OA 9-1-89

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,096

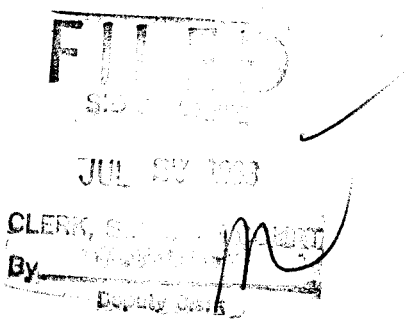
STATE OF FLORIDA,

Petitioner,

vs.

HAROLD TUTHILL,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, the State of Florida, was the appellee in the district court of appeal and the prosecution in the trial court. Respondent, Harold Tuthill, was the appellant in the district court and the defendant in the trial court. In this brief, the parties will be referred to as they stood in the trial court. The symbols "T.", "R.", and "S.R." shall designate the transcript of proceedings held on March 3, 1986, the remainder of the original record on appeal, and the supplemental record on appeal, respectively.

STATEMENT OF THE CASE AND FACTS

Respondent rejects petitioner's Statement of the Case and Facts because extensive material facts are omitted from it. The following is accordingly supplied:

Harold Tuthill had been placed on a four-year term of probation on May 10, 1983, based upon his nolo contendere plea to the charge of committing a lewd or lascivious act in the presence of a child. (R. 1, 2, 9).

Sixteen months later, on September 14, 1984, an affidavit of probation violation was filed which alleged that "between November 1, 1983 and December 31, 1983, the defendant did commit the offense of lewd and lascivious on a minor". (R. 11). Two months later, an amended affidavit was filed changing the date of the alleged offense to having occurred "between August 15, 1983 and September 15, 1983". (R. 12).

On December 3, 1984, a probation violation hearing was held before the Honorable Theodore Mastos, Judge of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. (R. 5, 6; S.R. 1-150). The purported violation occurred during a visit by the alleged victim and her brother, M[redacted] and D[redacted] F[redacted], to Mr. Tuthill's home.

At the hearing, the crucial issue concerned the year in which the visit occurred. The defense maintained that this visit occurred in 1982, and therefore before the imposition of probation on May 10, 1983. (S.R. 7, 9). The defendant filed a notice of alibi in this regard. (S.R. 152).[1]

Mr. Tuthill testified that the F[redacted] children's visit to his home occurred in 1982. (S.R. 140). In support of this position, evidence was presented concerning the physical layout of the defendant's property which was located at 130 Northwest 79th Street and consisted of a 300-foot deep by 70-foot wide lot. (S.R. 137). On the front portion of the lot was an office building and to the rear of it was a two-bedroom house. (S.R.

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[1] The alleged violation also formed the basis of a distinct substantive charge which at the time of the violation hearing was still pending against the defendant. (S.R. 149). At the outset of the violation hearing, defense counsel advised that the defendant was fully contesting the alleged violation, but because the defendant was awaiting his trial on the substantive charge, the defendant's testimony at the hearing would be confined to the timing issue. (S.R. 9-10). Immediately after the court revoked the defendant's probation and sentenced him to fifteen years' imprisonment, the state abandoned its prosecution of this alleged offense. (S.R. 149).

At the violation hearing, the evidence reflected that during a visit by the alleged victim, M[redacted] F[redacted] to the defendant's home, he fondled himself and touched her genital area. (S.R. 107, 108, 111). The mother testified that she observed no indication of emotional trauma, and there was no evidence of any physical injury. (S.R. 69).

137).

In 1982, when the F[redacted] children made the visit which allegedly resulted in the violation, the defendant lived in the house in the rear. (S.R. 137, 140). During the visit, one or both of the children went from the rear house to view the defendant's front office building. (S.R. 140, 141, 142). Subsequent to that visit, in the latter part of 1982 and the beginning of 1983, Mr. Tuthill moved out of the rear house and into the front office building because he was remodeling the rear house to rent it; it was during this time period that he had a fence constructed between the front office building and the rear house. (S.R. 137, 138, 139, 141, 142). In April, 1983, prior to being placed on probation, he rented the rear house to Leon Altidor. (S.R. 141).

Mr. Altidor confirmed that since early May 1983 to December 3, 1984, the date of the probation violation hearing, he continuously resided in the rear house which he rented from the defendant. (S.R. 129, 132). Altidor's lease agreement with Mr. Tuthill, dated May 5, 1983, was introduced into evidence. (S.R. 131). Altidor related that while the lease recited the address of the rear house as [redacted], the house was located on the same property as the office building which was situated at the front part of the defendant's property. (S.R. 130). Since May, 1983, when he leased the rear house, a five-foot fence blocked it from the front office building in which the defendant was residing. (S.R. 130, 131, 134). Except by standing on an object and climbing over the fence, there existed no access

between the rear house and the front office building. (S.R. 134, 135).

The alleged victim, M[redacted], and her brother D[redacted], also described the property as it existed at the time of the alleged offense. D[redacted] testified that the incident occurred in the house in the rear and that Mr. Tuthill was residing there at that time. (S.R. 95, 97, 98, 100). D[redacted] related that between the rear house and the front office building there was a yard; while there were fences on the front and side perimeters of the property, at the time of the alleged incident no fence existed between the office building and the rear house. (S.R. 84, 96-97, 101). On the day of the alleged incident, D[redacted] and his sister walked from Mr. Tuthill's house in the back to the front office building through a yard - no fence separated these two structures. (S.R. 96, 97, 102). Likewise, M[redacted] F[redacted] testified that on the day of the alleged incident, she walked from the house to the office building on Mr. Tuthill's property and that no fence existed at that time separating the two structures. (S.R. 123, 124, 125).

R[redacted] and A[redacted] F[redacted], the alleged victim's parents, testified that the incident occurred in the summer months of 1983. (S.R. 59, 74, 128). R[redacted] F[redacted] arrived at that time period based upon her recollection of her wedding anniversary on [redacted]. (S.R. 59). In this regard, she testified as follows:

> Q. Ma'am, are you positive that this occurred in 1983?
>
> A. I am positive it happened in '83, but the

correct date, the day, no, I am not for sure. I can't remember the correct date it happened.

Q. Are you positive that it happened while the children were in summer recess from school?

A. Yes, I am pretty sure it happened in '83 in the summer when they were out of school.

Q. And you have testified that your [anniversary] is on [redacted]

A. Yes.

Q. And you did not go out to dinner because you were upset about this incident?

A. Right.

Q. Are you sure it happened then sometime prior to your anniversary?

A. It could have been, yes.

Q. But at or near your anniversary date in the summer of '83?

A. Yes, but I am not for sure, you know.

(S.R. 60-61).

After making several unsuccessful telephone calls to the police immediately following the incident, Mrs. F[redacted] "forgot about it" and did not take any further action to report the matter until August, 1984. (S.R. 57, 58, 64, 68). At that time, the F[redacted] family initially advised the police that the incident occurred between November and December, 1983. (S.R. 39, 40, 50). Detective Wellings testified that Mrs. F[redacted] was unable to remember when the alleged offense occurred. (S.R. 51).

D[redacted] F[redacted], the alleged victim's older brother, was present in the defendant's home on the date of the incident. (S.R. 83, 86). At first he testified that the incident occurred

in 1983 while he was out of school; he could not recall whether it occurred during the summer or Christmas. (S.R. 91, 92). He explained that he thought it occurred in 1983 "[b]ecause that's what my mother and everybody we talked it out with and that's the best we could come up with, the date". (S.R. 93). D[redacted] thereafter testified that he did not know if the alleged offense occurred in 1982, 1983, or 1984. (S.R. 94).

M[redacted] F[redacted] the alleged victim, first testified that she did not recall when the incident occurred. (S.R. 113). She then stated that it occurred in the summer of 1983. (S.R. 113, 114). She further testified that her parents had advised that the incident occurred around the date of their anniversary, [redacted] (S.R. 113-114). She could not recall if the incident occurred on that day. (S.R. 114).

At the conclusion of the hearing, the trial court found the defendant in violation of probation, revoked it, and imposed a preguidelines sentence of fifteen years' imprisonment. (R. 6; S.R. 148). Immediately after the court revoked probation and imposed sentence, the state abandoned its prosecution of the substantive lewd and lascivious charge by entering a nolle prosequi. (S.R. 149).

Mr. Tuthill pursued a direct appeal of the revocation order and sentence. (R. 20). On November 5, 1985, the Third District Court of Appeal vacated his sentence and ordered a new sentencing hearing due to the trial court's failure to afford him "an opportunity to be heard on the question of the severity of the sentence to be imposed." (R. 20).

Following receipt of the district court's mandate, defense counsel filed a motion for disqualification that was grounded on prejudice and bias. (S.R. 153). Judge Mastos granted it and recused himself from the resentencing proceedings. (R. 43). On March 3, 1986, the resentencing hearing was held before Judge Edward Cowart. (T. 1-27).

At this sentencing proceeding, extensive biographical data concerning Mr. Tuthill was presented, which in summary disclosed the following.

Born in August 22, 1910, Mr. Tuthill had never been convicted of any crime except for the instant offense. (T. 4; R. 25, 44). Throughout his fifty-year career as a scientist he engaged in a wide-variety of community service endeavors which included operating the Cleveland, Ohio police laboratory where he developed methods of analyzing blood and urine for drunk driving arrestees (T. 4; R. 25, 26); conducting research on alcoholism and developing a drug to help cure the disease (T. 5; R. 25); devising a program for the City of Miami Prison which involved the treatment and cure of inmates afflicted with alcoholism. (T. 5; R. 25). In 1946, he founded the first emergency poison control information center in Coral Gables and operated it on an entirely volunteer-basis for six years, during which period he provided a 24-hour hotline for emergency calls concerning poison-related cases and collected research materials on poison control. (T. 6; R. 26, 27). Additionally, Mr. Tuthill assisted in instituting pollution controls and published reports regarding industrial and consumer health hazards in Dade County, and drug

and alcohol abuse; he also assisted in setting up the City of Miami's police laboratory, invented arson detection methods for local prosecution agencies, and assisted the U.S. Narcotics Bureau in inspecting contraband. (R. 27, 28, 29; T. 7, 9).

Dr. Theodore Struhl, senior attending surgeon at Mount Sinai Medical Center and Cedars Medical Center, testified that he knew Mr. Tuthill for the past eight years both as his physician and as a professional colleague. (T. 8). Dr. Struhl confirmed the extensive community services performed by Mr. Tuthill. (T. 9). He diagnosed Mr. Tuthill as "a very ill man" whose physical condition had seriously deteriorated during the year and a half incarceration preceding the hearing; his prognosis of the defendant's mental condition was "impending senility". (T. 10; R. 40). The doctor related that Mr. Tuthill was in great need of medical treatment and concluded that he would die if subjected to much further incarceration. (T. 10-11; R. 40-41).

Defense counsel stated that Mr. Tuthill was "electing . . . to be sentenced under the guidelines in this case". (T. 15). The guidelines recommended range was any nonstate prison sanction. (R. 44). By application of the one-cell increase authorized for probation revocation under Rule 3.701(d)(14), Fla.R.Crim.P., the range could be enhanced to twelve to thirty months' imprisonment. (R. 44). The trial court, by a seven-cell increase from the latter range, imposed a departure sentence of fifteen years' imprisonment. (R. 42-44A). Two reasons were relied upon for this departure: "That the substantive offense which was the basis of the probation violation was substantially similar to the charge

on which the defendant was placed on probation"; and "[t]hat the new offense occurred within six months of the defendant being placed on probation." (R. 43).

Defense counsel objected to the guidelines departure on the grounds that the substantive offense which comprised the basis for the violation did not result in a conviction and that the standard employed by Judge Mastos in making the finding of probation violation was "the conscience of the court", not proof beyond reasonable doubt. (T. 16, 18, 20, 21, 22, 23, 24). The successor trial court acknowledged that it was relying upon Judge Mastos' finding of probation violation for its reasons for departure and that its departure reasons were not based upon facts that had been subjected to a finding of guilt beyond a reasonable doubt. (T. 22, 25).

The departure sentence was appealed to the Third District Court of Appeal. The district court reversed it and held that the grounds for the sentencing departure - the defendant's alleged commission of a crime similar to the offense for which he was placed on probation and which was allegedly committed six months after he was on probation - were infirm since the evidence regarding the timing of the alleged offense was uncertain and never resolved under the reasonable doubt standard as required by State v. Mischler, 488 So.2d 523 (Fla. 1986), and because the defendant was never convicted of the alleged offense, as required under Rule 3.701(d)(11). Tuthill v. State, 518 So.2d 1300 (Fla. 3d DCA 1987).

QUESTION PRESENTED

I.

WHETHER SENTENCING IMPOSED AFTER REVOCATION OF PROBATION IS EXEMPT FROM THE SENTENCING GUIDELINES SCHEME?

II

WHETHER THE EXTENT OF THE DEPARTURE SENTENCE IS EXCESSIVE?

SUMMARY OF ARGUMENT

The rules governing departures under the guidelines scheme apply uniformly to all defendants facing sentencing for noncapital felony convictions, regardless of whether or not sentencing is preceded by probation revocation. This conclusion is fully supported by the requirement of Rule 3.701(d)(14), Fla.R.Crim.P., that sentencing following probation revocation be "in accordance with the guidelines", this Court's decision in State v. Pentaude, 500 So.2d 526, 528 (Fla. 1987) that in order to impose a departure sentence beyond the one-cell increase for probation revocation under Rule 3.701(d)(14), "compelling clear and convincing reasons are required", and the many decisions at the district court-level recognizing that the guidelines' rules are fully applicable to sentencing departures following probation revocation.

In accordance with the foregoing, the Third District Court of Appeal correctly held that the reasonable doubt standard set forth in State v. Mischler, 488 So.2d 523 (Fla. 1986), and the conviction requirement of Rule 3.701(d)(11) apply to sentencing departures following probation revocation.

The state's contrary position, in effect, seeks to exempt sentencing following revocation from the guidelines scheme. The state offers no cogent basis for its argument but, instead, confuses the question of whether probation should be revoked with the clearly discrete question of what sentence should be imposed for the original offense upon revocation.

The probation revocation determination focuses upon conduct

during the term of probation in order to resolve whether there has been a violation and, if so, whether conditional liberty should be continued or terminated. In contrast, sentencing after revocation is for the purpose of imposing punishment for the original offense of which the defendant has been convicted. Therefore, sentencing following probation revocation is no different than sentencing in any other felony case and is governed by the guidelines scheme.

Of course, departures, although circumscribed, are permitted in every case based upon a defendant's unscored misconduct. Accordingly, this Court recognized in State v. Pentaude, supra, that in sentencing following revocation, departures may be based on such matters as the timing of the violation and its underlying basis. These matters are the same as many other factors which may be considered at any sentencing. Thus, factors such as the timing of offenses in relationship to prior releases from prison, or the nature and/or number of crimes committed after the offense for which sentence is being imposed are valid departure reasons.

Before these reasons can be used to depart, however, the facts supporting them must be established beyond a reasonable doubt, and, if they encompass a crime, a conviction must be obtained. The reasonable doubt standard of Mischler and the conviction-requirement of Rule 3.701(d)(11) foster reliablity, prevent the meting out of extended punishment for alleged crimes for which there has been no finding of guilt, and promote the guidelines scheme's central goal of uniformity since departures are deterred unless soundly based. These concerns apply with

equal force to initial and post-revocation sentencing.

The present case particularly exemplifies the lack of cogency in the state's attempt to exempt post-revocation sentencing from the guidelines scheme. For the offense for which Mr. Tuthill was being sentenced, the recommended range was any nonstate prison sanction. A fifteen-year departure sentence was imposed based only upon a conscience-of-the court-finding that Mr. Tuthill purportedly committed a crime while on probation that was similar to the offense for which he had been placed on probation. No conviction was obtained for this alleged subsequent criminal conduct; the state had abandoned prosecution of the charge. Perhaps more critical, the very conclusion put forward as the reason to depart, that Mr. Tuthill committed the alleged offense during probation, was strongly susceptible to reasonable doubt. Substantial evidence was presented that the alleged offense, if it occurred, could only have occurred before he was on probation. The evidence, however, was never tested under the reasonable doubt standard.

To singularly exempt sentencing following revocation from the guidelines scheme, as the state advocates, based upon an allegation of misconduct assessed under the conscience of the court standard invites the meting out of punishment for acts of which a defendant has not been found guilty, and encourages disparity in the sentencing of similarly-situated offenders, in contravention of the guidelines scheme's very purpose.

ARGUMENT

I

SENTENCING IMPOSED AFTER REVOCATION OF PROBATION IS NOT EXEMPT FROM THE SENTENCING GUIDELINES SCHEME.

Consistency in the sentencing of felony offenders throughout the counties of this state is the underlying premise of the guidelines. In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 849 (Fla. 1983); State v. Brown, 13 F.L.W. 389 (Fla. June 16, 1988). By prescribing recommended sentencing ranges which reflect objective offender and offense-related criteria, uniformity is promoted and unwarranted disparity avoided. Rule 3.701(b), Fla.R.Crim.P.; Hendrix v. State, 475 So.2d 1218, 1219-20 (Fla. 1985); Santiago v. State, 478 So.2d 47, 48-9 (Fla. 1985); Whitehead v. State, 498 So.2d 863, 866 (Fla. 1986). Although departures from the guidelines are permitted, to ensure that they do not undercut the central goal of uniformity, a compilation of restrictive rules governing departures has been promulgated and carefully enforced. State v. Mischler, 488 So.2d 523, 524-25 (Fla. 1986); Hendrix, supra, at 1220; Scurry v. State, 489 So.2d 25, 28 (Fla. 1986). Fully consistent with this goal of uniformity, the comprehensive guidelines scheme governs all non-capital felony sentencing, including sentencing upon probation revocation.

Although not expressly asserted, the state's argument comprises a thinly-veiled claim that sentences imposed upon felony offenders whose probation has been revoked are exempt from

the guidelines scheme. This argument is precisely contradicted by the plain language of Florida Rule of Criminal Procedure 3.701(d)(14) and this Court's decision in State v. Pentaude, 500 So.2d 526 (Fla. 1987).

Rule 3.701(d)(14) expressly provides as follows:

> 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.

In State v. Pentaude, 500 So.2d 526 (Fla. 1987), this Court reiterated the clear intendment of this rule that sentencing following probation revocation squarely falls within the guidelines scheme. It recognized that a trial court may increase a sentence to the next higher recommended cell based upon the fact of probation revocation and that, as in every guidelines case, its authority to impose a departure sentence is not prohibited. This Court observed, however, that a departure from the one-cell increased range is circumscribed by the governing principle, applicable to all cases under the guidelines, that "compelling clear and convincing reasons" be established. State v. Pentaude, supra, 500 So.2d at 528.

Refutation of the state's argument that sentencing following probation revocation is exempt from the guidelines is found not only in the clear terms of Rule 3.701(d)(14) and the express holding of Pentaude, but in the many decisions at the district-

court level recognizing the applicabilty of the guidelines to sentencing following probation revocation.[2]

The state seeks to circumvent the clear language of Rule 3.701(d)(14) and the decisional law which has construed it by crafting a position which erroneously commingles the issue of

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[2] See e.g., Eldridge v. State, 13 F.L.W. 1042 (Fla. 5th DCA April 28, 1988) (departure sentence imposed upon revocation based on lewd assault of child, which offense was same type of offense for which probation imposed, held invalid under R. 3.701(d)(11) since no conviction obtained); Helms v. State, 522 So.2d 519 (Fla. 2d DCA 1988) (departure sentence imposed upon revocation for reason of extraordinary psychological trauma to child-victim of fondling crime for which probation imposed, held invalid because trauma not supported by facts proven beyond reasonable doubt as required by State v. Mischler, supra); Fisher v. State, 489 So.2d 857, 858 (Fla. 1st DCA), review denied, 500 So.2d 545 (Fla. 1986) (departure reason that defendant committed same offense while on probation held invalid under R. 3.701(d)(11) since no conviction for new crime); Lewis v. State, 510 So.2d 1089 (Fla. 2d DCA 1987) (departure sentence imposed upon revocation for reason that conscience of court satisfied defendant involved in violent crime while on probation for violent crime held invalid under Mischler standard and R. 3.701(d)(11) since defendant neither admitted this violation nor was convicted of it); State v. Amico, 525 So.2d 515 (Fla. 4th DCA 1988) (since sentencing upon revocation must be in accordance with guidelines, new scoresheet must be prepared); Mack v. State, 489 So.2d 205, 206 (Fla. 2d DCA 1986) (departure reason based on defendant's commission of robbery and resisting arrest with violence while on probation held invalid absent convictions: "We reject the state's argument that the trial judge's finding, for purposes of probation revocation, that the defendant committed these felonies was tantamount to conviction."); Royer v. State, 488 So.2d 649, 650 (Fla. 5th DCA 1986) (departure reason based on offense for which probation revoked, "...he shot the victim almost killing him which constitutes the violation. He is very violent and the facts of his violation prove that out", held invalid under R. 3.701(d)(11) since defendant later acquitted of substantive offense); Henderson v. State, 496 So.2d 965, 966 (Fla. 1st DCA 1986) (departure sentence upon revocation based on reason that defendant charged with four drug-related offenses during probation held invalid since to go beyond one-cell increase of R. 3.701(d)(14), sentence "must be supported by clear and convincing reasons for departure" [citing to Pentaude v. State, 478 So.2d 1147 (Fla. 1st DCA 1985), approved 500 So.2d 526 (Fla. 1987)], which under R. 3.701 (d)(11) require convictions); Lockett v. State, 516 So.2d 46 (Fla. 4th DCA 1987) (where recommended range (Cont'd)

whether one's probation should be revoked with the fundamentally discrete issue of what sentence should be imposed on the original offense upon revocation.

The decision to revoke probation embraces the dual inquiry of whether the individual has engaged in conduct violative of the terms of the conditional liberty which the court has granted to him in its discretion, and if so, whether, due to the violation, the revocation of probation, as opposed to its continuation or modification, is warranted. Gagnon v. Scarpelli, 411 U.S. 778, 84 (1973); §948.06(1), Fla. Stat. (1985); Rule 3.790(b), Fla.R.Crim.P. Because probation is conferred after guilt has already been found, and its purpose is to assess the defendant's rehabilitative potential while unincarcerated, the determination as to whether there has been a violation of the probation conditions is resolved under the conscience of the court standard. Bernhardt v. State, 288 So.2d 490, 495 (Fla. 1974); Russ v. State, 313 So.2d 758, 760 (Fla.), cert. denied, 423 U.S. 924 (1975). Thus, the probation revocation determination focuses exclusively upon conduct during the probation period for the limited purposes of ascertaining the existence of a violation and

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was any nonstate prison sanction but state and defense agreed to community control, upon revocation, trial court could only impose one-cell increase from original recommended range absent clear and convincing reasons since sentence upon revocation must be in accordance with guidelines); McClatchie v. State, 482 So.2d 550 (Fla. 4th DCA 1986) (recommended sentence can be increased one-cell under Rule 3.701(d)(14) for probation violation, but further increase prohibited based upon factors relating to any offense for which conviction not obtained). Accord Royal v. State, 508 So.2d 1313 (Fla. 2d DCA 1987); Wilson v. State, 510 So.2d 1088 (Fla. 2d DCA 1987); Fabelo v. State 488 So.2d 915, 916-17 (Fla. 2d DCA 1986); Hudson v. State, 504 So.2d 2 (Fla. 2d DCA 1986); Weaver v. State, 475 So2d 1365 (Fla 2d DCA 1985).

resolving whether the conditional liberty status should be continued or terminated.

In contrast, sentencing following probation revocation is for the purpose of imposing punishment upon a defendant for the original felony offense of which he was convicted. §948.06(1), Fla. Stat. (1985). Accordingly, sentencing following revocation is no different than sentencing in any other felony case and is governed by the guidelines scheme. In recognition of this, Rule 3.701(d)(14) puts the defendant whose probation has been revoked in the same stead as all other defendants who have been adjudged guilty of a felony and are facing sentencing, with one important exception. The trial court can, in its discretion and without complying with the restrictive rules regarding departures, extend the recommended range by one cell because of the defendant's failure to abide by the court-imposed terms of his conditional liberty. The one-cell increase authorized under Rule 3.701(d)(14) is therefore similar in function to the uniformly-prescribed legal constraint points under Rule 3.701(d)(6) which are assessed against an individual when he is being sentenced for a crime that was committed while on probation.

Of course, departures, although circumscribed, are permitted in all cases and sentencing upon probation revocation is no different. As State v. Pentaude, supra, recognizes, the defendant's conduct during probation is relevant to the sentencing determination. Thus, such factors as the timing of the violation, its underlying basis, the number of times probation has been violated and the number of conditions

violated, are pertinent to the sentencing court's assessment of the defendant's character. Id. 500 So.2d at 528.

These factors are the same as many other factors which are considered at any sentencing proceeding, whether initial or post-probation revocation. Thus, the timing of offenses in relationship to one another and/or in relationship to prior releases from imprisonment, the escalating pattern of criminal activity, and the nature and number of offenses committed subsequent to the offense for which sentencing is being imposed, are clearly relevant to an evaluation of the defendant's character for sentencing purposes.[3]

Although these factors may comprise valid departure reasons in the abstract, before they may be relied upon for departure, proof of the facts supporting the reasons must be established beyond a reasonable doubt and, if they encompass a crime, a conviction must be obtained. In State v. Mischler, 488 So.2d 523, 525 (Fla. 1986), this Court declared that in order to support a departure with "clear and convincing reasons", "the facts supporting the reasons" must "be credible and proven beyond a reasonable doubt." The use of this standard ensures that extended punishment is not meted out on the basis of insufficiently-supported factual allegations. It thus fosters

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[3] The state asserts that in the absence of a conviction, a defendant's criminal conduct is relevant to sentencing after probation revocation, but on the other hand is "irrelevant" and "wholly extraneous" to initial sentencing. Brief of Petitioner, at 6, 11. No basis for any distinction is given and none exists. Criminal conduct is clearly relevant to all sentencing, but it cannot be considered without satisfying the requisite standard of proof.

reliability in the sentencing process. Likewise, the express prohibition contained in the committee note to Rule 3.701(d)(11) against departures based upon an offense for which no conviction has been obtained, prevents the exaction of extended punishment on the basis of criminal activity alleged but not proven by the state. State v. Jaggers, 526 So.2d 682 (Fla. 1988); State v. Tyner, 506 So.2d 405, 406 (Fla. 1987); Williams v. State, 500 So.2d 501, 502-03 (Fla. 1986) By requiring proof beyond a reasonable doubt and, where criminal activity is relied upon, a conviction, the goal of uniformity is promoted because departures are deterred unless soundly based.

This deterrent rationale applies with equal force to initial and probation revocation sentencing; the purpose of both is to impose punishment for the original offense of which the defendant has been convicted. To singularly allow departures in probation revocation sentencing based upon allegations of misconduct assessed under the conscience of the court standard invites indirectly what is prohibited directly - the meting out of punishment for acts of which the defendant has not been found guilty, and encourages unwarranted disparity in the sentencing of similarly-situated offenders.[4]

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4 Nor can disparate treatment be justified by conceiving of probation as "a matter of judicial grace". See Tuthill v. State, 518 So.2d 1300, 1304 (Fla. 3d DCA 1987) (Schwartz, C.J. dissenting). Underlying the "grace" rationale is the notion that since a trial court in its unfettered discretion could have originally imposed any sentence up to the statutory maximum, once the court revokes probation which it had imposed as a matter of grace, it may then in its unbridled discretion impose the statutory maximum penalty. Whatever validity this rationale may have had in the past, it no longer survives the advent of the guidelines. Under the guidelines, the court's discretion to (Cont'd)

There is no reason for any distinction between the standard of proof required at an initial sentencing or post-revocation sentencing. This point has been correctly recognized in the many decisions which have held invalid departures based upon a defendant having violated his probation by the commission of a substantive offense where the requirements of Rule 3.701(d)(11)[5] and State v. Mischler, supra,[6] have not been met. See Eldridge v.

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impose, originally, either probation or the statutory maximum penalty is strictly circumscribed: in order to do so, the guidelines score must fall within the recommended range or clear and convincing reasons must be established.

[5] The contention that the phrase "factors relating to the instant offense" in Rule 3.701(d)(11) is confined to the original charge for which sentence is being imposed and that, therefore, factors relating to subsequently committed offenses are not embraced by the prohibition of (d)(11) is patently incorrect. See Tuthill v. State, 518 So.2d 1300, 1304 n.2 (Fla. 3d DCA 1987) (Schwartz, C.J., dissenting). The committee note to Rule 3.701(d)(11) broadly sets forth that "[t]he court is prohibited from considering offenses for which the offender has not been convicted." The commitee notes, of course, have been adopted by this Court as part of the official sentencing guidelines. See The Florida Bar: Amendment to Rules of Criminal Procedure, 451 So.2d 824 (Fla. 1984).

In keeping with this prohibition, the courts have repeatedly applied Rule 3.701(d)(11) to bar departures based upon alleged criminal conduct that did not result in conviction where the conduct was distinct from, and arose subsequent to, the offense for which sentence is being imposed. See Williams v. State, 500 So.2d 501 (Fla. 1986) (failure to appear at sentencing); Rease v. State, 485 So.2d 5 (Fla. 1st DCA 1986) (attempted escape while transported to sentencing hearing); McNealy v. State, 502 So.2d 54 (Fla. 2d DCA 1987) (threat to kill arresting officer); Gonzalez v. State, 511 So.2d 703 (Fla. 3d DCA 1987) (violent altercation with courtroom officers during sentencing); Nodal v. State, 524 So.2d 476 (Fla. 2d DCA 1988) (drug charges pending in another county at time of sentencing for drug offense).

[6] The claim that application of the reasonable doubt standard to a departure based upon "technical" violations of probation would necessitate separate trials "to a jury or the court" is ill-conceived. See Tuthill v. State, 518 So.2d 1300, 1304 n.3 (Fla. 3d DCA 1987) (Schwartz, C.J., dissenting). In the event that a departure sentence based upon technical violations is intended, the court can evaluate the evidence presented to it (Cont'd)

State, 13 F.L.W. 1042 (Fla. 5th DCA April 28, 1988); Lewis v. State, 510 So.2d 1089 (Fla. 2d DCA 1987); Wilson v. State, 510 So.2d 1088 (Fla. 2d DCA 1987); Royal v. State, 508 So.2d 1313 (Fla. 2d DCA 1987); Henderson v. State, 496 So.2d 965 (Fla. 1st DCA 1986); Royer v. State, 488 So.2d 649 (Fla. 5th DCA 1986); Mack v. State, 489 So.2d 205 (Fla. 2d DCA 1986); Fisher v. State, 489 So.2d 857 (Fla. 1st DCA 1986); Fabelo v. State, 488 So.2d 915 (Fla. 2d DCA 1986); McClatchie v. State, 482 So.2d 550 (Fla. 4th DCA 1986); Hudson v. State, 504 So.2d 2 (Fla. 2d DCA 1986); Weaver v. State, 475 So.2d 1365 (Fla. 2d DCA 1985).

Indeed, the Fifth District, subsequent to its decision in Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988), upon which conflict with the instant case partly rests, held invalid a departure sentence which was imposed for grounds similar to the instant case. In Eldridge v. State, 13 F.L.W. 1042 (Fla. 5th DCA April 28, 1988), the defendant had been placed on probation for lewd assault upon his step-child and his probation was revoked based upon a finding that while on probation he committed another assault upon the same child. The trial court imposed a departure sentence based upon the nature of the probation violation - sexual assault on same victim. The Fifth District, in reversing

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during the violation hearing under the reasonable doubt standard before imposing sentence. Obviously, no jury finding is required. Furthermore, if any additional evidence needs to be presented, that can be accomplished at the sentencing hearing. The situation is no different from any other instance where the state must adduce proof to support the basis for a departure. If, for instance, at the trial of the charge no evidence was presented regarding psychological trauma to the victim or prior record of the defendant and departure was sought on these grounds, the state would be required to supply proof of them at the sentencing hearing.

the departure sentence, held that because the defendant had not been convicted of the offense underlying the probation violation, "the spirit" of Rule 3.701(d)(11) "precluding departures based on crimes for which convictions have not been obtained" applied. Ibid.

The present case particularly exemplifies the cogency of applying the reasonable doubt standard and Rule 3.701(d)(11). For the offense of which Mr. Tuthill was convicted and placed upon probation, committing a lewd and lascivious act in the presence of a child, the recommended punishment under the guidelines was any nonstate prison sanction. With the one-cell increase authorized under Rule 3.701(d)(14) for probation violation, the penalty became twelve to thirty months' incarceration. Actually imposed, however, was a departure sentence of fifteen years imprisonment. This seven-cell enhancement was imposed based upon a conscience-of-the-court finding that the defendant had committed an alleged lewd and lascivious offense within six months of probation. Yet, no conviction was obtained for that crime, as indeed the state abandoned prosecution of the alleged offense.

More fundamental, beyond the noncompliance with Rule 3.701(d)(11), the departure sentence's factual basis failed to comply with the reasonable doubt standard. The very gist of the trial court's departure reason rested on the conclusion that the defendant, during the term of his probation and within six months of it, had committed a crime similar to that for which he was placed on probation. Yet, the evidence strongly supported the

conclusion that, not only did the alleged offense not occur in the summer of 1983 as alleged by the state, but, if it occurred at all, it could have only occurred well before Mr. Tuthill was placed upon probation.

At the violation hearing, the defendant maintained that the alleged victim's visit to his house, during which the claimed incident occurred, was in 1982, and thus before May 10, 1983, the date he was placed on probation. (S.R. 140, 143-144). This evidence was strongly corroborated by the testimony of the alleged victim, her older brother who was present, and an independent witness.

The alleged incident occurred during the F[redacted] children's visit to Mr. Tuthill's property. Mr. Tuthill's property consisted of a 70-foot wide by 300-foot long lot with two buildings: a large office building in front and a small house in the rear. (S.R. 95, 130, 137). Mr. Tuthill testified that when the F[redacted] children visited him in 1982, he lived in the house in the rear. (S.R. 137, 140). After the visit, in the latter part of 1982 and 1983, he moved out of the rear house and into the front office building, so that the rear house could be remodeled for renting. (S.R. 137, 139, 141). During this same period, Mr. Tuthill had a five-foot fence erected which separated the rear house from the office building. (S.R. 137-38, 141, 142).

In May, 1983, the rear house was rented to Leon Altidor. (S.R. 131). Mr. Altidor testified that he rented and exclusively resided in the rear house continuously from early May 1983 through the day of the violation hearing on December 3, 1984.

(S.R. 132, 133). He related that a tall fence completely separated the rear house he rented from the front office building where Mr. Tuthill resided. (S.R. 129-30, 134, 135-36). A lease agreement dated May 5, 1983 and signed by the defendant and Mr. Altidor was introduced into evidence. (S.R. 131).

Most critical, both the alleged victim and her brother testified that the incident occurred in the rear house where the defendant was then living, and that at the time of the incident no fence had existed separating the house from the front office building. (S.R. 95, 96, 97, 98, 100, 102, 123, 124, 125).

Accordingly, substantial evidence was presented which established that the alleged incident could not have happened after the defendant had been placed on probation in May 1983: (1) the defendant had moved out of the rear house where the alleged incident occurred and it was exclusively occupied by Leon Altidor from May 1983 through December 1984, and (2) no fence separating the front office building from the rear house was in existence at the time of the incident; the fence was subsequently constructed and in existence on May 5, 1983.

In contrast with the foregoing, the testimony presented by the state to support its allegation that the incident occurred in the summer of 1983, and therefore while the defendant was on probation, was riddled with uncertainty. While the parents stated that the incident occurred at that time, the evidence established that after some telephone calls to the police, they "forgot about it" and did not report the alleged incident until more than one year later in August, 1984, and that at that

belated time, they advised the police that the incident had definitely occurred between Thanksgiving and Christmas of 1983. (S.R. 32, 39, 40, 57, 58, 64). Months later that time period was changed and it was claimed that the incident occurred in August 1983. (R. 12, S.R. 40, 75). Additionally, while the mother stated that she thought the incident occurred in the summer of 1983 because she did not go out to dinner on her anniversary in August, her testimony in this regard was replete with "I am pretty sure", "it could have been", and "I am not for sure". (S.R. 59, 60-61).

Similarly, the testimony of the alleged victim and her older brother as to the date was imprecise and confusing. The brother first stated that the incident occurred in 1983 "[b]ecause that's what my mother and everybody we talked it out with and that's the best we could come up with, the date". (S.R. 93). He thereafter testified that he did not know if the alleged offense occurred in 1982, 1983, or 1984. (S.R. 94). The alleged victim at one point stated that the incident occurred in the summer of 1983 and at another point testified that she did not recall when it happened. (S.R. 113, 114). She also testified that her parents had advised that it occurred around the date of their anniversary, and that she could not recall if the incident occurred on that day. (S.R. 113-114).

Accordingly, on the crucial question of whether the defendant was on probation when the alleged offense occurred, the evidence was strongly susceptible to a reasonable doubt. The original judge who presided at the revocation hearing evaluated

the evidence only under the conscience-of-the-court standard, and the successor judge, who imposed the departure sentence, relied upon the first judge's finding from a cold record without ever having tested it against the reasonable doubt standard. (T. 22, 25, S.R. 52, 149).

Nevertheless, although the factual basis for the departure is tenuous, the state seeks to suspend those rules which serve to eliminate unreliability and promote fairness. The state provides no cogent basis for its attempt to exempt sentencing following probation revocation from these rules. Indeed, the state presses for that exemption while at the same time maintaining that Mr. Tuthill must be held to his election to be sentenced under the guidelines scheme and thereby be bound to its salient feature, parole ineligibility. The Third District Court of Appeal appropriately refused to endorse this position. It correctly held that the guidelines rules must be uniformly applied to all defendants facing sentencing under the guidelines scheme. The district court's reversal of the departure sentence should be approved by this Court.

II

THE EXTENT OF THE DEPARTURE SENTENCE IS EXCESSIVE.

The state acknowledges that the extent of the departure sentence is subject to review. Brief of Petitioner, at 14.[7] Without any factual analysis, however, the state glibly concludes that the sentence should be affirmed. Ibid. That conclusion is wrong.

The relevant criteria for analyzing this issue were provided in Albritton v. State, 476 So.2d 158, 160 (Fla. 1985):

> ...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 the record to determine if the departure is reasonable. (footnote omitted).

These criteria must be evaluated under an "objective test of reasonableness". Booker v. State, 514 So.2d 1079, 1085 (Fla. 1987). The unreasonableness of the extent of the departure in this case is quite apparent upon an objective application of these criteria to the record.

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[7] The state's present posture differs from the position it took below. In their briefs to the district court, the state and counsel for Mr. Tuthill indicated that the statutory amendment precluded review of the departure's extent. As an alternate remedy, the defense requested withdrawal of the election to be sentenced under the guidelines, while the state opposed it. The Third District, in addition to finding the departure grounds infirm, held that the defendant was entitled to withdrawal. The parties' position below dissuading the Third District from reviewing the departure's extent preceded this Court's decision in Booker v. State, 514 So.2d 1079 (Fla. 1987), holding the amendment nonretroactive to cases arising before its enactment.

Although the sentence recommended by the guidelines was any nonstate prison sanction, the departure sentence imposed was the statutory maximum of fifteen years' imprisonment. (R. 42, 44-44A). This represents a seven-cell departure over the one-cell increase for probation revocation authorized by Rule 3.701(d)(14), Fla.R.Crim.P. (R. 44-44A).

This seven-cell increase was premised upon the conscience-of-the-court finding that Mr. Tuthill, within six months of probation, had violated it by committing a similar crime. (R. 43). However, as discussed in issue 1, substantial evidence established that the alleged new offense could not have occurred during the probation period. Not only did this alleged offense not result in conviction, but there was no evidence of physical injury, and the alleged victim's mother testified that she did not observe any emotional trauma. (S.R. 69). Moreover, in regard to the original offense for which the punishment was being imposed, no circumstances which would justify departure were shown.

Weighing the foregoing departure grounds against the other factors in the record bearing upon the defendant's character, it becomes manifest that the extent of the departure was greatly excessive.

The record establishes that Mr. Tuthill is 77 years old and that except for the offense for which this fifteen-year departure prison sentence was imposed, he had never been convicted of any crime. (R. 44). The record also amply demonstrates that throughout his fifty years as a scientist, Mr. Tuthill performed

numerous acts of community service, which included his assisting in the cure and treatment of alcoholics and his establishment and operation of the City of Coral Gables' first emergency poison control center on a volunteer basis. (See R. 25-29; T. 4-9, for other activities).

Furthermore, Mr. Tuthill's probation supervisor specifically testified that aside from the allegation of probation violation which served as the ground for the departure sentence, Mr. Tuthill had fully cooperated and complied with all of his probation conditions, one of which required that he undergo psychological counseling. (R. 10; S.R. 14). Notably, it was not until over sixteen months after Mr. Tuthill had been placed upon probation, and over one year after the alleged violation had occurred, that the affidavit of probation violation was filed. (R. 11, 12).

Additionally, the testimony of his examining physician established that Mr. Tuthill is a very ill man whose physical and mental condition has seriously deteriorated during his years in prison. (T. 10-11).

Finally, not only did the court impose the maximum departure possible, but the sentence is unjustifiably more severe than the fifteen-year preguidelines sentence which had initially been imposed following revocation of probation. (R. 15).

In his prior appeal, the Third District had reversed the preguidelines, fifteen-year sentence for the very reason that the trial court had failed to afford Mr. Tuthill the "opportunity to be heard on the question of the severity of the sentence to be

imposed." (R. 20). On resentencing, Mr. Tuthill elected the guidelines, and received the fifteen-year departure sentence. (T. 15; R.43). In contrast with his preguidelines fifteen-year sentence in which Mr. Tuthill had the opportunity for an earlier release by parole, under his present fifteen-year departure sentence he has no hope of parole eligibility. §921.001(8), Fla. Stat. (1985); See Whitehead v. State, 498 So.2d 863, 866 (Fla. 1986). Because there exists no objective basis to reasonably justify the greater severity in sentence, on this basis alone the departure sentence suffers from arbitrariness and caprice. See Booker v. State, 514 So.2d 1079, 1085 (Fla. 1987). Indeed, since the record is devoid of any reasons "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding," the imposition of the enhanced sentence following the defendant's successful exercise of his right to appeal the first sentence also violates the due process rights guaranteed to him by North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

In view of the record, the extent of the departure is excessive. Giving due consideration to the departure reasons, and weighing them against the other circumstances, use of the one-cell enhancement provision of Rule 3.701(d)(14) to increase the recommended range of any nonstate prison sanction to twelve to thirty months' incarceration would have afforded sufficient punishment. The fifteen-year prison sentence without parole was unjustified.

CONCLUSION

Based upon the foregoing arguments and authorities, the respondent requests that this Court approve the decision of the Third District Court of Appeal reversing the departure sentence based upon the infirm departure grounds, and remand the cause for resentencing within the initial guidelines range or the one-cell increased range authorized by Rule 3.701(d)(14), Fla.R.Crim.P.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to RALPH BARREIRA, Assistant Attorney General, 401 N.W. 2nd Avenue, Miami, Florida this 26th day of July, 1988.

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