IN THE SUPREME COURT OF FLORIDA

VICTOR RAYMOND JORY,

Petitioner,

vs. CASE NO. 85,146

STATE OF FLORIDA,

Respondent.
_____/

On Appeal from the Fifth District Court of Appeal

PETITIONER'S INITIAL BRIEF

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STATEMENT OF FACTS AND CASE

This appeal arises from a decision of the fifth district court of appeal upholding an upward departure from the sentencing guidelines. (R at 72-77). *Jory v. State*, 647 So.2d 152 (Fla. 5th DCA 1994).

Petitioner was convicted on November 14, 1990, of ten counts of lewd and lascivious assault upon a child less than sixteen years of age, one count of promotion of a sexual performance by a child, and one count of use of a child in a sexual performance.[1] All of the sexual acts underlying petitioner's convictions took place in a single episode of consensual activity between petitioner and the subject child which was videotaped. The child testified at trial that he was sixteen years old at the time of the sexual acts. (SR, v. IV, at 159, 165, and 179).

Petitioner was originally sentenced on January 22, 1991, to 150 years in prison followed by thirty years supervised probation. (SR, v. III, at 555-556). Petitioner appealed his convictions and sentence to the fifth district court of appeal under case number 91-334. On March 13, 1992, the fifth district affirmed the convictions but reversed petitioner's sentence based on an erroneously calculated scoresheet. *Jory v. State*, 596 So.2d 1126 (Fla. 5th DCA 1992).

Petitioner was resentenced on July 7, 1992. (R at 1-49). The recommended guideline sentence was 17 to 22 years. (R at 71).[2] The trial court departed upward from the presumptive sentence, however, and imposed the identical sentence as before. (R at 72-77 and 82-97).

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[1] Sections 800.04(2), 827.071(3) and 827.071(2), Florida Statutes (1987), respectively.

[2] Because this offense took place before July 1, 1988 (SR, v. IV, at 129), there is no applicable "permitted range." Ch. 88-131, Laws of Fla.; *McCaskell v. State*, 542 So.2d 461 (Fla. 5th DCA 1989).

Petitioner again appealed, and on June 3, 1994, the fifth district upheld one of the reasons relied upon by the trial court to justify its upward departure sentence: that petitioner "poses a danger to society." *Jory*, 647 So.2d at 154. On June 15, 1994, petitioner filed a Motion for Rehearing or Certification or for Rehearing En Banc, which was denied on January 6, 1995. On February 1, 1995, petitioner filed his Notice to Invoke Discretionary Jurisdiction with this Court. This Court accepted jurisdiction on May 12, 1995.

SUMMARY OF ARGUMENT

Issue I

At his first sentencing hearing, petitioner was invited to address the court "[w]ith regard to mitigation" before imposition of sentence. What he said was later relied upon by the trial court at petitioner's resentencing to justify imposition of a 150-year departure sentence. According to the sentencing departure order, "[t]he defendant's *comments* . . . clearly show that the defendant sees nothing wrong with his conduct in this case. He is unable to perceive any reason to change. The defendant views his conduct to be lawful and blames a system that is 'prejudicial against homosexuals' for his plight." The district court's majority opinion upholding petitioner's departure sentence construes his remarks to the trial court likewise and, like the trial court's departure order, mentions nothing more in the record than petitioner's own words as justification for the departure sentence.

Throughout this prosecution, petitioner has steadfastly maintained his innocence. Petitioner's comments at sentencing represent nothing more than a reassertion of his innocence and an expression of his opinions concerning the prosecution against him.

In *State v. Mischler*, 488 So.2d 523 (Fla. 1986), this Court rejected an upward departure from the guidelines based on facts substantially the same as the facts in this case. In *Mischler* the trial court had departed upward based on the defendant's statements in her presentence investigation report. These statements amounted to Mischler's "maintaining her innocence and voicing her opinion on the workings of the criminal justice system in America." In his comments to the trial court petitioner did no more than maintain his innocence and express his dissatisfaction with the criminal justice system that had found him guilty. By aggravating petitioner's sentence on the basis of its conclusion that

petitioner's comments proved he was a "danger to society," the trial court impermissibly punished petitioner for simply exercising his constitutional rights.

Issue II

Speculation about a criminal defendant's conduct has long been an impermissible basis for aggravation of the defendant's sentence. On the other hand, this Court has suggested, in *Whitehead v. State*, 498 So.2d 863 (Fla. 1986), that evidence of factors not taken into account by the sentencing guidelines "which establishes beyond a reasonable doubt that the defendant poses a danger to society *in the future* can clearly be considered justification for a departure from the recommended sentence."

In the instant case the district court concluded that "Jory's statements [at his initial sentencing hearing] clearly indicate that he does pose a real future danger to society." By any reasonably objective standard, however, petitioner's comments to the trial court do not even begin to prove he is a "real future danger to society." Nowhere did petitioner suggest that he held the "philosophy" or belief that oral and anal intercourse with "minors" was not wrong and should not be prosecuted if the minor did not feel "victimized." Nor did petitioner express any disagreement with or defiance of the laws under which he had been prosecuted, or indicate he would have ever engaged in any sexual activity with a child under the age of consent.

By characterizing petitioner's comments as it did, the district court sought to avoid the appearance of speculating about petitioner's future conduct. Given petitioner's lack of prior record of sexual offenses with children, the lack of competent evidence in the trial court of any other sexual offenses with children, and the lack of any other evidence suggesting that petitioner

does indeed pose a threat "to our young people," it is impossible to arrive at the conclusions reached by the trial court and the district court *without* speculating.

Issue III

The sentencing process, like a trial, must satisfy the requirements of the due process clause of the fourteenth amendment and Article I, § 9, of the Florida Constitution. In the instant case the trial court deprived petitioner of his right to due process by preparing its written departure order prior to the hearing at which petitioner's sentence was supposed to have been an issue. In *Ree v. State,* 565 So.2d 1329 (Fla. 1990), this Court held 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." By coming into the sentencing hearing having already prepared its written departure order--unalterably predisposed toward the 150-year departure sentence imposed in this case--the trial court deprived petitioner of the very essence of due process.

Issue IV

The Florida Constitution prohibits the imposition of "cruel *or* unusual punishment" (emphasis added), affording even broader protection than the analogous clause of the federal constitution's eighth amendment. In the instant appeal the trial court imposed a departure sentence of 150 years in state prison for a single episode of consensual sexual activity. This sentence exceeds the maximum recommended sentence under the guidelines by 128 years.

The record reflects petitioner used no violence, threats or intimidation in this case, nor does he have a criminal history of such behavior. The alleged victim was not traumatized or even afraid of petitioner. This case differs from the typical statutory rape prosecution (i.e., where the victim consents) in only two respects: the sexual activity was homosexual in nature, and it was videotaped.

Clearly, under the proven facts of this case, petitioner's sentence is uniquely harsh, grossly disproportionate, and "unusual" within the meaning of the Florida Constitution.

Issue V

Rule 3.700, Fla.R.Crim.P., requires a sentencing court to pronounce in open court every sentence or other final disposition of a case. In the instant case the trial court failed to pronounce in open court the special conditions of the probationary sentence it imposed upon petitioner, saying only: "The same terms and conditions are imposed for this probation as were previously imposed . . . . They are by this reference reaffirmed and realleged today."

Due process requires a sentencing court to pronounce any special conditions of a probationary sentence in open court in a manner sufficient for the defendant to know of these conditions and to have an opportunity to object to them. This rule applies even where the special conditions were orally pronounced at a prior sentencing hearing and are being reimposed at a resentencing, as in this case.

ARGUMENT

Issue I

"Future danger to society" is not a valid reason for an upward departure from the sentencing guidelines when based on inferences derived from a defendant's continuing assertion of innocence or opinions concerning the criminal justice system.

At his first sentencing hearing, petitioner was invited to address the court "[w]ith regard to mitigation" before imposition of sentence. (SR, v. III, at 542). What he said was later relied upon by the trial court at petitioner's resentencing to justify imposition of a 150-year departure sentence.[3] What petitioner said was as follows:

> Your Honor, you have not been present throughout these proceedings from the very beginning, but from the very beginning and throughout over twenty months of pre-trial incarceration the government has continually and repeatedly manipulated, misled and deliberately misconstrued the realities of this case.
>
> The case was initiated by an illegal search warrant obtained in violation of the constitutional protections of the Fourth Amendment. There is ample evidence and information already on the record to substantiate that the search warrant was procured in violation of the premise of [*Franks v. Delaware*] and its prodigy [sic].
>
> Judge Budnick clearly agreed with me that the confidential informants were not credible and reliable and it is clear from the information on the record that the police knew this.
>
> The government brought many false charges against me, dropping and nol prossing charges at its convenience, to manipulate the Courts and to prevent me from making bail which would have enabled me to better assist in the preparation of my defense.
>
> The government has filed false motions with the Court intentionally and in bad faith to interfere with my rights to counsel.
>
> These allegations are all part of the record as it exists already.
>
> The government continually throughout these proceedings fed the media in an attempt to try this case in the press and create a negative inherent prejudice in the potential jury pool and then had the gall to cry "foul" when defense attorney spoke to the press.

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[3] Although the trial court provided five written reasons for departure, the sentencing order indicates: "The departure sentence imposed in this case would remain the same if any ***one*** of the above stated grounds are [sic] affirmed on appeal." (R at 75) (emphasis in original).

The government has used intimidation, inuendo [sic] and ostracism to attempt to prevail upon defense counsel to not exert theirselves on my behalf.

This case has been a case where delay has been a benefit to the prosecution. The prosecution have [sic] manipulated for the delay for tactical advantage and has severely prejudiced my defense. Just as the police solicited false information to get a search warrant, the prosecution solicited and received false testimony to get this conviction[,] manipulating Bobby's mother's emotions to get her to misrepresent the truth on the witness stand.

In the pretrial hearing in July[,] before the first jury that we picked[,] Assistant State Attorney Meryl Allawas intentionally miscited and misrepresented mandatory authority case law to the Court so that she would be able to maintain jurisdiction in this case after the Court indicated that it was prepared to dismiss the charge. This case would have been lost if it had not been for her intentional misrepresentation of mandatory case authority.

After twenty months of pre-trial incarceration I was just wore out and convinced that I could not and would not receive a fair trial. So, finally just to get this out of the Circuit Court and into a higher court jurisdiction I consented to proceed with a tainted venue, who without doubt must have been inherently prejudiced from pre-trial publicity, despite the claimed responses to the contrary.

This has not been a criminal prosecution. It has been a lifestyle persecution, a classic example of homo-phobia, a judicial system run amuck where dislike and prejudice have overcome reason and fact.

The persecutors of this case have outrageously abused the judicial process and flagrantly violated my Fourth, Fifth, Sixth and Fourteen [sic] Amendment Rights guaranteed by the United States Constitution, not to mention the rights of true victims of sexual abuse and assault. True victims of sexual abuse and assault, both women and children, should be outraged at the gross abuse of judicial resources squandered on a case where the alleged victim says he is not a victim and says this was not a crime.

From the inception of this case the government has deliberately misled the Court and the public to manipulate inherent prejudice to outweigh and to overcome facts and reason.

As to the trial itself, no where [sic] in my search through the Florida State Statutes could I find any law about the size of a person being part of the criteria of when he could legally consent to sex, yet obviously the size of the alleged victim in this case, which is the result of a gastro-intestinal birth defect that impeded his normal growth and development, had a significant influence on this Court.

Nor could I believe any Court could find reasonable or credible the mother's guess as to his age in a case where obviously if the mother thinks that I corrupted her son that she would hate me and even if she thought he had long since passed the legal age would be willing and perhaps eager to testify, ["O]h, I don't think he looks like he was legal age.["] The Court knows as fact that the mother does not know the alleged victim's age at the time of the incident because she wasn't there. (SR, v. III, at 542-547).

According to the trial court's sentencing departure order, "[t]he defendant's *comments* . . . clearly show that the defendant sees nothing wrong with his conduct in this case. He is unable to perceive any reason to change. The defendant views his conduct to be lawful and blames a system that is 'prejudicial against homosexuals' for his plight." (R at 75) (emphasis added). The district court's majority opinion upholding petitioner's departure sentence construes his remarks to the trial court likewise: "Jory is unequivocal in his stance that he has done nothing illegal and that the State's pursuit of the case stems from a 'life-style persecution, a classic example of homophobia . . . .'" *Jory*, 647 So.2d at 153. Like the trial court's departure order, the majority opinion below mentions nothing more in the record than petitioner's own words as justification for the departure sentence in this case. To fairly interpret petitioner's comments, however, the context of those comments cannot be ignored.

Petitioner's trial defense was that the alleged victim in the instant case was sixteen years old at the time of any sexual contact. This defense was supported by the alleged victim, who testified at trial he was sixteen at the time of the sexual acts shown on the videotape. (SR, v. IV, at 159, 165, and 179). Clearly, petitioner's comments at sentencing represent nothing more than a reassertion of his innocence, based on his contention that the alleged victim was sixteen at the time of the sexual activity between them, and an expression of his opinions concerning the prosecution against him.

In *State v. Mischler*, 488 So.2d 523 (Fla. 1986), this Court addressed the validity of an upward departure from the guidelines based on facts substantially the same as the facts in this case. In *Mischler* the trial court had departed upward based on the defendant's statements in her presentence investigation report. These statements amounted to Mischler's "maintaining her innocence and voicing her opinion on the workings of the criminal justice system in America." *Id.* at 526. Finding this reason an invalid basis for departure, this Court held that "lack of remorse to support a departure sentence

cannot be inferred from either the mere exercise of a constitutional right or a continuing assertion of innocence." *Id.; accord State v. Sachs*, 526 So.2d 48, 51 n.1 (Fla. 1988); *Pope v. State*, 441 So.2d 1073, 1078 (Fla. 1983); *Hubler v. State*, 458 So.2d 350, 353 (Fla. 1st DCA 1984); *cf. Boomer v. State*, 564 So.2d 1232, 1233 (Fla. 2nd DCA 1990) (lack of remorse is not a proper reason for departure from the guidelines). *See also Smith v. State*, 482 So.2d 469 (Fla. 5th DCA 1986) (error to aggravate sentence on the basis that defendant steadfastly maintains his innocence despite incriminating evidence); *Vance v. State*, 475 So.2d 1362 (Fla. 5th DCA 1985) (defendant's refusal to admit guilt and persistence in maintaining innocence are not proper or clear and convincing reasons for departure).

The facts underlying the trial court's departure sentence in the instant case are virtually the same as those rejected by this Court in *Mischler*. In his comments to the trial court at his initial sentencing petitioner did no more than maintain his innocence and express his dissatisfaction with the criminal justice system that had found him guilty. The trial court, relying on petitioner's continuing assertion of innocence and his opinions concerning the prosecution against him, concluded he is a "danger to society." By aggravating petitioner's sentence on the basis of that conclusion, however, the trial court impermissibly punished petitioner for simply exercising his constitutional rights. *See Pope*, 441 So.2d at 1077.

Issue II

"Future danger to society" is not a valid reason for an upward departure from the sentencing guidelines when based on speculation that a defendant will commit crimes in the future.

Speculation about a criminal defendant's conduct has long been an impermissible basis for aggravation of the defendant's sentence. *Keys v. State*, 500 So.2d 134, 136 (Fla. 1986); *Tillman v. State*, 525 So.2d 862, 864 (Fla. 1988); *Dixon v. State*, 492 So.2d 410, 411 (Fla. 5th DCA 1986); *Odom v. State*, 561 So.2d 443, 445 (Fla. 5th DCA 1990); *Stromberger v. State*, 595 So.2d 587 (Fla. 2d DCA 1992); *Cowan v. State*, 505 So.2d 640, 642 (Fla. 1st DCA 1987). On the other hand, this Court has suggested, in *Whitehead v. State*, 498 So.2d 863 (Fla. 1986), that evidence of factors not taken into account by the sentencing guidelines "which establishes beyond a reasonable doubt that the defendant poses a danger to society *in the future* can clearly be considered justification for a departure from the recommended sentence." *Id.* at 865 (emphasis added).

In the instant case the district court concluded that

> Jory's statements [at his initial sentencing hearing] clearly indicate that he does pose a real future danger to society. No other conclusion can be reached after considering Jory's own philosophy that oral and anal intercourse with a minor is not "wrong" and should not be prosecuted as a criminal offense as long as the minor does not come away from the encounter feeling victimized.
>
> Jory's own comments allow a distinction to be made between this case and those cases holding that departure is invalid if based on the mere speculation or conjecture that the defendant will again engage in criminal conduct. Jory is clearly a threat to our young people because he has an avowed intention not to be rehabilitated because he perceives his actions to be proper and legal.

Jory, 647 So.2d at 154 (citations omitted). What petitioner actually said was this:

> This has not been a criminal prosecution. It has been a lifestyle persecution, a classic example of homo-phobia, a judicial system run amuck where dislike and prejudice have overcome reason and fact.

> . . . True victims of sexual abuse and assault, both women and children, should be outraged at the gross abuse of judicial resources squandered on a case where the alleged victim says he is not a victim and says this was not a crime. (SR, v. III, at 545-546).

By any reasonably objective standard, petitioner's comments to the trial court do not even begin to prove he is a "real future danger to society." Nowhere did petitioner even suggest that he held the "philosophy" or belief that oral and anal intercourse with "minors" was not wrong and should not be prosecuted if the minor did not feel "victimized." Nor did petitioner express any disagreement with or defiance of the laws under which he had been prosecuted, or indicate he would have ever engaged in any sexual activity with a child under the age of consent. Neither did petitioner express an "avowed intention not to be rehabilitated," except possibly from his homosexuality.

By characterizing petitioner's comments as it did, the district court sought to avoid the appearance of speculating about petitioner's future conduct. Given petitioner's lack of prior record of sexual offenses with children, the lack of competent evidence in the trial court of any other sexual offenses with children, and the lack of any other evidence suggesting that petitioner does indeed pose a threat "to our young people," *see, e.g., Cochran v. State*, 534 So.2d 1165 (Fla. 2d DCA 1988); *cf. Coleman v. State*, 515 So.2d 313 (Fla. 2d DCA 1987) (trial court's finding that defendant posed a threat to his community based on expert testimony is speculation of future conduct and an invalid basis for departure), it is impossible to arrive at the conclusions reached by the trial court and the district court *without* speculating.

Issue III

The trial court deprived petitioner of his right to due process by preparing its written departure order in advance of his sentencing hearing.

The sentencing process, like a trial, must satisfy the requirements of the due process clause of the fourteenth amendment and Article I, § 9, of the Florida Constitution. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Porter v. State*, 400 So.2d 5, 7 (Fla. 1981); *Griffin v. State*, 517 So.2d 669, 670 (Fla. 1987). This means that a sentencing court must not enter the sentencing phase of a criminal prosecution having predetermined the particular sentence to be imposed, thereby depriving the defendant of a meaningful opportunity to be heard. *See United States v. Greenman*, 700 F.2d 1377 (11th Cir. 1983). In the instant case the trial court deprived petitioner of his right to due process by preparing its written departure order prior to the hearing at which petitioner's sentence was supposed to have been an issue. *See Griffin*; *Ree v. State*, 565 So.2d 1329 (Fla. 1990); *Williams v. State*, 559 So.2d 372 (Fla. 1st DCA 1990) (*Williams I*); *Williams v. State*, 614 So.2d 642 (Fla. 2d DCA 1993) (*Williams II*).

In *Ree* this Court held 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." 565 So.2d at 1332. To remedy the inherent due process problem in the guidelines' requirement that a departure sentence be accompanied by contemporaneous written reasons, the *Ree* opinion spells out three options available to a sentencing court where the state is seeking a departure sentence:

> 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. *Id.*

At its essence, "due process of law" describes a fair hearing before an impartial court. *See, e.g., United States v. Gonzalez*, 661 F.2d 488 (5th Cir. 1981). By coming into the sentencing hearing having already prepared its written departure order–unalterably predisposed toward the 150-year departure sentence imposed in this case[4]--the trial court deprived petitioner of the very essence of due process. *Ree*, 565 So.2d at 1331-32; *Elkins v. State*, 489 So.2d 1222, 1224-25 (Fla. 5th DCA 1986) (Sharp, J., concurring specially); *see United States v. Long*, 656 F.2d 1162 (5th Cir. 1981); *see also Greenman*; *Griffin*; *Williams I*; *Williams II*.

Issue IV

The 150-year departure sentence imposed by the trial court for a single episode of consensual sexual activity violates the Florida Constitution's prohibition against cruel *or* unusual punishment.

Article I, § 17, of the Florida Constitution prohibits the imposition of "cruel *or* unusual punishment" (emphasis added), and, by its use of the disjunctive "or," affords even broader protection than the analogous clause of the federal constitution's eighth amendment. *See Tillman v. State*, 591 So.2d 167, 169 n. 2 (Fla. 1991); *see also Traylor v. State*, 596 So.2d 957 (Fla. 1992); *In re: T.W.*, 551 So.2d 1186 (Fla. 1989); *State v. Kinchen*, 490 So.2d 21 (Fla. 1985). Thus, while the United States Supreme Court has limited the availability of proportionality review under the eighth amendment, *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), *modifying Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), such review

[4] The departure sentence was identical to petitioner's original sentence, which had been based on an erroneously prepared scoresheet and was reversed on appeal. *Jory v. State*, 596 So.2d 1126 (Fla. 5th DCA 1992).

continues to be appropriate under our state constitution. *See Tillman*, 591 So.2d at 169; *Hale v. State*, 630 So.2d 521 (Fla. 1993).

In the instant appeal the trial court imposed a departure sentence of 150 years in state prison for a single episode of consensual sexual activity. This sentence exceeds the maximum recommended sentence under the guidelines by 128 years. The record reflects petitioner used no violence, threats or intimidation in this case, nor does he have a criminal history of such behavior. The alleged victim was not traumatized or even afraid of petitioner. Still, the trial court imposed a sentence effectively no less severe than that reserved for predatory pedophiles who forcibly rape their victims. §§ 794.011(2), 775.082(1), Fla. Stat. (1991). Clearly, under the proven facts of this case,[5] petitioner's sentence is uniquely harsh, grossly disproportionate, and "unusual" within the meaning of the Florida Constitution. Art. I, § 17, Fla. Const.; *see State v. Bartlett*, 171 Ariz. 302, 830 P.2d 823 (1992) (40-year mandatory sentence held disproportionate to severity of crimes and constituted cruel and unusual punishment where defendant was convicted of two counts of statutory rape involving two fourteen-year-old girls, both of whom consented to have sexual intercourse with the defendant).

Issue V

The trial court failed to orally pronounce the special conditions of probation imposed upon petitioner.

Rule 3.700, Fla.R.Crim.P., requires a sentencing court to pronounce in open court every sentence or other final disposition of a case. In the instant case the trial court failed to pronounce in open court the special conditions of the probationary sentence it imposed upon petitioner, saying only: "The same terms and conditions are imposed for this probation as were previously imposed . . . . They

[5] This case differs from the typical statutory rape prosecution (i.e., where the victim consents) in only two respects: the sexual activity was homosexual in nature, and it was videotaped.

are by this reference reaffirmed and realleged today." (R at 41). These special conditions are set forth at pages 14 and 15 of the sixteen-page judgment and sentence entered by the trial court at petitioner's sentencing hearing. (R at 95-96).

Due process requires a sentencing court to pronounce any special conditions of a probationary sentence in open court in a manner sufficient for the defendant to know of these conditions and to have an opportunity to object to them. *Olvey v. State*, 609 So.2d 640, 642 (Fla. 2d DCA 1992). This rule applies even where the special conditions were orally pronounced at a prior sentencing hearing and are being reimposed at a resentencing, as in this case. *Id.* The failure to adhere to this rule requires setting aside the special conditions on appeal. *Id.*

CONCLUSION

Based upon the foregoing argument and the authorities cited herein, petitioner respectfully requests this Court to quash the decision below and remand this cause to the district court with directions to remand to the trial court for resentencing within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by (mail)/delivery to Steven J. Guardiano, Senior Assistant Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida, this 16th day of June, 1995.

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