IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,047
(5TH DCA CASE NO. 87-783)

BERNHINE W. YOUNG,

Defendant, Petitioner,

-vs-

STATE OF FLORIDA,

Plaintiff, Respondent.

APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

THOMAS W. TURNER, P.A.
56 E. Pine Street, Suite 300
Orlando, Florida, 32801
(305) 422-8686
Attorney for Petitioner
Fla. Bar #478288

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STATEMENT OF THE CASE AND FACTS

On January 2, 1985, the Appellant pled guilty to two counts of the sale of cocaine and was sentenced to five years probation following the service of 90 days in the Marion County Jail and a fine of Five Hundred Dollars (R 121-127).

On September 22, 1986, an Affidavit charging Violation of Probation was filed against Mr. Young alleging that he violated probation by possessing a firearm (R 136). On January 20, 1987, an amended Violation of Probation was filed charging that Mr. Young violated his probation by possessing cocaine on three occasions, on October 27, 1986, December 4, 1986, and December 11, 1986 (R 144). In addition to the Violation of Probation charges, substantive cases were also filed with respect to the alleged violations of October 27, 1986, and December 4, 1986, charging sale of cocaine and possession of cocaine. Prior to the revocation hearing, Appellant had been tried on the charges stemming from the October 27, 1986 transaction, and was acquitted of the charge of distribution of cocaine, but was convicted of possession of cocaine. The Appellant was sentenced to a

maximum guideline sentence of three and one-half years in the Department of Corrections.[1] At the time of the hearing, the second case[2] was still pending.

At the probation revocation hearing on March 31, 1987, testimony was presented by a confidential informant for the sheriff's department that he bought cocaine from Mr. Young on October 27, and December 4, 1986 for Twenty ($20.00) Dollars each (R 6-13). A police officer also testified that when Appellant was arrested on December 11, 1986, a piece of rock cocaine was found in the trunk of Appellant's car (R 31).

Following the hearing, the court revoked Young's probation based on its finding that the Appellant was guilty of the sale of cocaine on October 27, 1986, and

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[1]State of Florida v. Bernhine Wilford Young, Circuit Court of the Fifth Judicial Circuit for the State of Florida, in and for Marion County, Case # 86-2987-W, currently on appeal to the Fifth District Court of Appeal for the State of Florida.

[2]State of Florida v. Bernhine Wilford Young, Circuit Court of the Fifth Judicial Circuit for the State of Florida, in and for Marion County, Case # 86-3087X, currently on appeal to the Fifth District Court of Appeal for the State of Florida.

December 4, 1986, (R 78). The Court did not make any other factual finding of fact except as to these two sales. Specifically, the Court did not find that the Appellant possessed a firearm, or make any reference to possession of cocaine, as opposed to the sale of cocaine. An order of revocation of probation was entered on March 31, 1987, with the court finding that the probation was violated by "violating Condition (5)."[3] The guideline scoresheet prepared for sentencing showed a total of 96 points, placing Young in the 2 1/2 to 3 1/2 year range including a one-cell increase for violation of probation.[4] (R 190) The court determined to depart from the guidelines, and sentenced Young on the two previous sale charges to two concurrent 15 year terms of imprisonment, consecutive to the 3 1/2 years sentence imposed in Case No. 86-2987. The Court's order providing for departure states:

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[3]Condition (5) provided:

> You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation.

[4]At the hearing, it was determined that the guideline scoresheet was incorrect, and that the correct score was 78 points, which was within the same cell as the scoresheet indicated (R 81).

> The reason for the guideline departure is that the Defendant committed a substantive violation of his probation in that the Defendant was on probation for two counts of selling cocaine and violated his probation by twice more selling cocaine. See Townsend v. State, 458 So.2d 856 (Fla. 2d DCA 1984) and cases cited therein. (R 147)

On February 4, 1988, the Fifth District Court of Appeals upheld the Violation of Probation finding and the guideline departure sentence, and certified the following question as one of great public importance:

> Where a trial judge finds that the underlying reasons for violation of probation constitute more than a minor infraction and are substantive violations, may he depart from the presumptive guidelines range and impose an appropriate sentence within the statutory limit even though the defendant has not been "convicted" of the crimes which the trial judge concluded constituted a violation of his probation?

A Notice to Invoke Discretionary Jurisdiction was filed on the 2nd day of March, 1988, by the Appellant, and the Supreme Court of Florida accepted jurisdiction of this appeal.

ISSUES

I. WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES IN RULE 3.701, FLORIDA RULES OF CRIMINAL PROCEDURE.

II. WHERE A TRIAL JUDGE FINDS THAT THE UNDERLYING REASONS FOR VIOLATION OF PROBATION CONSTITUTE MORE THAN A MINOR INFRACTION AND ARE SUBSTANTIVE VIOLATIONS, MAY HE DEPART FROM THE PRESUMPTIVE GUIDELINES RANGE AND IMPOSE AN APPROPRIATE SENTENCE WITHIN THE STATUTORY LIMIT EVEN THOUGH THE DEFENDANT HAS NOT BEEN "CONVICTED" OF THE CRIMES WHICH THE TRIAL JUDGE CONCLUDED CONSTITUTED A VIOLATION OF HIS PROBATION?

III. WHETHER THE TRIAL COURT'S DEPARTURE FROM THE SENTENCING GUIDELINES WAS AN ABUSE OF DISCRETION.

SUMMARY OF ARGUMENT

The Appellant was originally placed on probation for two counts involving the sale of cocaine. The trial court found that the Appellant had violated his probation by selling cocaine to an informant for $20.00 on two more occasions and imposed two concurrent departure sentences of fifteen years imprisonment on each count, as opposed to a guideline sentence of 2 1/2 to 3 1/2 years. The only reason specified to justify the departure sentences was that these new offenses were committed while on probation for essentially the same type of offense. No other reason was given to justify the departure, such as a finding of an escalating pattern of criminal behavior. The Appellant had not been convicted of the two new offenses at the time of the violation of probation hearing; and in fact, had been acquitted of one of the sales. Accordingly, the reasons given by the trial judge are not sufficient reasons for a departure from the sentencing guidelines.

Secondly, assuming arguendo that two additional cocaine sales by themselves normally would be enough to justify departure from the guidelines, the Court is prohibited by Florida Rules of Criminal Procedure, Rule 3.701(d)(11), from considering offenses for which the Appellant had not been convicted as reasons to depart

from a guideline sentence. Finally, assuming arguendo that some departure was justified, because the original offenses were committed in 1984, the extent of departure is reviewable, and a seven cell departure in this case was an abuse of discretion. For all of these reasons the case should be remanded for resentencing, with instructions that the Court impose a guidelines sentence.

ISSUE ONE

THE TRIAL COURT ERRED IN DEPARTING FROM SENTENCING GUIDELINES OF RULE 3.701, FLORIDA RULES OF CRIMINAL PROCEDURE.

Following the Appellant's revocation of probation hearing, the guidelines scoresheet was prepared placing the Appellant in the community control or 12 to 30 months range, or 2 1/2 to 3 1/2 year range, considering a one cell increase for the violation of probation (R 140). The Court departed from the guidelines and sentenced Young to two concurrent 15 year terms of imprisonment for the two previous sale charges, consecutive to the previously imposed 3 1/2 year sentence, (R 148-154), stating:

> The reason for the guideline departure is that the Defendant committed a substantive violation of his probation in that the Defendant was on probation for two counts of selling cocaine and violated his probation by twice more selling cocaine. (R 147)

relying on Townsend v. State, 458 So.2d 856 (Fla. 2d DCA 1984) and cases cited therein.

The District Court of Appeal, on the other hand, relied upon the Florida Supreme Court decision of State v. Pentaude, 500 So.2d 526 (Fla. 1987), in which they stated:

> Following the test enunciated in Pentaude, we have no difficulty in determining that Young's violations of probation, as found by the trial judge, were more than minor

> infractions -- the cocaine possession and sales were substantive offenses sufficiently egregious to warrant departure.

The departure in this case cannot be justified either on the basis of Townsend or Pentaude.

In Townsend, supra, the defendant pleaded nolo contendere to attempted robbery and was placed on three years probation. Subsequently the defendant pleaded guilty to two separate cases of grand theft and armed robbery and admitted the violation of probation. In Townsend the Court then sentenced the defendant to a one cell upward departure, noting that the violations alleged were substantive and not contested by the defendant.[1]

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[1]This occurred prior to the amendment to Rule 3.701, which added category (d)(14), which states:

> Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control 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.

(Rule added May 8, 1987 -- see The Florida Bar: Amendment to Rules of Criminal Procedure 3.701, 3.988 -- Sentence Guidelines, 451 So.2d 824 (1984).

Subsequent to Townsend and with reference to Rule 3.701 (d)(14), the Second District Court of Appeal, in Alexander v. State, 513 So.2d 1117, (Fla. 2nd DCA 1987), held:

> The first reason given was that Alexander had violated substantive provisions of probation by committing new offenses. When imposing a sentence after revocation of probation, a trial judge may depart one cell without giving a reason. Fla.R.Crim.P. 3.701(d)(14). Any further departure must be supported by clear and convincing written reasons not related to the violation of probation. Mitchell v. State, 488 So.2d 911 (Fla. 2d DCA 1986); Boldes v. State, 475 So.2d 1356 (Fla. 5th DCA 1985) Because the reason for departure is related to Alexander's violation of probation, the departure in this case of more than one cell is invalid. (Emphasis added.)

See also McClure v. State, 513 So.2d 1119 (Fla. 2nd DCA 1987).

While neither case discusses Pentaude, the cases were sufficiently subsequent to Pentaude to presume that the Second District Court of Appeals had the benefit of the Pentaude decision. Thus, clearly the trial court's reliance on Townsend was misplaced, as Appellant's departure was based solely upon the two reasons given for the violation of probation itself.

We submit that the Fifth District Court of Appeal's reliance on Pentaude was also erroneous. The Supreme Court in Pentaude, in which the defendant violated seven conditions of probation within the first two months of

being placed on probation, and was convicted of a substantive crime during the probation period, held as follows:

> Finally, we note agreement with the district Court's holding that '[w]here a trial judge finds that the underlying reasons for violation of probation (as opposed to the mere fact of violation) are more than a minor infraction and are sufficiently egregious, he is entitled to depart from the presumptive guidelines range and impose an appropriate sentence within the statutory limit.' 478 So.2d at 1149. See Taylor v. State, 485 So.2d 900 (Fla. 1st DCA 1985) Williams v. State, 480 So.2d 679 (Fla. 1st DCA 1985) (certifying to this Court identical questions); Monti v. State, 480 So2d 223 (Fla. 5th DCA 1985); Gordon v. State, 483 So.2d 22 (Fla. 2d DCA 1985).
>
> Rule 3.701 d.14 merely recognizes that sentencing following revocation of probation is a serious matter, and so allows for a one cell departure without the necessity of any other reason. By no means, however, does the rule even purport to completely limit the trial court's discretion in sentencing when compelling clear and convincing reasons call for departure beyond the next cell. The trial judge has discretion to so depart based upon the character of the violation, the number of conditions violated, 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.

Id. at 528.

The District Court of Appeal cited that language in Pentaude and then stated:

> Following the test enunciated in Pentaude, we have no difficulty in determining that Young's violations of probation, as found by the trial judge, were more than minor

> infractions -- the cocaine possession and sales were substantive offenses sufficiently egregious to warrant departure.

The District Court of Appeal was in error because Pentaude had been convicted of a subsequent offense. In addition, in this case the trial court did not rely upon the cocaine possession in its written reasons for departure, as indicated by the District Court of Appeal, and did not state in its written reasons that the two sales on which it did rely were in any way egregious. In fact this case involved charges of two Twenty Dollar sales of cocaine, upon one of which charge the Appellant was acquitted, and the other of which the Appellant at the time of the hearing had not been convicted. While these transactions constitute substantive offenses, there was nothing egregious about them. While any criminal offense is a serious matter, these transactions were only Twenty Dollar transactions between the Appellant and an informant, which would be considered relatively minor offenses in a State plagued by multi-kilo cocaine transactions. They do not represent an escalating pattern of criminal behavior, which has been held to be a sufficient basis to depart. Keys v. State, 500 So.2d 134 (Fla. 1986).

Neither the trial court nor the District Court of Appeal conducted any sort of balancing of the factors listed in Pentaude, such as the character of the

violation, number of conditions violated, number of times placed on probation, length of time Appellant has been on probation for violating the terms and conditions or any other factors deemed material or relevant to the Appellant's character. The net effect of the District Court of Appeal's opinion is to permit trial courts to completely disregard the sentencing guidelines in violation of probation cases where the defendant is deemed to have committed two substantive criminal offenses without regard to the nature of said offenses, the amount of drugs involved, or any other factors. The Supreme Court did not go so far in Pentaude. To do so now would further erode any continuing vitality to the sentencing guidelines in violation of probation cases.

Accordingly, the written reasons given to justify the departure, that the Appellant was on probation for two offenses of sale of cocaine and violated probation by committing two more sales of cocaine, are not sufficient reasons to justify a departure from a guideline sentence, and this Honorable Court should remand the case to the trial court with instructions to resentence the Appellant to a guideline sentence.

ISSUE TWO

WHERE A TRIAL JUDGE FINDS THAT THE UNDERLYING REASONS FOR VIOLATION OF PROBATION CONSTITUTE MORE THAN A MINOR INFRACTION AND ARE SUBSTANTIVE VIOLATIONS, HE MAY NOT DEPART FROM THE PRESUMPTIVE GUIDELINES RANGE AND IMPOSE AN APPROPRIATE SENTENCE WITHIN THE STATUTORY LIMIT WHEN THE DEFENDANT HAS NOT BEEN "CONVICTED" OF THE CRIMES WHICH THE TRIAL JUDGE CONCLUDED CONSTITUTED A VIOLATION OF HIS PROBATION.

Assuming arguendo that the underlying reasons for violation of probation were more than minor infractions and were substantive violations sufficiently egregious to warrant departure, as held by the District Court of Appeal, the trial court nonetheless was not justified in departing from the presumptive guideline sentence when the defendant has not been convicted of the crimes that the Judge relied upon as a basis for the departure.

The Appellant's initial offenses for which he was placed on probation occurred on August 27, and 29, 1984, (R 100) and at that time Florida Rules of Criminal Procedure, Rule 3.701 (d)(11) read as follows:

> Reasons for departure shall be articulated at the time sentence is imposed. The written statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public, of the reasons for departure. The court is prohibited from considering offenses for which the offender has not been convicted. Other factors, consistent and not in conflict with the Statement of Purpose, may be considered and utilized by the sentencing judge. (Emphasis added.)

The reason for the departure in this case involved two transactions for which the Appellant had not been convicted. Of the two, the Appellant had actually been a acquitted on one and had not been to trial on the second, at the time of the hearing. Thus, the clear language of 3.701 (d)(11) explicitly prohibits using said offenses to justify the departure. In Williams v. State, 500 So.2d 501, 502 (Fla 1986) the trial court attempted to depart from a guideline sentence in imposing an original sentence for burglary and grand theft, in part because the defendant did not appear for sentencing following the entry of a plea. The Florida Supreme Court held that since failure to appear is a third degree felony and because the defendant had not been tried and convicted of that charge, the departure sentence was reversible error, stating that:

> permitting departures for an offense for which defendant has not been convicted is clearly prohibited by Florida Rules of Criminal Procedure, 3.701(d)(11). (Emphasis added.)

Thus, it appears that unless the Supreme Court is willing to overrule the Williams case, the trial Court erred in using two offenses for which the Appellant had not been convicted as the reason to depart.

In the context of a Violation of Probation, this same issue has been examined with conflicting results by three District Courts of Appeal, including the Fifth

District Court of Appeal in this case. Of the two districts holding that a departure is justified even though a conviction has not been obtained, the Fourth and Fifth District Courts of Appeal, neither explains why the holding or rationale of the Williams case does not apply to their holdings. Both seem to rely solely on Pentaude, which did involve offenses on which convictions had been obtained.

In Tuthill v. State, 518 So.2d 1300, 12 FLW 2250, (Fla. 3rd DCA, Sept. 15, 1987) Case No. 86-847, the Third District Court of Appeal, cognizant of this Court's holding in Pentaude supra, held that:

> It is well established that '[r]easons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.' Fla. R. Crim. P. 3.701(d)(11). Recent cases have reiterated that principle. Clark v. State, 490 So.2d 1349 (Fla. 1st DCA 1986); Mack v. State, 489 So.2d 205, 206 (Fla. 2d DCA 1986); see Williams v. State, 500 So.2d 501 (Fla. 1987). Cf. 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 the 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, the court's primary reason fails.

The Fourth District Court of Appeals in Lambert v. State, 517 So.2d 133, 13 FLW 70 (Fla. 4th DCA December 31, 1987) Case No. 87-0648, with very little analysis of the applicable law, and the Fifth District Court in this case, relying upon the dissenting opinion of Chief Judge Schwartz in the Tuthill opinion, upheld departures based upon offenses for which convictions had not been obtained. Specifically Judge Schwartz expressed the following rationale (which was also adopted by the Fifth District Court of Appeal):

> I think it clear, first of all, that the nature and character of the conduct which constituted the violation of probation as found by the trial judge was properly considered as a clear and convincing reason for departure even though Tuthill was not separately convicted of the substantive crime. In my view, nothing in any rule, statutory provision, or the cases cited by Judge Baskin justifies the position that this is required. To the contrary, the determinative case of State v. Pentaude, 500 So.2d 526, 528 (Fla. 1987), and those which follow it, emphasize that it is the violation itself -- as opposed to some distinct factual demonstration and finding as to the basis of the violation -- which is determinative.
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> * * *
>
> To hold otherwise by requiring proof beyond a reasonable doubt to support a guidelines departure in a probation situation -- either, as Judge Baskin suggests, by necessitating a 'conviction' under Fla.R.Crim.P. 3.701(d)(11) or, as the appellant contends, pursuant to the rule that the factual basis for a departure must be supported by that degree of proof, see Mischler v. State, 488 So.2d 523 (Fla. 1986) -- is unjustifiably contrary to the entire basis of the concept of probation, which, because it is purely a

> matter of judicial grace (for which Tuthill successfully pleaded at his first sentencing), Bernhardt v. State, 288 So.2d 490 (Fla. 1974), requires proof of a violation sufficient only to satisfy the conscience of the court. Randolph v. State, 292 So.2d 374 (Fla. 3d DCA 1974), cert. denied, 300 So.2d 901 (Fla. 1974); see Lee v. State, 440 So.2d 612 (Fla. 3rd DCA 1983). I cannot agree that every probation violation hearing should be rendered meaningless in determining the propriety of a departure and would hold, to the contrary, that a finding of violation is binding and determinative in the sentencing process.

12 FLW at 2251, and Young opinion, p. 4.

The rationale of Judge Schwartz is fatally flawed. It is based upon the assumption that since proof beyond a reasonable doubt does not apply to the burden of proof in a violation of probation hearing and that since the Court instead must find a violation only by evidence to the satisfaction of the Court's conscience, the reason for departure in a violation of probation sentence should also need be proved only to the satisfaction of the Court's conscience. Yet, inexplicably, Judge Schwartz cites but does not distinguish another Florida Supreme Court decision, Mischler v. State, 488 So.2d 523 (Fla. 1986), which specifically stated that clear and convincing reasons used to justify a departure sentence must be supported by proof beyond a reasonable doubt. While that case involved an original sentence rather than a violation of probation, neither Judge Schwartz nor the

Fourth or Fifth District Courts of Appeal have articulated any reason why said rationale of Mischler is inapplicable to departure in violation of probation cases, other than to suggest that probation is a matter of judicial grace. While probation may have been a matter of judicial grace prior to the enactment of the sentencing guidelines, when a sentencing court had discretion to impose any sentence up to the maximum permitted by law, probation is no longer a matter of grace. A defendant who properly falls within the first cell must receive a sentence in the first cell, absent clear and convincing written reasons to depart, with departures subject to appellate review.

On the other hand, the opinion of the Third District Court of Appeal in Tuthill, is sound and well reasoned. One case relied upon was Clark v. State, 490 So.2d 1349 (Fla. 1st DCA 1986), which held that the departure based upon attempted murder charges which had been nolle prossed, was improper under the express language of Rule 3.701 (d)(11). A second case cited by the Third Circuit was Mack v. State, 489 So.2d 205, 206 (Fla. 2d DCA 1986) which held that departure sentence may not be based on an arrest not resulting in conviction because of the express language of Rule 3.701.(d)(11),

rejecting the State's argument that for violation of probation purposes, a court finding that defendant committed the offense is tantamount to conviction.

The Tuthill court also relied upon Williams v. State, supra, which was previously discussed and which held that:

> permitting departure for an offense for which defendant has not been convicted, is clearly prohibited by Florida Rules of Criminal Procedure, Rule 3.701 (d)(11).

500 So.2d at 502.

Accordingly, a departure based upon offenses for which the defendant has not been convicted cannot be justified and the certified question should be answered in the negative with this Court remanding the case to the trial court with instructions that the court impose a guideline sentence on this Appellant.

ISSUE THREE

THE TRIAL COURT'S EXCESSIVE DEPARTURE FROM THE SENTENCING GUIDELINES CONSTITUTED AN ABUSE OF DISCRETION.[1]

Assuming arguendo that the court finds that the trial court based its departure sentence on valid reasons, the extent of departure is subject to appellate review in order to determine whether the departure was excessive. Albritton v. State, 476 So.2d 158 (Fla. 1985); Deer v. State, 476 So.2d 163 (Fla. 1985); Davis v. State, 489 So.2d 754 (Fla. 1st DCA 1986).[2] The standard of review was set forth in Albritton as follows:

> 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

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[1]This section of the brief was taken substantially verbatim from section four of the original brief filed in the Fifth District Court of Appeal for the State of Florida, which was prepared by Ronald E. Fox, Esquire, Ocala, Florida.

[2]Appellant's offenses were committed prior to the effective date (July 9, 1986) of Chapter 86-273 Laws of Florida, which precluded appellate review of the extent of departure. Hence, pursuant to Miller v. Florida, ___ U.S. ___, 107 S. Ct. 2476, 96 L.Ed.2d 351 (1987), the extent of departure is reviewable in this case.

> look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and the record to determine if the departure is reasonable. 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.

476 So.2d at 160 (footnote omitted).

As noted earlier, the guidelines sentence in this case was community control or 12 to 30 months incarceration or 2 1/2 to 3 1/2 years incarceration, with a one cell increase for a violation of probation. The sentence imposed was two 15 year terms to be served concurrently. The extent of the departure was thus more than 12 years or more than five times the recommended sentence and was a 7 cell increase from the cell into which the Appellant properly fell. The only reason for the departure was that the appellant committed two substantive violations of the law -- two $20 sales of cocaine, while on probation for two previous sales of cocaine. There was no finding that there was anything aggravated about the original sales, or the two additional sales, other than that they were committed while on probation. A review of the record indicates that the extent of the departure was unreasonable. In fact, while the Appellant was acquitted of the one cocaine sale, he was convicted of possession arising out of the same incident and given a guideline sentence of 3 1/2 years.

In addition, subsequent to the violation of probation hearing, he was convicted of the December 4, 1986, sale and possession charges, and sentenced to a maximum guideline sentence of 5 1/2 years, consecutive to the other sentences, giving the Appellant a total sentence of 24 years for 3 counts of sale of cocaine and 2 counts of possession of cocaine, none of which transactions having warranted a departure in the original sentence.

As already noted, one of the substantive violations of probation on which the departure was premised was based on a sale of cocaine for which the appellant had previously been tried and acquitted. The other violation was based on an alleged sale of cocaine to the same confidential informant as the former sale, which had not at that time gone to trial. Thus, it cannot be said that the violations were proved by overwhelming evidence. Furthermore, there is nothing else in the record to indicate that such a drastic departure was warranted. See, e.g., Campos v. State, 488 So.2d 677 (Fla. 4th DCA 1986) (departure excessive where guidelines sentence recommended a 5 1/2 to 7 years imprisonment and sentence imposed was life imprisonment for each count of robbery, 15 years for each count of shooting at an unoccupied vehicle, 5 years for each count of aggravated assault and 60 days for each count of simple assault, all to run concurrently); McBride v. State, 477 So.2d 1901 (Fla. 4th

DCA 1985) (holding that a departure sentence which exceeded the guidelines sentence by five times was excessive and an abuse of discretion); Valdes v. State, 488 So.2d 171 (Fla. 3d DCA 1986) (sentence vacated and remanded for sentencing within guidelines, but no facts given); cf Holden v. State, 487 So.2d 1199 (Fla. 5th DCA 1986) (two cell departure for second degree murder which was based on several reasons not excessive; however, the sentence was vacated because it was based in part on an invalid reason); Ochoa v. State, 476 So.2d 1348 (Fla. 2d DCA 1985) (sentence of 40 years while the guidelines sentence was 9 to 12 years was not excessive for a conviction for kidnapping with the use of a firearm and armed robbery in view of the emphasis placed upon the victim's psychological trauma set forth in the reasons for departure and in light of the record in the case); DePaul v. State, 505 So.2d 659 (Fla. 2d DCA 1987) (trial court was justified in departing from a guideline sentence of 12 to 30 months' incarceration and in sentencing the defendant to five years' incarceration based upon the defendant's failure to rehabilitate himself despite numerous opportunities to do so).

There was no articulation of the type of factors specified in Albritton v. State, supra. Rather, it is clear that the trial court felt that Townsend v. State, supra, gave him authority to depart from the guidelines.

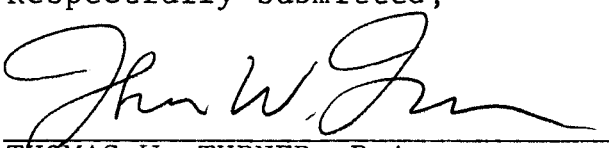
Townsend, however, only authorizes a one cell departure. Therefore, the extent of departure in this case was clearly excessive and an abuse of discretion. Since the Appellant received a total of 9 years additional incarceration for the two transactions that the Court used as a basis to depart, (3 1/2 years on the October 27th possession and 5 1/2 years on the December 4th sale and possession), consecutive to the violation of probation sentence, it is difficult to see how a departure of more than one cell can be justified.

Accordingly, the Appellant requests that this Honorable Court reverse the 15 year sentences and remand this case for resentencing with no more than a one cell increase over the original guideline sentence of 12 to 30 months.

CONCLUSION

For the foregoing reasons a departure sentence was not justified, and the 15 year sentences imposed in this case should be reversed and the case should be remanded to the trial court for imposition of a guideline sentence of community control, 12 to 30 months incarceration, or a one cell increase to 2 1/2 to 3 1/2 years incarceration because of the violation of probation. Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

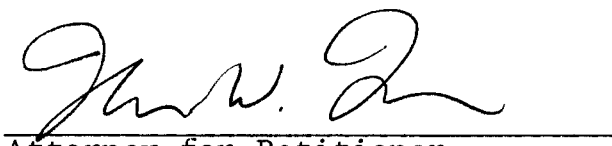
Respectfully submitted,



THOMAS W. TURNER, P.A.
56 E. Pine Street, Suite 300
Orlando, Florida, 32801
(305) 422-8686
Attorney for Petitioner
Fla. Bar #478288

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished to Hon. Belle B. Turner, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, 32014, by mail this 31st day of March, 1988.



Attorney for Petitioner