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IN THE SUPREME COURT OF FLORIDA

JAMES REE,

Petitioner,

vs.

CASE NO. 71,424

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the Appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and Appellee in the lower courts. In this brief, the parties will be referred to as they appear before this Court.

The symbol "R" will denote Record on Appeal.

The symbol "SR" will denote Supplemental Record on Appeal.

STATEMENT OF THE CASE

Petitioner was charged by way of an information filed in the Seventeenth Judicial Circuit (Broward County) with Count I, burglary, Count 11, possession of burglary tools, and Count III, criminal mischief. R 227.

Appellant pled nolo contendere to all three (3) counts of the information. R 229. On December 19, 1984, he was placed on two (2) years probation. On August 28, 1985, an affidavit of violation of probation was filed charging Petitioner with I Count I, violating the law by committing a sexual battery upon R[redacted] B[redacted] a person under the age of eleven (1); and Count II violating the law by committing a sexual battery upon A[redacted] B[redacted] a person under the age of eleven (11) years old. R 230.

A probation revocation hearing was held on the violations. At the conclusion of the hearing, the trial court found that Petitioner had violated his probation. R 189. The trial court in his written order of revocation of probation found that Petitioner had committed both counts of violation as alleged in the affidavit *(See* Appendix 1).

Petitioner was scored under the Fla.R.Crim.P. 3.701 sentencing guidelines (Appendix 2). Petitioner's guidelines sentence range was in the 12 - 30 months incarceration range. R 190, SR (See Appendix 2).

On March 21, 1986, the trial judge sentenced Petitioner to five (5) years in prison for Count I, five (5) years in prison for Count 11, and six (6) months in the Broward County Jail under Count III with credit for time served with the sentences to run consecutively. R 216-217, 236-238. Petitioner received a total of ten and one-half (10 1/2) years in prison. The trial judge declined to state at the hearing his reasons for departure but indicated that he would file a subsequent written order specifying his reasons for departure. R 216-219. On March 26, 1986, the trial judge issued his written order. See SR (Appendix 3).

Timely Notice of Appeal was filed by Petitioner to the Fourth District Court of Appeal. R 239. The Fourth District in a written opinion, Ree v. State, 12 F.L.W. 2252 (Fla. Sept. 16, 1987) held that two of the four reasons cited by the trial judge as grounds to depart from Petitioner's presumptive guidelines sentence range were valid. The Court citing this Court's decisions in Albritton v. State, 476 So.2d 158 (Fla. 1985) reversed Petitioner's sentence and remanded the cause for resentencing because "the state has not shown beyond a reasonable doubt that the absence of the two invalid reasons for departure would not have affected the sentence." Also the Fourth District citing this Court's decision in State v. Oden, 478 So.2d 51 (Fla. 1985) held that Petitioner's sentence must be reversed because

the trial court's written order of departure was not contemporaneous with its pronouncement of sentence. However the Court certified a question of great public importance on this issue.[1]

Petitioner, James Ree, filed a petition seeking review of the decision on the ground that it directly and expressly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law pursuant to Fla.R.Crim.P. 9.030(a)(2)(A)(iv).

On February 17, 1988, this Court accepted jurisdiction of this case and dispensed with oral argument. The Petitioner's Brief on the Merits follows.

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[1] The Fourth District certified the following question:

> MUST A TRIAL COURT PRODUCE WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES AT THE SENTENCING HEARING?

Respondent-State did not file a Notice to Invoke Jurisdiction on the basis of this certified question.

STATEMENT OF THE FACTS

A[redacted] B[redacted], age 12 and R[redacted] B[redacted], age 7, reside with their parents at the [redacted] in Hollywood, Florida. R 119. Petitioner also resided at the same trailer park. He was formerly employed as a maintenance man for the trailer park.

The first witness called by Respondent/State at the probation revocation hearing was R[redacted] B[redacted] age seven. R 9-11. R[redacted] B[redacted] testified that she was sleeping on a couch at Appellant's trailer. R 27, 32. Appellant with his finger hurt her in her "private parts." R 14-15, 21, 25.

Dr. Robelen, a pediatrician, testified that he performed an examination of R[redacted] B[redacted] on August 18, 1985. R 45. He performed an examination of her genitalia which revealed a seven (7) millimeter opening. R 47. The hymen showed a tear. R 47. According to Dr. Robelen, a normal opening in reference to a prepubsecence female is four (4) millimeters. R 47. This opening coupled with the tear would be classified as medical evidence of sexual abuse in Dr. Robelen's opinion. R 49. Dr. Robelen believed that something like a finger had been inserted within the vagina. R 50.

Dr. Robelen also performed an examination of A[redacted] B[redacted] which revealed an opening of ten (10) millimeters and a torn hymen. R 51-52. In Dr. Robelen's opinion, there was medical evidence of sexual abuse. R 53. This injury was caused most likely by a finger or small object. R 53.

The next witness called by Respondent-State was A[redacted] B[redacted] age 12. R 75. A[redacted] B[redacted] testified that one evening during July, 1985 she went over to M[redacted]s trailer. R 75-76. M[redacted] left the trailer for a short time. Petitioner was present and was situated next to A[redacted] on the couch. R 79. Petitioner began to feel her "private spots" with his finger. R 79. She did not recall whether Petitioner's finger went inside her. R 79-80. She testified that Petitioner hurt her the one time. R 80. A short while later, M[redacted] returned to her trailer. R 80-82. A[redacted] B[redacted] decided not to tell M[redacted] anything about the incident with Petitioner. R 82. A few days later, M[redacted] asked A[redacted] if Petitioner had ever touched her. R 84. A[redacted] B[redacted] at that time told M[redacted] that Petitioner did touch her. R 84.

M[redacted] the manager, testified that A[redacted] B[redacted] in late July, 1985 came over to her residence to spend the night. R 137. Petitioner, employed as a maintenance man, was there that evening. R 137-138. M[redacted] left the residence and then returned. R 138. Upon her return she observed Petitioner touching A[redacted] B[redacted] breasts and whispering into her ear. R 138. Petitioner was

promptly fired. R 138. M[redacted] told A[redacted] B[redacted] to tell her mother about the incident. R 139. On August 18, 1986, M[redacted] went down to the H[redacted] trailer and spoke to M[redacted] H[redacted] about the incident. R 139, 140.

M[redacted] H[redacted] testified that she resides at the [redacted] Hollywood, Florida with her two daughters, A[redacted] and R[redacted] B[redacted] R 119. On August 15, 1985, R[redacted] B[redacted] seemed upset. R 120. She told her mother that when she sat on Petitioner's lap he poked something against her. R 120. Mrs. H[redacted] asked A[redacted] and R[redacted] if Petitioner ever touched them. R 121. They both informed her that he had. R 121-122.

Detective Baerga testified that on August 18, 1985 he was summoned to the sexual assault treatment center. R 159-160. Detective Baerga spoke to both A[redacted] and R[redacted] B[redacted] at the police station about the incident. R 161-162. R[redacted] told the officer that Petitioner penetrated her vagina with his finger. R 162-163. A[redacted] B[redacted] told the officer that Petitioner penetrated her vagina with his finger. R 163.

SUMMARY OF ARGUMENT

The trial court revoked Petitioner's probation. As scored under the Fla.R.Crim.P. 3.701 sentencing guidelines, Petitioner's guidelines sentence range was in the twelve (12) to thirty (30) months imprisonment range. This guidelines range was arrived at through a one (1) cell upward scoring allowed for violating probation. Rule 3.701(d)(14). However the trial court further departed from Petitioner's guidelines range and sentenced him to ten (10) and 1/2 years in prison. The trial judge delineated four (4) separate reasons for departure.

The Fourth District found that two of the four reasons specified by the trial court were valid. Petitioner contends that neither of the two reasons found by the district court in its opinion to be acceptable reasons for departure is "clear and convincing." The two grounds found to be valid are untenable and unsupported by the record. These reasons are legally insufficient and not established beyond a reasonable doubt. Hence, the trial court erred in departing from Petitioner's guidelines range. The Fourth District erred in upholding two of the four grounds for departure. Petitioner's departure sentence should be vacated and this cause remanded for imposition of a sentence within Petitioner's guidelines range.

ARGUMENT

THE TRIAL COURT ERRED IN DEPARTING FROM THE PRESUMPTIVE GUIDELINES SENTENCE AND IMPOSING AN EXCESSIVE ILLEGAL SENTENCE UPON PETITIONER

In any sentencing guidelines appeal it is important to reiterate the fundamental principles embodied in the Rule 3.701 sentencing guidelines which are:

> Sentencing guidelines are intended to eliminate unwarranted variations in the sentencing process by reducing the subjectivity in interpreting specific offenses -- and offender -- related criteria and in defining their relative importance in the sentencing decision.

The elimination of subjective variations in the sentencing process which has heretofore existed geographically -- and indeed from judge-to-judge -- throughout the state is its goal.

A departure from the presumptive guidelines sentencing range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating a sentence. Rule 3.701-(d)(11). This rule seeks to discourage unwarranted departures from the sentencing guidelines. Albritton v. State, 476 So.2d 158 (Fla. 1985); Scurry v. State, 489 So.2d 25 (Fla. 1986).

Departures from the presumptive guidelines sentence range are discouraged, to be utilized only in limited circumstances. This Court in State v. Mischler, 488 So.2d 523, 525, (Fla. 1986) held "the 'clear and convincing reasons' required by the sentencing statute must be 'credible' and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to

produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted." Also in State v. Mischler, supra, this Court explained:

> A reason which is prohibited by the guidelines themselves can never be used to justify departure. Santiago v. State, 478 So.2d 47 (Fla. 1985). Factors already taken into account in calculating the quidelines score can never support departure. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). A court cannot use an inherent component of the crime in question to justify departure. Steiner v.State, 469 So.2d 179, 181 (Fla. 3d DCA 1985). If any of the reasons given by the trial court to justify departure fall into any of the three above-mentioned categories, an appellate court is obligated to find that departure is improper.

Id. at 525.

In Keys v. State, 500 So.2d 134, 135 (Fla. 1986), this Court further held: "Even if the 'reason' is one which in the abstract may be appropriate for departure, the facts of the particular case must establish the reason beyond a reasonable doubt." These requirements place a heavy burden on the party advocating a departure both from a persuasive and evidentiary standpoint. The judicial overlay of the statutory requirements have evidenced an intent to ensure the vast majority of sentences stay within the presumptive bounds set by the guidelines ranges.

At bar, Petitioner was scored under the sentencing guidelines pursuant to Rule 3.701 (SR, Appendix 2). Petitioner's presumptive guidelines sentence range was "any non-state prison sanction or community control." Rule 3.701(d)(14) deals specifically with a sentence imposed after revocation of probation.

Said rule provides that "the sentence imposed after revocation of probation may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure." The trial judge utilized this rule to increase petitioner's guidelines range to twelve (12) to thirty (30) months in prison. Obviously pursuant to Rule 3.701(d)(14) the trial court had the authority to sentence Petitioner up to thirty (30) months in prison. However, the trial judge further departed and imposed consecutive sentences totaling ten and one-half (10 1/2) years in prison. Thus, the issue before this Honorable Court is whether the two reasons found by the district court in its opinion to be acceptable reasons for departure are "clear and convincing." A review of the applicable law and the record in this case indicates that neither reason is valid.

As a preliminary matter, § 921.001(6), F.S. (1985) and Fla.R.Crim.P. 3.701(d)(11) imposes upon the sentencing court the duty to determine and provide written reasons for departure from the presumptive guidelines sentence range. It is the function of the appellate court to review these grounds for departure not formulate its own basis for departure. This point was emphatically made by this Court in Casteel v. State, 498 So.2d 1249 (Fla. 1986) wherein Justice Ehrlich writing for the majority stated:

> An appellate court must look only to the reasons for departure enumerated by the trial court and must not succumb to the temptation to

> formulate its own reasons to justify the departure sentence. Although a review of the record may reveal clear and convincing reasons for departure which were not expressly cited by the trial court, such reasons should not be considered.

Id. at 1252.

In Casteel v. State, supra, this Court disapproved the appellate court's use of a ground for departure (Heinous, repugnant manner of commission) even if found to be a clear and convincing reason where "the trial judge did not expressly rely on this factor as a reason for departure." Id. at 1252. Unfortunately at bar, the Fourth District did succumb to the temptation to formulate its own reasons to justify two of the four grounds for departure.

The trial judge cited four (4) separate reasons for departure (See Appendix 3). The first reason listed by the trial court for departure was as follows:

> 1. That substantial psychological and emotional trauma has been caused to the victim as result of the Defendant's acts which have led to this violation of probation, the magnitude of which may only be fully realized at a stage much later in her life. [emphasis added]

This is an invalid reason for departure. The basis for the probation revocation was the finding by the trial judge that Petitioner committed the acts of sexual battery upon two persons under the age of eleven (11). In Lerma v. State, 497 So.2d 736, 739 (Fla. 1986), this Court rejected psychological trauma to the

victim as a reason for departure "because nearly all sexual battery cases inflict emotional hardship on the victim." See also Keys v. State, supra.

In State v. Rousseau, 509 So.2d 281 (Fla. 1987), this Court revisited the concept of psychological trauma to the victim as a basis for departure. This Court held "that the type of psychological trauma to a victim that usually and ordinarily results from being a victim of the charged crime is inherent in the crime and may not be used to justify departure." Id. at 284. Also psychological trauma "may constitute a clear and convincing reason for departure when the victim has a discernible physical manifestation resulting from the psychological trauma." Id. at 284. This Court concluded:

> When the victim's trauma results from extraordinary circumstances clearly not inherent in the crime charged or when the victim has a discernible physical manifestation resulting from the trauma, it may constitute a clear and convincing reason for departure. We point out, however, that almost all victims of a crime will feel some type of trauma: this type of trauma which usually and ordinarily results from being a victim of a crime is inherent in the crime and may not be used to justify departure.

Id. at 284.

Sub judice, the psychological trauma to the victims was not a clear and convincing reason for departure because it was the type of trauma inherent in being the victim of a sexual battery. And just as importantly, there was no factual basis established beyond a reasonable doubt in the record to support this ground

for departure. The trial judge merely speculated that possible psychological trauma may be suffered by the victims in the future. This clearly does not meet the clear and convincing test. See Crosby v. State, 12 F.L.W. 248 (Fla. 5th DCA Jan. 21 1988) ("Psychological trauma not a valid ground for departure in this case because such trauma is inherent in both crimes, and there was no record evidence that the victims suffered from a discernible physical manifestation resulting from the trauma. State v. Rousseau, 509 So.2d 201 (Fla. 1987).") Therefore this ground for departure as articulated by the trial judge is invalid.

The Fourth District in its opinion sub judice stated the following in reference to this ground for departure:

> We conclude that the first reason (psychological and emotional trauma of the sexual battery victims) was valid, as constituting consideration of the circumstances forming the basis for the probation revocation. See Isgette v. State, 494 So.2d 534 (Fla. 4th DCA 1986); Rodriguez v. State, 464 So.2d 638 (Fla. 3d DCA 1985).[2]

The trial court's first articulated basis for departure can not be fairly characterized as a "circumstance forming the basis for the probation revocation." The trial judge expressly articulated this ground as "psychological trauma" to the victims. It is readily apparent that the Fourth District succumbed "to the

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2 The Courts in Isgette and Rodriguez concluded that the trial court could properly depart from the guidelines based on the violence used by the defendants in committing the offenses which formed the basis for the revocation of probation.

temptation to formulate its own reasons to justify the departure sentence." Casteel v. State, supra at 1252. This is strictly prohibited. Hence on the authority of Casteel, the Fourth District erred in upholding this first ground for departure through a recharacterization not expressly cited by the trial court.

While this Court need not reach the issue, the unauthorized ground for departure i.e. "circumstances forming the basis for the probation revocation" can not in any event support departure in the instant case.

This Court recently held in State v. Pentaude, 500 So.2d 526, 528 (Fla. 1987) that such factors as "the character of the violation, the number of conditions violated, the number of times [the defendant] has been placed on probation, [and] the length of time he has been on probation before violating the terms and conditions" may comprise proper grounds for more than a 1-cell departure. However these grounds must comport with the remaining guidelines provisions.

Appellant was never convicted of the offense for which his probation was violated. Rule 3.701(d)(11) expressly prohibits departures based on "offenses for which the offender has not been convicted." Directly applying this prohibition, the courts have repeatedly held invalid a sentencing departure greater than 1-cell that was based on the defendant having violated his probation by the commission of a substantive offense, where that

offense had not resulted in a conviction. See Fisher v. State, 489 So.2d 857, 858 (Fla. 1st DCA 1986), Mack v. State, 489 So.2d 205, 206 (Fla. 2d DCA 1986). At the time of sentencing in the present case Petitioner had merely been arrested, but not convicted, of another offense. In accordance with Rule 3.701(d)-(11) a departure from the recommended guidelines sentence thus may not be predicated upon conduct not resulting in a conviction. See Tuthill v. State, 12 F.L.W. 2250 (Fla. 3d DCA Sept. 15, 1987). C.f. Cahill v. State, 505 So.2d 1113 (Fla. 2d DCA 1987) (where defendant is convicted of second crime while on probation, and second crime is of same type as first crime for which he was put on probation, trial court may depart from guidelines); Gissendaner v. State, 504 So.2d 474 (Fla. 1st DCA 1987) (where defendant who pled nolo contendere to offense which was same kind of offense for which defendant had been placed on community control, trial court's departure from the guidelines is justified). Thus, in the absence of a conviction to support departure from the guidelines even this unarticulated basis for departure can not justify the departure. This conclusion is fully consistent with State v. Pentaude, supra, where one of the reasons justifying the authorized departure sentence was that Pentaude had been "convicted of a substantive crime during the probationary period." (emphasis added).

The trial judge's second articulated reason for departure was as follows:

> The Defendant was on probation for less than eight months before he committed acts for which he is in violation leading this Court to conclude he is not suitable for rehabilitation. (emphasis supplied).

The entire thrust of this ground for departure is that Petitioner is not amenable to rehabilitation. This Court has held that failure at previous attempts at rehabilitation is not a valid reason for departure. Scott v. State, 508 So.2d 335, 337 (Fla. 1987). See also Baker v. State, 13 F.L.W. 121 (Fla. 2d DCA Dec. 30, 1987); Wilson v. State, 490 So.2d 1360, 1361 (Fla. 5th DCA 1986). With the advent of the sentencing guidelines the primary purpose of sentencing is to punish the offender. Rehabilitation has now assumed a subordinate role. Therefore this ground for departure is invalid.

The Fourth District in its opinion sub judice states the following in reference to this ground for departure:

> The second reason (commission of crimes within eight months of being placed on two years probation) is also valid. See Spivey v. State, 481 So.2d 100 (Fla. 3d DCA 1986).

Petitioner asserts that once again the Fourth District has recharacterized the trial court's expressed ground for departure. The Fourth District refers to the "timing" of violation as a basis to depart. However the trial judge focused on Petitioner's

rehabilitation potential not the "timing" of the probation violation. Therefore the departure can not be justified on the basis of the "timing" of the probation violation.

Even if this precise ground for departure was articulated by the trial judge (~~but see~~, supra), the eight (8) months served before the violation occurred is not a clear and convincing reason for departure. The "timing" or "temporal" basis for departure has been upheld by appellate courts as a valid reason for departure in the past. However this Court has recently disapproved this ground for departure. In State v. Rousseau, 509 So.2d 281 (Fla. 1987), the defendant pled guilty to three (3) burglaries. One of the grounds for departure was that the defendant committed the burglaries scored as the primary offense in a three-week period. This Court disapproved of this ground for departure as follows:

> The first of these reasons is that Rousseau committed three burglaries in a three week period. The district court evidently viewed the "temporal circumstances" of these crimes to justify departure. We disagree with this conclusion. Each of these three burglaries was scored as a primary offense in determining Rousseau's guidelines sentence. The record reveals no additional facts concerning the timing of these offenses which were not already factored into the guidelines scoresheet. Therefore, this reason cannot justify departure.

Id. at 283.

At bar, Appellant's primary offense (burglary) for which he was originally placed on probation was scored. And the probation violation was also scored pursuant to Rule 3.701(d)(14) (one cell departure for violation of probation) in determining Petitioner's guideline sentence range. The record reveals no additional facts concerning the timing of these offenses which were not already factored into the guidelines scoresheet. The defendant in Rousseau committed each of the three burglaries within a week. In contrast there is a considerable period of time between Petitioner's commission of the original burglary (July 30, 1984) being placed on probation (December 19, 1984) and engaging in conduct ultimately forming the basis of the probation violation (July 29, 1985, August 15, 1985).

The Fourth District citing Spivey v. State, 481 So.2d 100 (Fla. 3d DCA 1986) held that the trial court's second reason (commission of crimes within eight months of being placed on two years probation)[3] is valid. However in Spivey, supra, the violation of probation occurred within one (1) month of being placed on probation. There is a vast distinction between one (1) and eight (8) months on probation. To allow departure in the instant case would sanction an automatic basis for departure in every case where a probationer commits the violation within eight (8) months of being placed on probation. This is the antithesis

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3 As noted previously, Petitioner was not convicted of the subsequent crimes. Those offenses merely formed the basis of his revocation of probation.

of a valid justification for departure from the presumptive guidelines sentence range. See e.g. Hall v. State, 13 F.L.W. 28, 29 (Fla. Jan. 7, 1988) ("The repeated nature of the beating was of such intensity and occurred for so long a period of time as to mark this as one of those particularly aggravated cases for which a departure sentence was justified.")

The Respondent-Appellee conceded that the third ground for departure was invalid. See Ree v. State, supra at 2253. The Fourth District correctly held that the fourth ground for departure was unsupported by the record. Id. at 2253. Therefore all four (4) grounds cited by the trial judge for departure are invalid. Hence Petitioner's sentence should be vacated but the cause remanded to the trial court for imposition of a new sentence within the sentencing guidelines. See Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

B. The Extent Of Departure Was Excessive

The Fourth District in remanding this cause for resentencing on the authority of Albritton v. State, 476 So.2d 158 (Fla. 1985) found that "a review of the extent of the departure from the guidelines range would be premature." Id at 2253. Assuming arguendo that this Honorable Court finds that the trial judge was authorized to depart from Petitioner's guidelines sentence, Petitioner contends that the extent of the departure from Petitioner's presumptive guidelines range in this case was not justified. It should be noted that Petitioner's original

offense, the imposition of probation, the revocation of probation and Petitioner's instant sentencing all occurred prior to July, 1986. Thus the extent of departure is a viable basis for appeal herein. See Booker v. State, 514 So.2d 1079 (Fla. 1987).

In Albritton v. State, supra this Court held:

> In our view, and we so hold, the proper standard of review is whether the judge abused his judicial discretion. An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and record to determine if the departure is resonable. We disagree with and disapprove the holding below that the only lawful limitation on a departure sentence is the maximum statutory sentence for the offense.
> Id. at 160.

Petitioner's recommended guideline sentence with the Rule 3.701(d)(14) one-cell departure was in the twelve (12) to thirty (30) months in prison range. The trial judge departed from this guidelines range and sentenced Petitioner to ten and one-half (10 1/2) years in prison. R 236. The trial judge abused his discretion when he departed from this guidelines range and

sentenced Petitioner to ten (10) and one-half (10) (1/2) years in prison. Even if certain grounds are permissible for departure from the presumptive guidelines sentence, it surely does not allow the extensive departure. The extent of the departure from the recommended range was an abuse of discretion in light of the presumptive guideline sentence., reasons for departure, the sentence actually imposed, and the record in this cause.

In Cankaris v. Cankaris, 382 So.2d 1197, 1203 (Fla. 1980), this Court adopted the following test for review of a judge's discretionary power:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no resonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

The record at bar supports Petitioner's position that the departure was excessive. In fact there were no valid reasons to allow this departure to the maximum for each offense with said offenses to run consecutively. Hence Petitioner's excessive departure sentence must be vacated and this cause remanded to the trial court for resentencing.

CONCLUSION

This Honorable Court should reverse Petitioner's sentence and remand this cause to the trial court for imposition of a sentence within the guidelines range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to AMY DIEM, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 17th day of March, 1988.

Of Counsel