IN THE SUPREME COURT OF FLORIDA

KEVIN BELL, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 72,979

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

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STATEMENT OF THE CASE AND FACTS

This case arrives here on a certified question of great public importance from the District Court of Appeal, Fourth District, regarding the propriety of a departure sentence in aggravation upon a revocation of probation. Bell v. State, 13 F.L.W. 1757 (Fla. 4th DCA July 27, 1988) (Appendix -5). Petitioner was initially charged by information with aggravated battery of Charles Lancaster by cutting his left ear in half on October 15, 1986 (R-769-770). Petitioner entered a negotiated plea and received a sentence of 18 months probation, though his recommended range under the guidelines was 12 to 30 months incarceration (R-780-781). This probation commenced on February 19, 1987 (R-784).

On September 14, 1987, an affidavit of violation of probation was filed alleging that petitioner committed two technical violations in that he failed to report and failed to pay the costs of supervision and that he did commit the offenses of first degree murder, arson and attempted murder on May 3, 1987 (R-786).

Before petitioner's murder trial in November of 1987, he stipulated that the facts at trial could constitute his violation of probation hearing (R-782). Although petitioner was initially placed on probation by Judge Fine, petitioner agreed to have his probation case transferred to Judge Mounts, who was to hear the trial of the murder and arson case (R-729). Petitioner's trial

commenced on November 9, 1987, and on November 17, 1987, the jury announced that they were hopelessly deadlocked and they were discharged (R-714,725).

On December 22, 1987, at a violation of probation hearing petitioner admitted the technicals, that he failed to report and to pay the costs. The court found that petitioner had violated condition three of his probation but found that the evidence only sustained a charge of second degree murder (R-730). The court granted petitioner a continuance because the court was inclined to agree with the state's argument to exceed the sentencing guidelines range due to the nature of violence committed by petitioner as the basis for the violation of probation. Petitioner argued that his sentence upon revocation of probation could not be aggravated for the subsequent offense of arson and murder because he had not been convicted of those offenses.

On January 28, 1988, in a further violation of probation hearing, the court agreed with the state's authority and determined to aggravate petitioner from his recommended range of two-and-a-half to three-and-a-half years and sentenced petitioner to the maximum possible sentence of 15 years imprisonment (R-755).

The trial court entered its reasons for aggravation in writing which recited petitioner's charges and the proceedings, that his recommended range with the one cell bump up for violation of probation was two-and-a-half to three-and-a-half years and then said:

> Notwithstanding, the Court cannot ignore the violence used in the act that caused the violation of probation. The evidence presented by the state convinces the Court that the act of setting fire to an occupied trailer, knowing the same to be occupied, and causing the death of one person and severe burns to another, was of such a nature and to such an extreme as to provide clear and convincing reasons to depart from the guidelines.
>
> In addition, I have considered the facts of this case, the original 86-10493. That case is extremely violent and shocking. It far exceeds the norm.

(R-792-793).

Petitioner timely appealed. Before petitioner's brief was due to be filed, at petitioner's second trial for the arson, first degree murder and attempted first degree murder, petitioner was acquitted by the jury and a judgment of not guilty was entered on March 22, 1988 (Appendix -4). Petitioner requested and the district court allowed the appellate record to be supplemented to demonstrate that petitioner had been acquitted on the underlying offense for the violation of probation. (Appendix -2-3).

Petitioner contended in the District Court of Appeal, Fourth District, that the trial court erroneously imposed a departure sentence based on the facts and circumstances surrounding a criminal offense of which the petitioner had not been convicted and additionally, that such aggravation was unwarranted under Scurry v. State, 489 So.2d 25 (Fla. 1986), because petitioner had in fact been acquitted of the underlying offense.

In a decision rendered on July 27, 1988, the district court affirmed per curiam but additionally certified the same question of great public importance as it did in Lambert v. State, 517 So.2d 133 (Fla. 4th DCA 1987), review granted, Case No. 71, 890. The question is:

> WHERE A TRIAL JUDGE FINDS THAT THE UNDERLYING REASONS FOR VIOLATION OF PROBATION CONSTITUTE MORE THAN A MINOR INFRACTION AND ARE SUFFICIENTLY EGREGIOUS, 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.

(Appendix - 5-6).

Petitioner timely filed his notice invoking the jurisdiction of this Court and this Court set the briefing schedule. This brief follows.

SUMMARY OF ARGUMENT

Florida Rule of Criminal Procedure 3.701(d)(14) requires that sentencing following probation revocation be "in accordance with the guidelines." Case law under the guidelines requires that the facts supporting a reason for departure must be established beyond a reasonable doubt and if it encompasses a crime, a conviction must be obtained. Florida Rules of Criminal Procedure 3.701(d) (11). Sentencing upon revocation of probation should not be exempted from these guideline principles.

Not only was petitioner not convicted of the underlying offense on which the violation of probation is based, but he has been acquitted of that offense. Florida law recognizes that it is repugnant to fair play and fundamental fairness to allow the prosecution to use against the defendant either at trial or sentencing facts of a criminal offense of which he has been acquitted. These principles of fundamental fairness apply to the circumstances of the present case so that petitioner's sentence upon revocation of probation may not be aggravated based on facts of which he is acquitted.

ARGUMENT

POINT ON APPEAL

WHETHER A DEPARTURE SENTENCE IN AGGRAVATION UPON A REVOCATION OF PROBATION MAY BE BASED UPON FACTUAL CIRCUMSTANCES OF THE PROBATION VIOLATION WHERE THE DEFENDANT IS ACQUITTED OF THE SUBSTANTIVE CRIME ON WHICH THE VIOLATION OF PROBATION IS BASED.

This case arrives here on the same certified question now before this Court in Lambert v. State, 517 So.2d 133 (Fla. 4th DCA 1987), Supreme Court Case No. 71,890, and Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988), Supreme Court Case No. 72,047, asking if egregious circumstances surrounding an underlying reason for violation of probation could justify a departure in aggravation of the original offense even though the defendant had not been convicted of the underlying offense. The same legal question is also presented on the state's petition because of direct and express conflict in Tuthill v. State, 518 So.2d 1300 (Fla. 3d DCA 1977), Supreme Court Case No. 72,096.

However, there is one remarkable factual and legal difference between petitioner's case and those cases. Petitioner was not merely "not convicted" of the crimes which the trial court concluded constituted a violation of probation. Rather, petitioner has been positively found "NOT GUILTY," acquitted by a jury of his peers for the factual circumstances of arson and first degree murder, which were the underlying offenses that the trial court found so egregious as to justify a departure sentence on the original offense of aggravated battery upon revocation of

probation. Florida law recognizes the fundamental difference between an acquittal and a nolle prosse for purposes of determining whether the state may make any further use of facts underlying a charge which has not been proven. Holland v. State, 466 So.2d 207 (Fla. 1985). Use of acquitted facts are barred but where a defendant has been charged with a collateral offense and subsequently the charges are dropped, there is no fundamental unfairness in using the facts of that nolle prosse charge collaterally against the defendant.

Here, the trial judge made a decision to impose a more severe sentence upon petitioner for a reason premised on a "fact" that a jury specifically found not proven beyond a reasonable doubt. 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." Elsewhere, this Court has said that it is repugnant to notions of fair play to allow the prosecution to use evidence against the defendant when the prosecution has been unable to persuade a jury of the defendant's guilt on those facts. Holland v. State, 466 So.2d 207 (Fla. 1985). The decision to aggravate petitioner's sentence does not comport with these standards of fundamental fairness nor the principles applicable to sentencing guidelines departure. A trial judge may not depart in aggravation based on a fact for which the defendant is acquitted because it violates the proscription of Florida Rules of Criminal Procedure 3.701(d)(11) against departure based on factors for which convictions are not

obtained. Scurry v. State, 489 So.2d 25,28 (Fla. 1986), Johnson v. State, 517 So.2d 792 (Fla. 3d DCA 1988), Bulger v. State, 509 So.2d 1269 (Fla. 1st DCA 1987). Where the defendant has been acquitted of underlying charges, no departure upon a violation of probation is allowed. Royer v. State, 488 So.2d 649 (Fla. 5th DCA 1986).

Florida law gives special significance to acquitted facts and firmly holds that they may not be employed against the defendant either collaterally at trial, State v. Perkins, 349 So.2d 161 (Fla. 1977), nor for purposes of sentencing, Owen v. State, 441 So.2d 1111 (Fla. 3d DCA 1983), Fletcher v. State, 457 So.2d 570 (Fla. 5th DCA 1984), Royer v. State, supra. Scurry v. State, supra. Constitutionally, a defendant should not be punished (sentenced) for conduct for which he has been acquitted, not even by consideration of an acquitted fact in imposing an enhanced sentence on a separate matter, Fletcher v. State, supra. Although a judge's view of the evidence may be entirely correct, he is not free to disregard a jury's finding even for purposes of sentencing. Owen v. State, supra at 113.

The question here is not if probation may be revoked for criminal conduct on which the defendant is acquitted by a jury. Certainly, revocation on acquitted facts is permissible. Russ v. State, 313 So.2d 758 (Fla. 1975). This case involves the fundamentally discrete issue of what sentence should be imposed on the original offense upon revocation and whether such sentence must

comply with uniform standards applicable to any other sentence under the guidelines and fundamental principles of fair play regarding use of acquitted facts.

Sentences imposed upon felony offenders whose probation has been revoked are not exempt from the guidelines scheme. Florida Rules of Criminal Procedure 3.701(d)(14), State v. Pentaude, 500 So.2d 526 (Fla. 1987). In that case this Court recognized that a trial court may increase the 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 other cases under the guidelines, that "clear and convincing reasons" be established. State v. Pentaude, supra, 500 So.2d at 528.

Sentencing following probation revocation is for the purpose of imposing sentence upon a defendant for the original felony offense of which he was convicted. Section 948.06(1), Florida Statutes (1985). Accordingly, sentencing following revocation is no different than sentencing in any other felony case and is governed by the guidelines scheme. 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.

Under the sentencing guideline scheme, departure from the guidelines are permitted but to insure they do not undercut the central goal of uniformity and consistency in sentencing, restrictive rules regarding departures apply. State v. Mischler, supra, Hendrix v. State, 475 So.2d 1218 (Fla. 1985), Scurry v. State, supra. Departures though circumscribed are permitted in all cases and sentencing upon revocation of probation is no different. As recognized in State v. Pentaude, supra, the defendant's conduct during probation is relevant to the sentencing determination. Thus, such factors is 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. Absence of a conviction cannot be relevant to sentencing after probation revocation but, on the

other hand, wholly irrelevant and extraneous to initial sentencing. Criminal conduct is clearly relevant to all sentencing but it cannot be considered without satisfying the requisite standard of proof. State v. Mischler, supra, State v. Scurry, supra.

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. State v. Mischler, supra and, if they encompass a crime a conviction must be obtained. Florida Rules of Criminal Procedure 3.701(d)(11). Use of the reasonable doubt standard ensures that extended punishment is not meted out on the basis of insufficiently-supported factual allegations. It thus fosters reliability in a 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 reaction of extended punishment on the basis of criminal activity alleged but not proved 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 501,502-503 (Fla. 1986). Requiring proof beyond a reasonable doubt and, where a criminal activity is relied upon, a conviction, promotes uniformity because departures are deterred unless soundly based. This deterrant rationale applies with equal force to initial and probation 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)[1] and State v. Mischler, supra, have not been met. See Tuthill v. State, supra; Eldridge v. 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, supra; 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).

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[1] Any contention that the phrase "factors relating to the instance 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 (3)(11) is 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 committee 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).

Indeed, the Fifth District, subsequent to its decision in Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988), pending review, Supreme Court Case No. 72,047, held invalid a departure sentence upon revocation of probation where there was no conviction for the underlying offense. 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 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 standard of Rule 3.701(d)(11) and the specially recognized fundamental principles of fair play that prohibit any collateral use of acquitted facts to sentencing upon revocation of probation. For the offense of which Mr. Bell was convicted and placed upon probation, aggravated battery, the recommended punishment under the guidelines was 12 to 30 months incarceration (R-780-781). With the one cell increase authorized under Rule 3.701(d)(14) for probation violation, the recommended penalty became two-and-a-half to three-and-a-half years incarceration. Instead, the trial court departed and sentenced petitioner to 15

years imprisonment. This six cell enhancement was imposed and affirmed by the district court in spite of the fact that the state has failed to convince a jury of the defendant's guilt beyond a reasonable doubt. No conviction can ever be obtained for this crime because petitioner has been acquitted. State v. Pentaude cannot justify the result here for plainly Pentaude was subsequently convicted of the underlying offense.

Regardless of the outcome of this Court's decisions in Lambert, Young and Tuthill, petitioner submits that the district court's decision herein cannot be affirmed because of the fundamental difference that petitioner was acquitted of this underlying criminal offense. In its decision affirming petitioner's departure sentence, the district court did not examine or discuss the second written reason for departure given by the trial judge, that the facts of the original aggravated battery were extremely violent, shocking and far exceeding the norm. This departure reason is also infirm under prior decisions of this Court.

The facts of the original aggravated battery are set forth in the probable cause affidavit in the record (R-766-768) and do not support the second reason in aggravation given by the judge.

The affidavit states that petitioner jumped into the bed of a Ford truck where the victim of the aggravated battery, Charles Lancaster, and petitioner's former girlfriend, Nicole Buckner, were seated. Petitioner broke out the window with an unknown object, possibly a shovel or a two-by-four and began to hit Lancaster about the face, head and neck. When Lancaster got out of the truck petitioner grabbed him and used his hands and fist

to choke and strike the victim. As a result of this battery, the victim received a severe laceration to his left ear which required 18 stitches to mend (R-768). It was this cutting of Lancaster's ear which was alleged to be the great bodily harm under the information for aggravated battery (R-769).

When petitioner was initially placed on probation the trial judge did not find the circumstances of this offense to be aggravated beyond the norm, extremely shocking or violent. Instead, a downward departure sentence, of probation was imposed upon a negotiated plea. Because the trial court did not initially find this aggravated circumstance surrounding the aggravated battery any subsequent trial judge is prohibited from thereafter finding it as an additional or new reason to justify a departure sentence in this case. In Shull v. Dugger, 515 So.2d 748 (Fla. 1987), this Court held that the trial court is required to articulate all of the reasons for departure in the original sentencing order.

Also, the facts and circumstances of this aggravated battery cannot support a departure absent some unusual or extraordinary circumstances. Lerma v. State, 497 So.2d 736 (Fla. 1986), Vanover v. State, 498 So.2d 899 (Fla. 1988), Dawkins v. State, 479 So.2d 818 (Fla. 2d DCA 1985).

Appellant's act of attacking someone in the company of his former girlfriend in a fit of jealous rage and causing a laceration to his ear is not so exceedingly different from other aggravated batteries so as to justify departure in this case. If

it were, almost any aggravated battery sentence could be aggravated for the accompanying violence and injury that occurs. A departure cannot be based on a factor common to nearly all crimes in the sentencing category, Lerma v. State, supra at 739.

Since neither departure reason is valid, the sentence should have been reversed by the district court and remanded for resentencing within the guidelines recommended range.

CONCLUSION

This Court should quash the decision of the district court which affirmed petitioner's departure sentence in aggravation of the guidelines even though he had been acquitted of the offense which formed the basis for the first ground of departure. Since the second reason for departure is also invalid under established precedent of this Court, a new sentence within the guidelines recommended range should be ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JOHN TIEDEMANN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 22nd day of September, 1988.

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