Original

IN THE SUPREME COURT OF FLORIDA

MARSHALL SANDERS CROCKER,

Petitioner,

versus

CASE NO. 76,936

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by informations filed in the Circuit Court of Putnam County, Florida, with three counts of burglary of a dwelling; six counts of grand theft, third degree; two counts of burglary of a conveyance; and one count of burglary of a structure. (R 10, 15, 24, 25, 26, 27) He entered guilty pleas to three counts of burglary of a dwelling; two counts of burglary of a conveyance; and one count of burglary of a structure, and was sentenced on June 21, 1989, to spend fifteen years in prison for burglary of a dwelling, to be followed by concurrent terms of probation totalling fifteen years. (R 59-60, 30-33, 34, 37, 40, 43, 46)

Petitioner timely appealed to the Fifth District Court of Appeal and on October 18, 1990, his sentences were affirmed and the question of the extent to which a trial court may aggravate a defendant's sentence above the sentencing guidelines range on the basis of the defendant's unscored juvenile record was certified to this Honorable Court to be one of great public importance. Crocker v. State, 15 F.L.W. D2605 (Fla. 5th DCA October 18, 1990). (Appendix 1)

SUMMARY OF ARGUMENT

POINT I: This Honorable Court should answer the District Court's certified question by strictly limiting the utilization of unscored juvenile adjudications as grounds for departure to cases where the defendant's remote juvenile record is severe and extensive.

POINT II: This Honorable Court should recede from its decision in Weems v. State, 469 So.2d 128 (Fla. 1985), because the use of remote juvenile adjudications of delinquency for any purpose is expressly prohibited by statute and by the sentencing guidelines themselves. Even if the original sentencing guidelines were susceptible of an interpretation that permitted juvenile adjudications more than three years old to be used as a grounds for departure, any such foundation has been repealed by the subsequent re-enactment of Section 39.12(7) which specifically forbids the use of juvenile records for any but certain proceedings, none of which include criminal sentencings. It also is unfair to allow departures, the extent of which are not reviewable by an appellate court, on the basis of factors that legislation and public policy dictate shall not be considered.

POINT III: Although the trial court's order recites that its grounds for departing from the sentencing guidelines' range was Petitioner's unscored juvenile adjudications, the record does not demonstrate that his juvenile record was "extensive" because four of the five juvenile dispositions were apparently all

obtained on the same date.

POINT IV: The trial court's written order stating reasons for departing from the sentencing guidelines' recommended and "permitted" range was apparently prepared in advance of the sentencing hearing and any opportunity for argument by counsel or presentation of evidence was thus negated by the court's having previously decided upon the departure sentence to be imposed. This Honorable Court has held that a sentencing guidelines departure should be an "extraordinary" occurrence and that a trial judge should follow procedures, not utilized here, which would ensure that both the sentencing guidelines rules and the constitutional requirement of due process are enforced.

ARGUMENT

POINT I

IN LIGHT OF WEEMS, TO WHAT EXTENT MAY A TRIAL COURT CONSIDER A NON-SCOREABLE JUVENILE RECORD IN AGGRAVATING A SENTENCE ABOVE THE GUIDELINES RANGE?

Petitioner's sentencing guidelines scoresheet point total was 51, placing his recommended sentence within the range of community control or twelve to thirty months in prison, or within a "permitted" range of up to three and a half years in prison. Rule 3.988(e), Fla.R.Crim.P. (R 28, 56) The trial judge, however, sentenced him to spend nine years in prison, to be followed by concurrent terms of probation totalling fifteen years. (R 59-60, 34, 37, 40, 43, 46) In a sentencing guidelines departure order, the judge relied upon four adjudications of delinquency, all of which were entered on the same date, and all of which were unscoreable because they were obtained more than three years prior to the offenses for which Petitioner was being sentenced. Rule 3.701(d)(5)(c), Fla.R.Crim.P. (R 49-50)

Weems v. State, 469 So.2d 128 (Fla. 1985), held that a defendant's prior juvenile dispositions over three years old may justify an upward departure from the sentencing guidelines, even though such dispositions could not be used for the initial computation of the presumptive sentence. Rule 3.701(d)(5)(c), Fla.R.Crim.P. In Weems, this Honorable Court wrote:

> The fact that Weems had a multitude of juvenile dispositions

> for previous burglaries was certainly material to the sentencing process and may be considered by the trial court in deciding on an appropriate sentence under the circumstances. The district court correctly concluded that the trial court did not abuse its discretion in departing from the guidelines in this case.

Id., 469 So.2d at 130. (Emphasis supplied.) As argued in Point II, infra, the decision in Weems should be abandoned. Short of that step, this Honorable Court should at least approve the position taken by several District Courts of Appeal who have held that in order for a unscoreable juvenile record to justify a sentencing guidelines departure, the record must be extensive, a conclusion based upon Weems. See, e. g., Morgan v. State, 550 So.2d 151 (Fla. 3d DCA 1989); Blue v. State, 541 So.2d 736 (Fla. 1st DCA 1989); Musgrove v. State, 524 So.2d 715 (Fla. 1st DCA 1988); White v. State, 501 So.2d 189 (Fla. 5th DCA 1987); and Walker v. State, 524 So.2d 715 (Fla. 1st DCA 1988), which held that the defendant's unscoreable juvenile record, though one existed in each case, was not sufficient to justify a departure. See also, Puffinberger v. State, 558 So.2d 189 (Fla. 4th DCA 1990), Judge Anstead concurring. See also Tillman v. State, 525 So.2d 862 (Fla. 1988), and Carter v. State, 510 So.2d 930 (Fla. 5th DCA 1987), which approved departures for this reason but which seemed to require that the unscored juvenile record be significant. The Tillman decision approved, from among nine reasons offered by the sentencing judge for a departure sentence,

two grounds for the departure which included Tillman's **extensive** juvenile record. In Tillman, this Honorable Court wrote:

> A clear and convincing reason must be a valid reason, one which is an appropriate reason in the abstract, and must be supported by the facts of the particular case which are credible and proven beyond a reasonable doubt. State v. Mischler, 488 So.2d 523 (Fla. 1986); Keys v. State, 500 So.2d 134 (Fla. 1986).

Id., 525 So.2d at 864.

The judge's basis for departure in this case may be appropriate "in the abstract" under Weems; but it is not appropriate on the basis of the relatively minor juvenile record recited in his departure order.

If an unscored juvenile record may be utilized at all as a grounds for departure, then the certified question must necessarily be: How extensive must the unscored juvenile record be to allow a departure?

A few months after Weems was decided, this Honorable Court held that the sentencing guidelines were not intended to usurp judicial discretion, and that an appellate court could and should review a departure sentence to determine whether the extent of the departure to determine whether it is reasonable. Albritton v. State, 476 So.2d 158 (Fla. 1985). Albritton, however, was then "overruled" by the Legislature in Section 921.001(5) which states that the extent of a guidelines departure is not subject to appellate review. In Weems, this Honorable

Court had mentioned that "[a]ppellate review of the trial court's expressed reasons for departure provides a check against the trial court's abuse of discretion in departing from the guidelines." Id., 469 So.2d at 130. An important cornerstone of Weems may, therefore, have been undermined by the Legislature, if an appellate court may not now review a trial judge's acts to determine whether there has been an abuse of discretion in the severity of the departure sentence. For the reasons stated in Point II, infra, the decision in Weems should be receded from. For the reason that the Legislature has decreed that, once a departure has been authorized the extent of departure is limited only by the statutory maximum, then the validity of the Weems decision depends upon an agreement with the First, Second and Fifth District Courts of Appeal that an extensive unscored juvenile record should first be required before **any** departure is allowed. If remote juvenile delinquencies, which are otherwise specifically excluded by the sentencing guidelines themselves as factors to be scored, are to be accepted as grounds for departure, then they should surely be limited to being considered as are other, legitimate, offenses, i. e., on the basis of their number, their timing, their severe nature, their materiality and relevance to the present offense, and their clearly escalating pattern.

This Honorable Court should answer the District Court's certified question by strictly limiting the utilization of unscored juvenile adjudications as grounds for departure to cases

where the defendant's remote juvenile record is severe and extensive.

POINT II

JUVENILE DISPOSITIONS MORE THAN THREE YEARS OLD SHOULD NOT BE CONSIDERED IN SENTENCING, EITHER AS PART OF THE SENTENCING GUIDELINES OR OUTSIDE THE GUIDELINES.

A sentencing judge is prohibited from utilizing a defendant's juvenile record of dispositions more than three years old because (1) the sentencing guidelines limit consideration of juvenile records to those dispositions occurring within three years of the commission of the primary offense and (2) Florida Statutes exclude records of juvenile delinquency adjudications from sentencing proceedings.

Rule 3.701(d)(5)(c) states:

> c) Juvenile record: All prior juvenile dispositions which are the equivalent of convictions as defined in section (d)(2), occurring within three (3) years of the commission of the primary offense and which would have been criminal if committed by an adult, shall be included in prior record.

The Committee Note to Rule 3.701(d)(5) states:

> Juvenile dispositions, with the exclusion of status offenses, are included and considered along with adult convictions by operation of this provision. However, each separate adjudication <u>is discharged from consideration</u> if three (3) years have passed between the date of disposition and the commission of the instant offense.

(Emphasis supplied.)

Section 39.12(7) just as plainly states:

> (7) No court record of

> proceedings under this chapter shall be admissible in evidence in any other civil or criminal proceedings . . .

Section 39.12(7) then lists exceptions to this prohibition, none of which includes sentencings, either within or outside the sentencing guidelines.

The sentencing guidelines never authorized the conclusion in Weems; the result in Weems was in fact specifically prohibited by statute and by the Committee Note to the original sentencing guidelines. Even if it could be said that the sentencing guidelines authorized the use of remote juvenile adjudications of delinquencies for any purpose, that authorization was repealed by the 1987 adoption of Section 39.12(7)(e) which lists exceptions to the prohibition against using juvenile records in other courts and proceedings:

> (e) Records of proceedings under this part may be used to prove disqualification pursuant to ss. 110.1127, 393.0655, 394.457, 396.0425, 397.0715, 402.305, 402.313, 409.175, 409.176, and 959.06 and for proof in a chapter 120 proceeding pursuant to ss. 415.103 and 415.504.

Ch. 87-238, s. 1, Laws of Fla. This catalog of exceptions does not include any statutory provisions relating to sentencing or the sentencing guidelines. Implementation of the 1987 provision and application of the statutory canon, "Expressio unius est exclusio alterius," settles the question of whether juvenile court records may be utilized as grounds for departure in

sentencing proceedings. If, therefore, the enactment of the sentencing guidelines superseded and "impliedly repealed" the earlier statutory Section 39.12(6)[1] to the extent of any conflict between them[2], then clearly the enactment of Section 39.12(7)(e) has superseded and unambiguously repealed any provision of the sentencing guidelines that might seem to authorize the conclusion in Weems. See, e. g., Whitehead v. State, 498 So.2d 863 (Fla. 1987), which found that the subsequent enactment of the sentencing guidelines had repealed the operation of the former habitual offender statute.

In Walker v. State, 519 So.2d 1105 (Fla. 3d DCA 1988), the
District Court noted the irony of the Weems conclusion, that allows a much longer sentence on account of factors which are specifically excluded from the sentencing guidelines scoresheet computation, than if they were included. The effect of Weems is not just ironic but obviously unfair.

To help effect the rehabilitative, as opposed to retributive, purpose of the Juvenile Justice Act, the Legislature has decreed that after a specific period of time, children's delinquencies shall not be held against them. ss. 39.001(2)(a), 39.12(7)(e), Fla.Stat. (1989). Instead, the Weems decision has obliterated the policy and intended protections of specific

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[1] Renumbered in 1985 to Section 39.12(7).

[2] See Weems, 469 So.2d at 131 (Justice Boyd dissenting).

provisions of the Juvenile Justice Act and the sentencing guidelines regarding juvenile records. There is no logical reason to conclude that because a factor may not be used in an overall scoresheet calculation to raise a defendant's presumptive sentence by one or two cells, it may instead be used in some cases to more than double the recommended sentence.

In Franklin v. State, 545 So.2d 851 (Fla. 1989), and Lambert v. State, 545 So.2d 838 (Fla. 1989), this Honorable Court receded from its decision in State v. Pentaude, 500 So.2d 526 (Fla. 1987), and recognized that aggravating a defendant's sentence following a violation of probation beyond the one-cell increase authorized by the sentencing guidelines is contrary to the spirit and intent of the guidelines. This Honorable Court should likewise recognize that allowing trial judges to increase a defendant's sentence, possibly far beyond the objectively determined recommended range, on the basis of factors that the Legislature has expressly excluded from consideration for any purpose violates the spirit and intent of the sentencing guidelines and Juvenile Justice Act, and fair play. Weems should be reversed.

POINT III

PETITIONER'S PRIOR UNSCORED JUVENILE RECORD WAS IMPROPERLY UTILIZED AS A BASIS FOR DEPARTURE FROM THE SENTENCING GUIDELINES WHERE THE UNSCORED PRIOR JUVENILE RECORD WAS NOT "EXTENSIVE."

Although the departure order in this case recited five adjudications of delinquency, four of those were obtained on the same date. This suggests that the adjudications may have all resulted from a single criminal episode. See Crocker v. State, 15 F.L.W. D2605 (Fla. 5th DCA October 18, 1990). (Appendix 1) For purposes of declaring a defendant to be an habitual offender, it must be shown that the defendant committed the second offense subsequent to his conviction on the first offense. Shead v. State, 367 So.2d 264 (Fla. 3d DCA 1979); Wilken v. State, 531 So.2d 1011 (Fla. 4th DCA 1988). Two or more prior convictions rendered on the same day are treated as one offense for purposes of meeting the habitual offender statute's requirement of two or more convictions as a prerequisite to an enhanced sentence. Shead, 367 So.2d at 266. Likewise, in a situation such as this, where the judge intends to justify nearly tripling the recommended and "permitted" prison sentence for a nineteen-year-old defendant, a similar showing should be made, that the defendant's "extensive" juvenile record actually consists of independent and successive adjudications. The Fifth District Court of Appeal has previously required that an unscored juvenile record, to be a valid reason for departure, must be of more than

a minimal nature. White v. State, 501 So.2d 189 (Fla. 5th DCA 1987).

The record does not demonstrate that Petitioner's unscoreable juvenile adjudications constitute an "extensive" juvenile record, and the trial court's departure from the "permitted" range of up to three and a half years should not be upheld on that basis.

POINT IV

THE TRIAL COURT ERRED BY IMPOSING A DEPARTURE SENTENCE BASED UPON A DEPARTURE ORDER WHICH HAD BEEN PREPARED IN ADVANCE OF THE SENTENCING.

At Petitioner's sentencing, his counsel acknowledged that the presentence investigation report had recommended that Judge Eastmoore depart from the sentencing guidelines but he urged the judge to stay within the recommended and "permitted" ranges of up to three and a half years in prison. (R 57) Judge Eastmoore responded by sentencing Petitioner to nine years in prison for burglary of a dwelling and ordering five concurrent terms of probation totalling fifteen years to be served consecutively to the prison sentence. (R 59-60) The judge stated:

> THE COURT: This is a departure sentence. The Court at this time sets forth its reasons for aggravating the Defendant's sentence as being the unscored juvenile record as permitted by the Supreme Court finding in [T]il[l]man versus State, 525 So. 2d, [86]2.
>
> And the Court at this time enters a written order.
>
> Madam Clerk, you will need to prepare a copy of this and give it to Counsel for both parties.
>
> * * *
>
> She will furnish you, Mr. DeThomasis, with a copy of that departure, if you want to wait around a few minutes, before you leave here today.
>
> * * *

(R 61-62) (Emphasis supplied.)

In State v. Jackson, 478 So.2d 1054 (Fla. 1985), this Honorable Court held that a trial court's failure to enter written reasons for a sentencing guidelines departure required the appellate court to vacate the sentence and remand for resentencing. In State v. Oden, 478 So.2d 51 (Fla. 1985), the Court held it was reversible error for the trial court to depart from the guidelines without providing a contemporaneous written statement of the reasons therefor at the time each sentence was pronounced. Id., 478 So.2d at 51. Then Judge Sharp, in Elkins v. State, 489 So.2d 1222 (Fla. 5th DCA 1986), noted in a concurring opinion:

> I am also concerned about the practicality and fairness of requiring the trial judge to produce "contemporaneous" written reasons for a departure sentence at the sentencing hearing. That obviously means the sentencing judge must prepare the written reasons for departing in advance of the hearing where evidence relating to the sentence will be given. Those reasons for departure prepared before the hearing clearly would be vulnerable to the attack that they were not based on evidence presented, and therefore violated the defendant's due process rights.

Id., 489 So.2d at 1224-25 (Sharp, J., concurring specially) (emphasis in original).

In Ree v. State, 565 So.2d 1329 (Fla. 1989), this Honorable Court agreed with Judge Sharp

> . . . that the sentencing guidelines and accompanying rules do not permit

a trial court to decide a sentence before giving counsel an opportunity to make argument. Fundamental principles of justice require that decisions restricting a person's liberty be made only after a neutral magistrate gives due consideration to any argument and evidence that are proper. However, we are equally persuaded that the statute and rules that create the sentencing guidelines require written reasons for departure that are "contemporaneous." Oden. To be "contemporaneous," reasons must be issued at the time of sentencing.

We do not believe the requirements of the guidelines and the concerns raised by Judge Sharp are irreconcilable. When the state has urged a departure sentence, the trial court has three options. First, if the trial judge finds that departure is not warranted, he or she then may immediately impose sentence within the guidelines' recommendation, or may delay sentencing if necessary. Second, after hearing argument and receiving any proper evidence or statements, the trial court can impose a departure sentence by writing out its findings at the time sentence is imposed, while still on the bench. Third, if further reflection is required to determine the propriety or extent of departure, the trial court may separate the sentencing hearing from the actual imposition of sentence. In this event, actual sentencing need not occur until a date after the sentencing hearing.

We realize this procedure will involve some inconvenience for judges. However, a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court.

Id, 565 So.2d at 1332. (Emphasis in original.)

It is apparent that none of the three procedures suggested in Ree was adhered to. Judge Eastmoore had brought to court a previously prepared departure order, and imposed a departure sentence that had been decided before, and was evidently not subject to, argument of counsel. Petitioner has contended in Points I and III, supra, that the grounds for departure were themselves insufficient. At the new sentencing hearing which Petitioner believes is required in any event in this case, Judge Eastmoore should be required to afford Petitioner's counsel an adequate opportunity to be heard. Art. I s. 9, Fla. Const.; Amends. V and XIV, U. S. Const.

CONCLUSION

For the reasons expressed in Point II herein, Petitioner respectfully urges that this Honorable Court recede from its decision in Weems v. State, 469 So.2d 128 (Fla. 1985), and declare that an unscored juvenile record of adjudications of delinquency is not a permissible basis upon which to depart from the sentencing guidelines, and vacate Petitioner's sentences with directions to the trial court to resentence him within the sentencing guidelines. In the alternative, and for the reasons expressed in Points I, III, and IV herein, Petitioner respectfully requests that this Honorable Court vacate his sentence for burglary of a dwelling and remand this cause to the trial court with directions that he be resentenced within the sentencing guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Marshall S. Crocker, P. O. Box 340 - Camp Road, Sharpes, Florida 32959, this 6th day of December, 1990.

ATTORNEY