O/A 5-26-88

IN THE SUPREME COURT OF FLORIDA

EDWARD PAUL PETERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 71,609

DISCRETIONARY REVIEW OF THE DECISION OF THE
SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

EDWARD PAUL PETERS will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The state offers the following chronology to assist the Court in its understanding of the facts and case:

CHRONOLOGY

10/20/83 Police agent bought marijuana from Peters. R7.

10/28/83 Peters arrested on possession of marijuana and paraphernalia.

11/18/83 Information filed, case #CF83-3548, (R11-14):

1. Sale of controlled substance, F3 (3d degree felony) (drug sold 10/20/83).

2. Possession of controlled substance, M1 (drug possessed for sale 10/20/83).

3. Possession of controlled substance, F3 (drugs possessed by Peters when arrested 10/28/83).

4. Possession of drug paraphernalia, M1 (scales, baggies and rolling papers found on arrest 10/28/83).

03/22/84 Peters pleads guilty to counts 1 & 3, state nolle prosses counts 2 & 4. R15. Adjudiciation withheld, sentence deferred, R16, placed on probation for three years (two concurrent terms) pursuant to guidelines recommendation of any non-state prison sanction. R19.

07/01/84 Effective date of Rule 3.701(d)(14).

07/24/85 Peters discovered in possession of more than 20 grams of marijuana in search arising from warrant

issued on suspicion of Peters selling marijuana from his home. R28-32.

08/13/85 Information filed, case #CF85-3155, R25-26:

1. Possession of controlled substance, F3 (arising from 07/24/85 possession).

08/30/85 Affidavit of Violation of Probation filed alleging:

a. Failed to pay costs of supervision;

b. Arrested 07/24/85 for felony possession.

10/11/85 Peters pleads guilty to #CF85-3155, admits violation of probation. R34-35. Probation revoked, R34, Peters adjudicated guilty of the three charges in the two cases, and placed on two years community control concurrent on each count, R38, pursuant to guidelines scoresheet recommending any non-state prison sanction or 12-30 months, R37. Primary offense on scoresheet is case CF83-3548.

10/16/85 Peters sells marijuana.

11/26/85 Information filed, case #85-4608, R40-42:

1. Sale of controlled substance, F3.

2. Possession of controlled substance with intent to sell, F3.

02/10/86 Affidavit of Violation of Probation filed alleging:

a. Arrest for 10/16/85 offense.

b. Being away from his home except for work at the time Peters made the sale to sheriff's detectives.

07/03/86 Hearing before Judge Threadgill. R52-67. Peters pleads nolo contendere to the counts in case #85-4608 and is adjudicated guilty. R69. Peters sentenced to three years incarceration on both counts of case #85-4608, concurrent, and concurrent to the sentence in case #83-3548. R71-72. Peters sentenced to three years on case #85-3155, concurrent with the sentence in #83-3548. R74-75. Peters sentenced to three years on counts 1 & 3 of case #83-3548. R78-80. Guidelines scoresheet, R81, lists case #85-4608 as the primary offense, #'s 85-3155 and 83-3548 as additional cases.

SUMMARY OF THE ARGUMENT

I.

The guideline rules expressly provide for scoring points for crimes included on the scoresheet for sentencing committed while under legal constraint, and for a one cell bump if the sentencing arises because of revocation of probation. It does not matter what crime is used as the primary offense; one purpose of the guidelines is to maximize the penalty and to increase the sentence in proportion to the defendant's criminal history.

Departures are by definition deviations from the presumptive sentence requiring written reasons. Hendrix prohibits double-dipping only for departure. If the guidelines score a circumstance twice, that is merely an inherent and permissible aspect of the guidelines.

II.

A. Petitioner failed to raise the ex post facto claim below and waived the issue.

B. Prior to Rule 3.701(d)(14), trial courts were free to depart for any violation of probation. After the rule became effective, the courts have distinguished between "bare" violations which justify only a one-cell bump, and egregious violations which justify departure, i.e. Pentaude. The rule therefore inures to the benefit of criminal defendants since it prohibits departure for minimal violations and ex post facto protections are not triggered.

C. This Court need not reach the constitutional issue since the scoresheet may be viewed as providing for a departure. Since any probation violation justified departure before the one-bump rule, then a scoresheet with a written reason of "violation of community control" and a one-cell departure would be sufficient. That is the case here. A one-cell departure is the minimum departure possible, and, if a bare violation is sufficient to depart, then a one-cell departure cannot possibly be an abuse of discretion.

D. If "violation of community control" is insufficient to justify departure, then remand is appropriate to permit the trial court to consider the circumstances to depart to a greater extent if justified, and to provide explicit reasons for the departure. Petitioner failed to put the trial court on notice that the sentences constituted departure. Shull v. Dugger does not prohibit remand where the trial court never had the opportunity to consider the departure issue. Daughtry.

ARGUMENT

ISSUE I

THE SENTENCE IS CONSISTENT WITH THE GUIDELINES.

The rule of lenity is not applicable where the statute or rule has an express contrary statement. In the case of the sentencing guidelines, Florida Rule of Criminal Procedure 3.701(d)(3) provides that "primary offense," in cases where multiple offenses are being scored, shall be that offense which, when used as the primary offense on the scoresheet, yields the most severe penalty.[1] And, Rules 3.701(b)(2) and (4) emphasize the punitive intent of the guidelines.

In the instant case, the state chose case number 85-4608 as the primary offense. Thus, Peters was being sentenced for his possession with intent to sell and sale of a controlled substance on October 16, 1985. At the same time, he was also being sentenced for his 1983 and prior 1985 offenses.

While it might seem relevant that the primary offense in this case was the October 1985 offense, not the 1983 offenses, for purposes of determining the propriety of adding points for being under legal constraint, this is not so. In Gissinger v. State, 481 So.2d 1269 (Fla. 5th DCA 1986), the court held that

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1/ There is a certain saving grace to this provision, since, if the state errs in preparation of the scoresheet on this particular point, all possible error would inure to the benefit of the defendant. I.e. any error in deciding which should be the primary offense will be, by definition under Rule 3.701(d)(3), an error in choosing an offense yielding a less severe sanction than the use of the correct offense.

regardless of the primary offense, if the defendant was under legal constraint for any of the crimes for which he is being sentenced, i.e. included on the scoresheet, then the points should be added. The discussion at 481 So.2d at 1270 (paragraph ending with annotation to footnote 3) makes clear the sort of anomalies which would arise if the selection of primary offense were to control scoring for legal constraint.[2] Of particular note is the Gissinger court's reliance on Rule 3.701(b)(4), which states that the intent of the rules is to increase the severity of the punishment as a defendant's criminal history increases. Rule 3.701(b)(4) is the policy parallel and underpinning for Rule 3.701(d)(3), the "anti-lenity" rule regarding selection of the primary offense.

Turning to the issue before this Court, the decision of the second district in Peterson v. State, 13 F.L.W. 1047 (Fla. 2d DCA April 27, 1988), lends support and logic to the state's position. In Peterson, the defendant was originally placed on probation for three years. Subsequently, the defendant was charged with additional crimes. The defendant pled guilty to the additional crimes. The assistant public defender on appeal in Peterson, the same attorney as in the instant case, urged that it

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2/ Contrast this with the situation where the violation of probation was not a crime. See, e.g., Taylor v. State, 13 F.L.W. 677 (Fla. 2d DCA 1988) (to be reported at 522 So.2d 924), where the court found it error to score points for legal constraint when the primary offense was the underlying crime for which the defendant had originally been placed on probation. The court found it would have been proper to bump for the violation of probation.

was error for the trial court to bump one cell for violation of the original probation, citing to one of the cases alleged as being in conflict sub judice, Green v. State, 513 So.2d 794 (Fla. 4th DCA 1987). The Peterson court noted that Green relied on Meadows v. State, 498 So.2d 1018 (Fla. 2d DCA 1986), which the second district had receded from in Frick v. State, 510 So.2d 1077 (Fla. 2d DCA 1987). The Peterson court held:

> The appellant was on probation at the time the sale of cocaine, the primary offense [committed after the defendant had been placed on probation], was committed; therefore, points were properly scored for legal constraint. In addition, the appellant's probation for possession of cocaine was revoked. An increase of one cell after revocation of probation is clearly authorized by Florida Rule of Criminal Procedure 3.701(d)(14). **Lee v. State**, 491 So.2d 1289 (Fla. 2d DCA 1986) [the case readopted in the **Frick** decision when receding from **Meadows**]. **See also, Pearson v. State**, 514 So.2d 374 (Fla. 2d DCA 1987); **Cain v. State**, 506 So.2d 1125 (Fla. 1st DCA 1987).

13 F.L.W. at 1048. See also Griffin v. State, 519 So.2d 677 (Fla. 2d DCA 1988) (citing to instant decision below on identical issue). Pearson and Cain both find it proper to bump one cell when sentencing for multiple offenses, where probation was revoked and points were added for being under legal constraint (the probation) at the time of the later offense. The first district in Cain relied on Lee for the principle that such sentencing does not constitute the double-dipping condemned in Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

Only two cases stand out as clearly being in conflict with the instant case, the other second district decisions in Peterson and Griffin, and the first district in Cain: Cummins v. State, 519 So.2d 718 (Fla. 5th DCA 1988) and Green v. State, 513 So.2d 794 (Fla. 4th DCA 1987). The Cummins court held that "[t]he automatic one-cell departure of Rule 3.701(d)(14) only applies to the offense for which probation was revoked . . . not for the subsequent offense . . . which constitutes the probation violation." Id. at 719. The court remanded for resentencing within the guidelines on the subsequent offense.

Cummins is clearly erroneous. By distinguishing between offenses for purposes of sentencing, the fifth district in essence mandated preparation of separate scoresheets for sentencing on the separate charges, one without a bump in the recommended sentence, one with a bump. This is totally inconsistent with the philosophy and scheme of the guidelines, and with the express dictates of Rule 3.701(d)(1) which mandates that only one scoresheet shall be prepared for all offenses pending before the court for sentencing. The Cain court expressly rejected an argument by the state that separate scoresheets should have been used to permit the challenged split sentence.

In Green, the fifth district expressly relied upon Meadows. Ironically, at the time of the Green decision, Frick had already issued receding from Meadows, three months before Green was decided. It is understandable that the Green court

missed the Frick ruling, since Frick is a brief en banc decision that did not merit a headnote when reported in West's Southern Reporter Second. Of course, the first district in Cain, almost a year after Frick, was by then on notice of the demise of Meadows and relied, instead, on the revivified rationale of Lee.

Lee is the simple answer to a simple question which became complicated with Meadows and Green. There will never be a situation where a true double-dipping situation occurs because of scoring for legal constraint and bumping for violation of probation. For such double-dipping to occur, the defendant would have had to have been placed on probation for the underlying offense, committed some technical violation of probation sufficient to impose sentence, and then faced sentencing for the underlying, and only, criminal offense. In such a case, the trial court would double dip if it added points for being on probation at the time of the offense, since the defendant could not have been under such constraint until after he was brought to justice. This does not happen. Taylor v. State, 13 F.L.W. 677 (Fla. 2d DCA 1988) (to be reported at 522 So.2d 924).

Petitioner urges that Lee conflicts with Watkins v. State, 498 So.2d 576 (Fla. 3d DCA 1986). Appellant writes that

> Lee . . . addresses the question whether the same probation can be used both as points on the scoresheet for legal status and as a reason to depart from the guidelines by one cell. Lee holds that the same probation can be used for both purposes for all offenses pending for sentencing. This holding is contrary to Watkins . . . which criticizes using a defendant's legal status twice in this way.

Petitioner's Initial Brief at 5. This argument places the cart before the horse. First, Lee did not hold that violation of probation could be used to "depart." Lee did hold that probation revocation could be used to "bump," to "automatically increase," and to "increase" the sentence to the next higher cell. It is therefore misleading to state that Watkins "criticizes using a defendant's legal status twice in this way." Watkins criticizes using revocation of community control as a reason for departure, i.e. a deviation above the one-cell bump. The Watkins court expressly quotes Rule 3.701(d)(14) and even emphasizes the provision that the sentence "may be increased to the next higher cell," 498 So.2d at 578 (emphasis in original). What the trial court had done in Watkins was to depart, i.e. impose a sentence greater than the one-cell increase permitted under the rule. The state conceded in Watkins that none of the reasons offered for departure were valid. The court held that:

> The [trial] court not only factored the defendant's legal status at the time of the offense into the guidelines scoresheet but also used the same legal status as a basis for departure from the guidelines.

498 So.2d at 578 (emphasis added). Watkins is totally consistent with Lee. The Watkins court recognized that the trial judge could have increased the sentence by one cell, but he could not depart. Watkins expressly found that the trial judge failed to follow the directives of Rule 3.701(d)(14), i.e. to increase by one cell, no more.

Petitioner's argument that the one-cell increase of the rule is a "departure" is meritless. While some courts have used the term "departure" in describing the bump in dicta, the guidelines themselves provide the final word. In the most recent amendment to the guidelines, this Court modified the sentence ranges to provide not only recommended ranges but also permitted ranges. The permitted ranges provide, in effect, a one-cell increase or decrease at the complete discretion of the judge:

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

Rule 3.701(d)(11), Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 & 3.988), 13 F.L.W. 110 (Fla. Feb. 11, 1988). A sentence which is an increase of one cell under Rule 3.701(d)(14) is still a guideline sentence, i.e. one within the range permitted by the rules. With the latest amendment, one-cell increases and decreases are in all cases permitted, and are not departures. A departure sentence is one which, by definition, "must be accompanied by a written statement delineating the reasons for the departure."

This exercise in semantics is necessitated by petitioner's attempt to characterize the one-cell increase as a departure in order to bring it within the purview of Hendrix v. State, 475 So.2d 1218 (Fla. 1985). However, study of Hendrix shows that petitioner's efforts are futile, because Hendrix itself refutes the argument:

> Departures from the guidelines are permitted, but judges must explain departures in writing and may depart only for reasons that are "clear and convincing." . . .
>
> . . . To allow the trial judge to depart from the guidelines based upon a factor which has already been weighed in arriving at a presumptive sentence would in effect be counting the convictions twice which is contrary to the spirit and intent of the guidelines.

475 So.2d at 1220 (emphasis added). Obviously, this Court considered double-dipping to have occurred only where a trial judge departed for a reason already factored in on the scoresheet, and gave that as a reason in his written reasons for departure. On the other hand, the rules themselves expressly provide for adding points for both legal constraint and a one-cell bump when probation is revoked for a subsequent criminal act which is also being disposed of in the same proceeding.

The rules studiously avoid referring to the increase as a departure and refer to departure as deviations from the guidelines requiring written reasons. Examples cited by petitioner of judicial references to the increase as a departure are merely inexact use of the term "departure" in a context where

such usage lends clarity or brevity to discussions where precision on this point is not required. In the instant case, as in the rules themselves, precision is necessary. The rules have made the distinction between the bump and a deviation or departure; this Court created the distinction and need only reaffirm its intent to resolve the instant case.

ISSUE II

THE EX POST FACTO CLAUSE DOES NOT REQUIRE REVERSAL OF THE TRIAL COURT'S ORDER.

A. PETITIONER WAIVED THE EX POST FACTO CLAIM BY FAILING TO RAISE IT IN THE TRIAL COURT.

B. NO EX POST FACTO PROBLEM EXISTS. RULE 3.701(D)(14) INNURES TO THE BENEFIT OF CRIMINAL DEFENDANTS, NOT THEIR DETRIMENT.

C. EVEN IF THE ONE-CELL BUMP TRIGGERS EX POST FACTO PROBLEMS, THE SENTENCING SCORESHEET IS SUFFICIENT TO SUPPORT DEPARTURE FOR THE SENTENCES.

D. ASSUMING REMAND IS NECESSARY, THE TRIAL COURT SHOULD BE PERMITTED TO ENTER A VALID, EXPLICIT REASON FOR DEPARTURE.

A. WAIVER

Initially, the state urges, as it did below, that petitioner waived the ex post facto claim by failing to object on that ground at sentencing. See, e.g., Arnold v. State, 505 So.2d 1104 (Fla. 2d DCA), review denied, 515 So.2d 229 (Fla. 1987) (ex post facto claim waived); Parker v. State, 500 So.2d 721 (Fla. 2d DCA 1987); Treadway v. State, 500 So.2d 308 (Fla. 2d DCA 1986). The state further urges, as it did below, that any potential ex post facto problem is obviated by Florida Rule of Criminal Procedure 3.800(a), permitting the trial court to correct illegal or incorrect sentences. Cf. Felts v. State, 13 F.L.W. 205 (Fla. 1st DCA Jan. 14, 1988) (Rule 3.800 obviates ex post facto claim regarding statute eliminating remand if reasons for departure are found invalid on appeal, provided at least one valid reason remains). If relief is appropriate for petitioner, he should have sought it under Rule 3.800.

B. NO EX POST FACTO PROBLEM EXISTS

Addressing petitioner's argument sub judice, petitioner appears to urge that State v. Pentaude, 500 So.2d 526 (Fla. 1987), prohibits upward departure for violation of probation. To the contrary, Pentaude specifically found that upward departure was appropriate "based upon the character of the violation . . . the number of times he has been placed on probation, the length of time he has been on probation before violating the terms and conditions, and any other factor material or relevant to the defendant's character." 500 So.2d 528. Petitioner's multiple drug offenses in violation of the terms of his probation and subsequent community control for the 1983 offenses, the fact he was given two chances--probation and community control--before sentencing on the 1983 offenses, and the fact that he was caught selling drugs only five days after his probation was revoked and replaced with community control on his first violation of the probation for the 1983 offenses, are damning under the Pentaude decision.

Departure always has been and still is permitted for violations of probation and community control. Before Rule 3.701(d)(14) took effect, departure for a violation of probation sufficient to revoke was permitted. Hall v. State, 478 So.2d 385 (Fla. 2d DCA 1985), review denied, 488 So.2d 68 (Fla. 1986); Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985) ("A trial court is justified in using the probation violation as a reason for enhancing a sentence." 464 So.2d at 212); Jackson v. State, 454

So.2d 691 (Fla. 1st DCA 1984), modified on other grounds (ex post facto issue), 478 So.2d 1054 (Fla. 1985), overruled on other grounds (ex post facto issue), Miller v. Florida, 482 U.S. ___, 107 S.Ct. ___, 96 L.Ed.2d 351 (1987); Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984); Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984).

Hall and Addison specifically hold that violation of a substantive condition of probation justifies departure. In both cases, Rule 3.701(d)(14) was not applicable, so the "substantive condition" language provides a standard under which departure would be appropriate prior to the effective date of the rule. However, the requirement that the violation be of a substantive condition is a tautology, as a non-substantive probation violation will not support revocation of probation. If probation is not revoked, then the question of departure upon sentencing never arises. See, e.g., Molina v. State, 520 So.2d 320 (Fla. 2d DCA 1988) ("This court has refused to find technical violations sufficient to justify revocation." 520 So.2d at 321); Drayton v. State, 490 So.2d 229 (Fla. 2d DCA 1986) ("The violation triggering a revocation of probation must be willful and substantial." 490 So.2d at 230); Davidson v. State, 419 So.2d 728 (Fla. 2d DCA 1982) (same quote as Drayton, 419 So.2d at 729); Shaw v. State, 391 So.2d 754 (Fla. 5th DCA 1980) (violation must be willful and substantial).

The conclusion reached from synthesizing the two lines of cases cited in the preceeding two paragraphs is that any

violation of probation sufficiently egregious to support revocation was sufficient to support departure, prior to the effective date of Rule 3.701(d)(14), so long as the violation (and hence the revocation, since no sentencing would occur absent revocation for the violation) was given as the reason for departure.

After the rule became effective, the automatic one-cell increase eliminated departure where the violation was only the bare minimum substantive violation sufficient to support revocation. Pentaude now controls vis-a-vis what circumstances support departure. This is exemplified in the recent decision of Machansky v. State, 517 So.2d 101, 101-02 (Fla. 2d DCA 1987):

> Upon revoking a defendant's probation, the trial court may impose a sentence within the original guidelines range or the next higher guidelines range without providing written reasons for departure. Fla. R. Crim. P. 3.701(d)(14). A court is permitted to depart beyond the next higher range if the underlying reasons for the violation of probation, as opposed to the mere fact of violation, are more than minor infraction and are sufficiently egregious. **State v. Pentuade**, 500 So.2d 526 (Fla. 1987).

The Machansky court then concluded that the reason given for departure, willfulness of the violation, was not a valid reason since, as noted supra, willfulness is an element of every violation of probation. Machansky, therefore, illustrates that the courts are able to distinguish between "bare" violations and more egregious violations.

If the courts now distinguish between bare violations and egregious violations, when, prior to Rule 3.701(d)(14) and Pentuade, no such distinction was made in determining the propriety of a departure for revocation, then Rule 3.701(d)(14) operated to the benefit, not the detriment, of criminal defendants. Prior to Rule 3.701(d)(14), a trial court could have departed to the statutory maximum for a bare violation, subject to review as to whether the magnitude of the departure was an abuse of discretion. Under Rule 3.701(d)(14) the defendant can only suffer a one cell increase for a substantive but not egregious violation.

C. THE SCORESHEET VIEWED AS A VALID DEPARTURE SENTENCE.

Petitioner's constitutional challenge need not even be reached. The Peters court below found the sentences on the 1983 offenses to be based on a bump up rather than a departure, and that the bump did not implicate the ex post facto clause because the court would have been free to depart, regardless. In short, there was error, but it was harmless.

This Court has recently held that a notation made on a guidelines scoresheet under "reasons for departure," regardless of whether it is made by the judge or the clerk, satisfies the "written reason" requirement of the rules. Torres-Arboledo v. State, 13 F.L.W. 229, 233 (Fla. April 1, 1988). Torres-Arboledo therefore clears up the inter-district conflict noted by petitioner in his brief.

The question then becomes whether "violation of community control" under "reasons for departure" on petitioner's scoresheet, R81, is sufficient to support a one-cell departure for the sentences on the 1983 offenses.

In Barnes v. State, 519 So.2d 1112 (Fla. 4th DCA 1988), the court was forced to go beyond the bump up rationale because the defendant was sentenced to three years in prison, while a one-cell increase under Rule 3.701(d)(14) would have permitted only 30 months incarceration. The only written reason for the departure was "violation of probation," noted on the scoresheet. The court held that the reason given, i.e. bare violation of probation, was not valid, citing to Mackey v. State, 495 So.2d 916 (Fla. 4th DCA 1986). In Mackey, the court departed upward six cells and stated as one of several reasons for departure that "[t]he violations were substantive; armed sexual battery; armed kidnapping; armed robbery; and burglary (dwelling) . . . ." 495 So.2d at 917. The crimes also occurred the day after release from prison on probation. The court held:

> While the record may support a departure of more than one cell, the stated reasons are not sufficiently specific to do so. The term "substantive" used in this context is at least ambiguous, and the remainder of the statement is simply too vague to permit analysis of specific bases for departure.
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> * * *
>
> We reverse the sentence and remand for resentencing to permit the trial court either to make a more explicit statement of reasons to justify the original departure sentence or

> to resentence the appellant with no more than a one cell upward departure from the presumptive guidelines sentence.

495 So.2d at 917.

The second quoted paragraph places Mackey and its offspring, Barnes, in proper perspective. The Mackey court earlier in the opinion noted the availability of Rule 3.701(d)(14) for a one cell bump. Thus, the defendant in that case was subject to Rule 3.701(d)(14) for the probation violation, which, for the sake of argument at this point, is not the case here. Therefore, where a defendant is subject to the one-cell bump, a written reason for departure which states only "violation of probation," Barnes, or the functional equivalent thereof, "the violations were substantive," Mackey (see discussion supra re the tautology inherent in the phrase "substantive violation"), is not sufficient to depart.

Unlike Barnes and Mackey, petitioner in the instant case was not subject to Rule 3.701(d)(14) (for purposes of the instant argument), and, as urged supra, a bare violation of probation is sufficient to support departure. Since this is precisely what is stated on petitioner's scoresheet, a sufficient writing under Torres-Arboledo, a valid written reason for departure for the 1983 offenses has been given, and the sentences should be affirmed. A one-cell departure is the minimum departure possible, so the magnitude of departure raises no question of abuse of discretion.

Even if it be determined that a bare violation is

insufficient to support departure on the 1983 offenses sub judice, the state urges that "violation of community control" is a valid reason, as supported by the record. In State v. Mischler, 488 So.2d 523 (Fla. 1986), Justice Ehrlich wrote:

> 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 the particular crime; and (2) The facts of the particular case must establish the reason in that case beyond a reasonable doubt . . . .
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> * * *
>
> . . . . [I]n order for a reason to be valid, in the abstract and assuming it is proven beyond a reasonable doubt, it must be of such character as to produce, in the mind of a hypothetically reasonably prudent judge, an unhesitatingly firm belief or conviction that departure would be warranted. . . .
>
> The second factor, sufficiency of the evidence, is more easily analyzed. "[T]he facts supporting the reasons must be credible and proven beyond a reasonable doubt."

488 So.2d at 527 (Ehrlich, J., concurring) (emphasis in original). The state urges that "violation of community control" is a valid reason for departure. Pentaude. The reason is not invalid merely because it fails to list the explicit egregious circumstances supporting the valid reason. That is the purpose of the second prong of the Mischler analysis, which requires the reviewing court to look to the record for evidentiary support for the valid reason. As discussed supra, petitioner's multiple drug offenses in violation of the terms of his probation and subsequent community control for the 1983 offenses, the fact he

was given two chances--probation and community control--before sentencing on the 1983 offenses, and the fact that he was caught selling drugs only five days after his probation was revoked and replaced with community control on his first violation of the probation for the 1983 offenses, all support departure pursuant to Pentaude.

D. REMAND FOR MORE EXPLICIT DEPARTURE REASON

Assuming, arguendo, that this Court concludes that the proper view is that Rule 3.701(d)(14) cannot be retroactively applied, that the court below could have departed for probation violation for the 1983 offenses, but that the written reason given is not sufficiently explicit, then this Court should remand to permit a more detailed statement. That was the course of action ordered by the court in Mackey. In Pentaude, this Court approved remand by the district court for entry of a proper sentencing order where no written reasons had been given.

Shull v. Dugger, 515 So.2d 748 (Fla. 1987), is not implicated in the instant case. This case is similar to Daughtry v. State, 13 F.L.W. 443 (Fla. 2d DCA Feb. 12, 1988), pending on discretionary review, No. 72,118 (Fla., jurisdictional briefs filed April 13, 1988). In Daughtry, the trial judge entered a sentence which he believed to be within the guidelines. On appeal, the district court held that the sentence was, in fact, a departure because of a decision intervening between time of sentencing and determination on appeal. The district court remanded to permit the trial judge, if he chose to, to enter

written reasons for departure. The court distinguished Shull on the basis that the trial judge in Daughtry had offered no written reasons for departure.

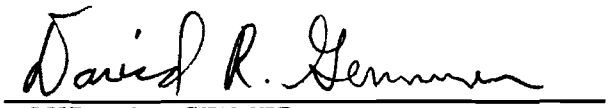
In the instant case, as in Daughtry, the trial judge entered a sentence he believed to be within the guidelines. The only objection raised at the sentencing hearing was the double-dipping argument addressed supra. Nowhere did defense counsel raise the question that the sentence for the 1983 offenses might raise an ex post facto problem vis-a-vis the bump. The entry of "violation of community control" under "reasons for departure" may be viewed, not as a reason for departure, but as an explanation for the one-cell increase under Rule 3.701(d)(14), and therefore, no written reasons for departure were given. Even if considered a valid but insufficiently explicit reason for departure, Shull prohibits enunciation of new reasons for departure on remand, 515 So.2d at 750, not further expansion upon existing, valid, but inexplicit, reasons. The trial judge in the instant case certainly should have the opportunity to place in writing the evidence clearly in the record supporting departure in this case. He should also have the opportunity to depart to a greater extent, since the circumstances of this case clearly justify departure by more than one cell.

CONCLUSION

Based on the argument and citations herein, this Court should approve the decision below. In the alternative, this Court should direct remand to the trial court to permit entry of a sufficiently explicit reason for departure.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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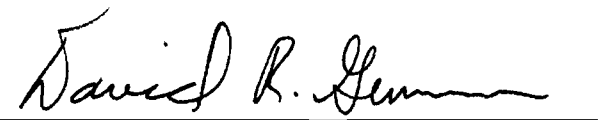
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Stephen Krosschell, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 17th day of May, 1988.



OF COUNSEL FOR RESPONDENT