and he had worked in the spray business, paint, and fumes also his whole life. That's what I have been involved with. He didn't hurt him and I think he should get life because he deserve it. John was a good human being. He had a great future ahead of him. His brother has been nothing but mentally depressed, countless phone calls, I went up to live with him for four months trying to help him get him out of his depression and it just hurt a lot of people. Not just John, his family is suffering quite a bit. As much penalty as this man can get is what he should get. (see Transcripts at 13 - Appendix A).

* * * * *

(MISS MEALY): Rose, I am John's sister.

(THE COURT): You wrote a letter?

(MISS MEALY): Yes, I did write a letter I want to point out the fact about the alcohol. What I wrote in my letter, that is not a reason to commit a crime and it's not an excuse. It's an excuse for him to use what he did and it's no reason for what happened and I think he should get the life sentence as my feelings of what happened (Appendix A- T-13).

* * * * *

The above reference portion of the sentencing hearing clearly shows that the victims family testimony was highly charged, with anger, depression, outrage, a sense of loss, and it nothing less tremendous emotion.

Significantly, the victims family testimony was presented without any opportunity for the defense to cross-examine or the defendant to confront and challenge the statements as to their veracity.

For instance, the father of the victim testified that his son was "really a decent, decent guy", that the victims brother apparently his other son was "mentally depressed", and that the defendant was a "tough person" (Appendix, T-12,13), this is clearly hearsay as to the defendant being a "tough person", and the issue of the victims brother being mentally depressed, is without any medical proof and irrelevant as to the "crime and history of the defendant" to determine an appropriate sentence within the guidelines, Booth supra. (Slip Opinion at 11-12).

The sister of the victim, went even further in her statement, alleging that the issue of alcoholism is "not a reason to commit a crime and it's not an excuse", further supports that the testimony was clearly inflammatory, and a act of emotion and anger. Troubling also, is the fact, that the victims family had made ex parte communications to the court, on the issue of alcoholism as not being a defense. This is not harmless error, nor error where the presumption weighs in favor of the prosecution. Quite the contrary, the Court had more to consider, than "the crime and the defendant", Booth supra., it had the victims family to deal with, in making sure their brand of justice was carried out, i.e., "the man should be in jail and that he shouldn't be turned lose on society"--Mother; "As much penalty as this man can get is what he should get"--Father; "And I think he should get the life sentence"--Victims Sister. (Appendix A - T-11-13).

The impact was overwhelming, why so, for the court clearly held:

"As I look back over the defendants life, certainly with his contact with law enforcement, there is nothing which would have led any judge anywhere to believe that he was capable of committing this crime. . . there is no indication of any problems at all with the law" (Appendix A -(T-15).

Did the victims testimony have any impact on the Sentencer in this case? The Answer is absolutely yes. By the very words of the Court, the defendants own record was testimony within itself. He had no problems with the law of any significance, and no indication that this particular crime would have even occurred.

We also have in support that their testimony played a substantial part for the Sentencer to depart from the Sentencing Guidelines was the lack of any written reason for the departure in the first instance, Albritton v. State, 476 So.2d 158 (Fla. 1985); Hendrix v. State, 475 So.2d 1218 (Fla. 1985); and see Lerma v. State, 497 So.2d 736 (Fla. 1986). Surely, if the Court deemed appropriate it would have shown why, based on applicable criteria, in writing, it's reasons for departing from the sentencing guidelines. Nevertheless, in the instant case, it did not, thus, the victims family testimony overplayed and certainly overkilled the sentencer's emotion to depart from the guidelines in sentencing the defendant to thirty (30) years, when the guidelines recommended 12-17 years, a difference of approximately 13-18 years, giving at what end of the bracket the court chose to use. This error is not harmless but fundamental and needed no objections to it at trial, Connecticut v. Johnson, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983); see e.g., Jones v. State, 92 So.2d 261 (1957)(failure to object-error still fundamental); Kozakoff v. State, 323 So.2d 28 (Fla. 4th DCA 1975), cert. denied, 336 So.2d 1184 (Fla. 1976)(failure to object-error still fundamental); Bell v. State, 311 So.2d 179 (Fla. 1st DCA 1975)(failure to object-error still fundamental); Rodriguez v. State, 462 So.2d 1175 (Fla. 3rd DCA 1985)(failure to object-error still fundamental); Warren v. State, 498 So.2d 472 (Fla. 3rd DCA 1986)(failure to object-error still fundamental).

It is interesting to note, the Supreme Court has never confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital, must be capable of wider application than the mischief which gave it birth", Weems v. United States, 217 U.S. 349, 373, 30 S.Ct. 544, 54 L.Ed. 793 (1910). Thus, the Clause forbidding "cruel and unusual punishments" is not "fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice", *Id.*, at 378, 30 S.Ct. at 553. See also Furman v. Georgia, 408 U.S. at 429-430, 92 S.Ct. at 28-23-2824; Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 597-598, 2 L.Ed.2d 630 (1958)(plurality opinion). But whatever else may be said, the application of punishment to fit the crime is simply that, punishment to fit the "defendant for the crime" not the whim of the victims family who quite naturally are outraged and angered. The Eighth Amendment as the Supreme Court determined prohibits the use of such evidence by the victims family when the determination of punishment is to be inflicted upon the defendant, Booth supra.

There is ample proof and clear evidence that the victims family testimony was prejudicial and irrelevant, let alone inflammatory before the sentencer. Prejudice has been established in that the court did depart from the guideline sentence, and second, that the court had no other reason to do so in writing or otherwise to sentence the Petitioner in excess of recommended 12-17 years.

Since the Eighth Amendment prohibits this action by the trial sentencer, fundamental fairness, and the ends of justice mandates that the judgment of the court below be reversed in light of the Eighth Amendment violation, and the fundamental fairness of the due process clause.

CONCLUSION

The District court opinion below in White v. State, 499 So.2d 14 (Fla. 3rd DCA 1986), premised upon the decision of Rowe v. State, 496 So.2d 857 (Fla. 2nd DCA 1986), is in direct conflict with the decision of the Florida Supreme Court and the district courts below and the U.S. Supreme Court. The matter should be reversed and remanded for consideration in light of Williams v. State, 500 So.2d 501 (Fla. 1986). It is so prayed.

Respectfully submitted

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the
afore INITIAL BRIEF OF PETITIONER, has been furnished to Counsel
for the Respondent, CALVIN L. FOX, Assistant Attorney General,
401 N.W. 2nd Avenue, Room 820, Department of Legal Affairs, Miami
Florida, 33128, this 25 day of JULY, 1987, by U.S.
Mail.

Don White
Don White Pro'se