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IN THE SUPREME COURT OF FLORIDA

CHARLES FREDERICK BARR, :

Petitioner, :

v. : CASE NO. 85,864

STATE OF FLORIDA, :

Respondent. :

______________________________ :

JURISDICTIONAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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v.	:	CASE NO. 85,864
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

JURISDICTIONAL BRIEF OF PETITIONER

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court in Barr v. State, _____ So.2d _____, 20 Fla.L.Weekly D1163 (Fla. 1st DCA May 12, 1995).

II STATEMENT OF THE CASE AND FACTS

Petitioner, Charles Frederick Barr, was convicted of armed robbery of a motor vehicle. On appeal to the district court, Barr argued his departure sentence was invalid, because it was based on criminal conduct for which he had not been convicted. Barr, 20 Fla.L.Weekly at D1163.

The facts were that Barr allegedly approached the victim in the parking lot at the Southern Bell Tower in Jacksonville as she arrived at work one morning, and demanded her car, which he took. When a police officer spotted him in the car, and

attempted to pull him over, Barr fled. According to the district court opinion:

> The chase occurred when traffic was heavy - it was 8:00 a.m. rush-hour traffic, and speeds exceeded 125 miles per hour. Appellant made several illegal U-turns and almost caused several accidents during the chase.

Id. The jury convicted him of armed robbery.

Petitioner contended that, at most, this conduct constituted reckless driving, a misdemeanor for which he had been neither charged nor convicted. As a crime of which he had not been convicted, it did not support an upward departure from the guidelines. Nevertheless, the trial court departed from the recommended guidelines of 7 - 9 years, with a permitted range up to 12 years, and sentenced Barr to 25 years in prison. The reason for departure was that

> appellant displayed a flagrant disregard for the safety of others. According to the [trial] court, appellant's reckless driving during the course of the chase with the police exposed numerous innocent citizens to serious harm.

Id.

The district court affirmed, relying primarily on a 1984 case, Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984). Finding that "[a]ppellant, at least partially, relies on the case of Felts," the district court distinguished this later case which was approved by this court. Felts v. State, 537 So.2d 995 (Fla. 1st DCA 1988), approved, 549 So.2d 1373 (Fla. 1989). The district court found that Felts did not recite the facts on

which it relied in holding that departure was not warranted because the defendant had not been charged with reckless driving. The court concluded that it is not an element of reckless driving nor inherent in the charge that "a large or numerous number of people be exposed to harm" [emphasis in original]. Id.

Judge Ervin dissented; he would find the departure was invalid under Rule 3.701(d)(11), Florida Rules of Criminal Procedure, as it is a factor relating to the instant offense for which he was not convicted, i.e., reckless driving. The dissent reasoned that Felts and State v. Tyner, 506 So.2d 405 (Fla. 1987) required reversal. The dissent said:

> Rather than follow the above case law, the majority chooses instead to follow Garcia. Garcia, however, was decided before the two supreme court decisions cited in Felts, namely, Williams and Tyner, both of which held that rule 3.701(d)(11) prohibits departure sentences based on reasons relating to the instant offense for which convictions have not been obtained.

Id. at D1164 (Ervin, J., dissenting), citing Williams v. State, 500 So.2d 501 (Fla. 1986).

Notice to invoke was timely filed, and this jurisdictional brief follows.

III SUMMARY OF ARGUMENT

The district court opinion relied on its own 1984 case, and ignored later contrary cases from the Florida Supreme Court

in holding that a high-speed car chase following the theft of a car constituted a valid reason for departure.

Florida law, including decisions of this court, prohibit using as a reason for departure a crime of which the defendant was not convicted. Petitioner could have been, but was not, charged with reckless driving as a result of the car chase. Since he was not convicted of this crime, it was improper to use the chase as a reason for departure, either.

The district court's distinction that Barr allegedly endangered many people, and danger to "many" others is not inherent in reckless driving is bogus. Reckless driving applies no matter how many people were endangered, or indeed, even if only property were endangered.

IV ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH THESE DECISIONS OF THE FLORIDA SUPREME COURT: STATE V. VARNER, 616 SO.2D 988 (FLA. 1993); STATE V. TYNER, 506 SO.2D 405 (FLA. 1987), AND WILLIAMS V. STATE, 500 SO.2D 501 (FLA. 1986), AND THIS DECISION OF THE SECOND DISTRICT COURT: BASS V. STATE, 496 SO.2D 880 (FLA. 2D DCA 1986).

The cases relied on by the district court, primarily Garcia, supra, are factually distinguishable from the instant case, although their factual distinctions are problematic for this argument. More important is the fact that Garcia predated

this court's decision in Williams, supra, by two years, and Williams superseded and effectively overruled Garcia. In Williams, this court held that Rule 3.701(d)(11), Florida Rules of Criminal Procedure, precludes departure for an offense of which the defendant has not been convicted. 500 So. 2d at 503. Subsequent decisions of this court reaffirm this ruling. See State v. Varner, 616 So. 2d 988 (Fla. 1993) (departure invalid if based on collateral conduct that is criminally punishable); State v. Tyner, supra (courts cannot consider for departure conduct arising out of the circumstances of an offense for which the defendant has not been convicted).

In Varner, the defendant was convicted of shooting into a building, shooting into a vehicle, and aggravated assault, but the departure was based on an allegation that Varner had threatened a witness prior to trial. This court held that, since Varner had not been convicted of witness tampering, the trial court erred in using this conduct as a reason for departure. 616 So. 2d at 988-989.

In Tyner, the defendant was convicted of armed burglary, and was initially charged with two counts of first degree murder. The murders were committed by a codefendant, and the murder charges against Tyner were subsequently dismissed. One of the reasons for departure was that two people were killed as a result of the armed burglary. Agreeing with the Second District, this court held that, even though the deaths were a direct result of the burglary, Rule 3.701(d)(11) prohibited the

departure because Tyner had not been convicted of the murders. Tyner, 506 So. 2d at 406.

In Felts v. State, 537 So. 2d 995 (Fla. 1st DCA 1988), aff'd on other grounds, 549 So.2d 1373 (Fla. 1989), the state argued at trial that the defendant's conduct, a high speed chase resulting in a fatal accident, was a valid reason to depart from the guidelines, citing Garcia, even though the defendant was not convicted of any offense relating to the chase or accident. The First District rejected the state's argument and held departure was invalid when based on conduct arising out of an offense for which no conviction was obtained. Felts, 537 So. 2d at 998.

In Bass v. State, 496 So. 2d 880 (Fla. 2d DCA 1986), also similar to the instant case, the Second District held the high speed chase was not a valid reason for departing from the guidelines, because it was a separate offense for which a conviction was not obtained. Id. at 881-82. Bass relied on the Second District's previous decision in Tyner, and as cited above, Tyner was later approved by this court. Tyner v. State, 491 So.2d 1228 (Fla. 2d DCA 1986), approved, 506 So.2d 405 (Fla. 1987).

Not only has Garcia been implicitly overruled by intervening caselaw from this court, Garcia is also factually distinguishable from the instant case, because it involved

> a defendant who leads police on a high-speed chase, shoots at the police, and who is involved in a wreck during a high-speed chase. . .

Barr, 20 Fla.L.Weekly at D1163. While Barr was involved in a high-speed chase, he did not shoot at the police, nor did he cause any accident. Also, the district court omitted one highly relevant fact, which is that, while the chase occurred during the morning rush hour, it was primarily northbound on I-95, opposite the direction of most rush hour traffic (T-233).

On the other hand, the majority opinion also distinguished Felts from the instant case on the ground that the facts of Felts did not demonstrate "the nature of area where the high-speed chase occurred, the time of day. . ., and whether there were any other vehicles or people on the streets at the time the chase ensured." Yet, the majority relied on the Garcia opinion, which omitted the same facts, save one: that the chase occurred somewhere in Gainesville at 3:20 a.m., a time of day from which the court could judicially notice that it would be highly unlikely for there to be many vehicles or people, if any, on the street. Both Felts and Garcia also involved the defendants shooting at the police, a fact not present here.

While the facts distinguish Garcia from the instant case, these distinctions are problematic because Garcia 1) also could surely have been charged with other crimes as a result of shooting at the police and recklessly causing an accident, thus precluding departure based on such factors, and 2) the one useful fact indicates there was no danger to "many" others. The lack of danger to many others makes Garcia indistinguishable from Felts on the very fact, the key fact, that the district

court found to distinguish Felts from the instant case.

The similarity between Garcia and Felts demonstrates that the district court's distinction that danger to "many" others is not inherent in reckless driving is bogus. The reckless driving statute applies no matter how many people were endangered, or indeed, even if only property were endangered. Barr, 20 Fla.L.Weekly at D1164 (Ervin, J., dissenting).

Moreover, as the dissent pointed out, the real distinction between the instant case and those where "flagrant disregard for the safety of others" is a valid departure reason, involves situations where the conduct could not be separately charged as another crime. E.g., Webster v. State, 500 So.2d 285 (Fla. 1st DCA 1986) (approving departure based on flagrant disregard for safety of others where defendant shot the victim outside a nightclub in the presence of 30 to 40 witnesses, and there was evidence that one witness was within three feet of the victim). Barr at D1164. In conclusion, Garcia could not have reached the same result had the principles of Williams, Tyner and Varner been applied.

The range of holdings obviously indicates a need for this court to clarify the issue for the district courts. Important policy considerations support the need to hold the line on this principle. The most compelling is that a contrary ruling would effectively eliminate a defendant's constitutional right to trial. This court said in Varner:

> Had Varner been charged and. . . sentenced for witness tampering, the guidelines would

> not have permitted a sentence as great as the one he received. This result should not be permitted, because it fosters inconsistent sentencing based on similar facts. Such a state is contrary to the basic precepts underlying the sentencing guidelines.

616 So.2d at 988; see also Barr at D1164, n.2 (Ervin, J., dissenting) ("[p]ermitting deviation from the guidelines. . . would, in essence, be circumventing established legislative punishments by eliminating a trial"); Williams, 500 So.2d at 503 (characterized permitting punishment without a trial as a "Kafkaesque" situation).

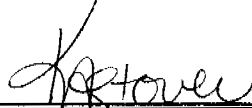
The proper procedure is to separately charge and convict the defendant for each instance of criminal conduct. A departure based on conduct that constitutes a criminal offense, but for which the defendant was not convicted could effectively sentence a defendant to an incarceration period exceeding the maximum for the offense, as in the instant case. Barr was in effect sentenced to an additional 13 years for an offense which would have been only a misdemeanor had it been charged and tried. Id. at D1164.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, appellant requests that this court exercise its discretion and accept review of this case.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sonya Roebuck Horbelt, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Charles F. Barr, inmate no. 311442, Holmes Correctional Institution, P.O. Box 190, Bonifay, Florida 32425, this 22 day of June, 1995.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

CHARLES FREDERICK BARR, Petitioner, vs. THE STATE OF FLORIDA, Respondent,	:	CASE NO. 85,864

APPENDIX

great public importance. (BOOTH and JOANOS, JJ., CONCUR.)

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[1]*Daniels v. State*, 595 So. 2d 952 (Fla. 1992).
[2]*Witt v. State*, 387 So. 2d 922 (Fla. 1980), *cert. denied*, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 612 (1980).
[3]*Hale v. State*, 630 So. 2d 521 (Fla. 1993), *cert. denied*, ___ U.S. ___, 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994).

* * *

Criminal law—Sentencing—Guidelines—Departure—Defendant's conduct surrounding his apprehension for armed robbery, which consisted of a high-speed automobile chase during rush hour traffic that endangered the lives of many innocent persons and demonstrated a flagrant disregard for the safety of others, constituted clear and convincing reason for departure—Fact that defendant was not charged with and convicted of reckless driving does not bar trial court from relying on circumstances surrounding high-speed chase as basis for departure

CHARLES FREDERICK BARR, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 94-1152. Opinion filed May 12, 1995. An appeal from the Circuit Court for Duval County. Aaron K. Bowden, Judge. Counsel: Nancy A. Daniels, Public Defender; Cynthia L. Hain, Certified Legal Intern, and Kathleen Stover, Assistant Public Defender, Tallahassee, for appellant. Robert A. Butterworth, Attorney General; Sonya Roebuck Horbelt, Assistant Attorney General, Tallahassee, for appellee.

(WOLF, J.) Barr appeals from a judgment and sentence after a conviction for armed robbery of a motor vehicle. Appellant contends that his departure sentence was invalid because it was based on criminally punishable conduct for which he was not convicted. The record clearly shows that the departure was based on appellant's conduct surrounding his apprehension for the armed robbery. Because this conduct endangered the lives of many innocent persons and demonstrated a flagrant disregard for the safety of others, it constituted a clear and convincing reason for departure.

Appellant was charged by information with the November 24, 1993, armed robbery of a motor vehicle from Patricia Maddox, and with possession of a firearm by a convicted felon. The charges were severed and the robbery charge proceeded to trial.

Evidence was presented at the March 22, 1994, trial that appellant approached the victim as she pulled into the parking lot at Southern Bell Tower in Jacksonville, and that he took her car after showing her a pistol he had hidden under his coat. The victim immediately reported the theft. A Jacksonville police officer spotted the stolen car, and when he attempted to pull the car over, appellant fled. The chase occurred when traffic was heavy—it was 8:00 a.m. rush-hour traffic, and speeds exceeded 125 miles per hour. Appellant made several illegal U-turns and almost caused several accidents during the chase. The jury convicted appellant on the robbery charge.

On March 23, 1994, the state filed a notice of intent to seek a departure above the recommended sentencing guidelines range as a result of the unreasonable risk to others created by the defendant.

On March 29, 1994, appellant was sentenced to 25 years in prison, which was an upward departure from the guidelines. (Appellant's recommended guideline sentence was seven to nine years, and the permitted range was 5½ to 12 years). A three-year mandatory-minimum was imposed for use of a firearm. After hearing argument from the state and appellant, and testimony from the officer Smith about the car chase, the court entered a written departure order. The court's reasoning for the departure was that appellant displayed a flagrant disregard for the safety of others. According to the court, appellant's reckless driving during the course of the chase with the police exposed numerous innocent citizens to serious harm.

In *Garcia v. State*, 454 So. 2d 714 (Fla. 1st DCA 1984), this court specifically determined that a defendant who leads police on a high-speed chase, shoots at the police, and who is involved in a wreck during a high-speed chase, may receive a departure sentence based on his conduct during the chase. (*In accord Ward v. State*, 568 So. 2d 452 (Fla. 3d DCA 1990), a defendant whose conduct puts many people at risk may receive a departure sentence). In *Miller v. State*, 549 So. 2d 1106 (Fla. 2d DCA 1989), *reversed on other grounds*, 573 So. 2d 337 (Fla. 1991), the second district upheld a departure sentence based on the defendant knowingly creating a great risk of injury or death to a large number of persons. In that case, the police began pursuing the defendant on a tip that he was selling batteries from his car and a high-speed chase ensued. The defendant traveled south in a north-bound lane of traffic at speeds between 50 and 80 miles per hour. Traffic was forced to swerve off the road, and the defendant's car collided head-on with another car.

In *Campos v. State*, 515 So. 2d 1358, 1360 (Fla. 4th DCA 1987), the fourth district acknowledged that the conduct of a defendant "who personally created an extreme risk to the physical safety of law enforcement officers and innocent citizens by firing several shots from an Uzi semi-automatic rifle at pursuing police officers during the high-speed chase in heavy traffic on I-95 at speeds over 100 miles per hour setting the case apart from the ordinary robbery" would justify an upward departure from the sentencing guidelines.

Appellant urges us, however, to depart from this line of cases and hold that a high-speed chase which endangers the lives of a large number of people should not constitute a valid reason for a departure sentence because the defendant was not charged and convicted of reckless driving. Appellant, at least partially, relies on the case of *Felts v. State*, 537 So. 2d 995 (Fla. 1st DCA 1988), *decision approved*, 549 So. 2d 1373 (Fla. 1989), for this proposition. Appellant's position is not well taken for several reasons.

First, there is no indication in the *Felts* opinion that the defendant endangered anyone other than himself and his fellow passenger. The *Felts* opinion is silent about the nature of the area where the high-speed chase occurred, the time of day the chase occurred, and whether there were any other vehicles or people on the streets at the time the chase ensued. While the opinion stated that the reason given for the departure was the unnecessary danger to many persons, it cannot be determined if this allegation was supported by the record. Indeed, as the fifth district stated in *Strawn v. State*, 576 So. 2d 877, 879 (Fla. 5th DCA 1991), while placement of a substantial number of bystanders at risk during the commission of a robbery constitutes a valid reason for departure where the record fails to support such an allegation, a departure sentence could not be upheld.

In the instant case, the facts demonstrate that chase occurred on busy thoroughfares during rush hour, several accidents almost occurred, and appellant's behavior posed a direct threat to a substantial number of people. In addition, in *Felts*, *supra*, the uncharged crimes would include not only reckless driving but also vehicular homicide based on the death of the passenger (who was the only person who can be shown to have been endangered from the facts recited in the opinion). Thus, all the factors justifying the departure in *Felts* were inherent in the uncharged offenses. In the instant case, the only charge that appellant argues which could have been brought as a result of the high-speed chase was reckless driving.[1] Clearly, it is neither an element of the offense of reckless driving nor an inherent factor in a reckless driving charge that a *large or numerous* number of people be exposed to serious harm.

The judgment and sentence are, therefore, affirmed. (MINER, J., concurs; ERVIN, J., dissenting with written opinion.)

(ERVIN, J., dissenting.) Because I consider that the sole reason given for the upward departure sentence imposed on appellant is invalid under Florida Rule of Criminal Procedure 3.701(d)(11), as it is a factor relating to the instant offense for which he was not convicted, *i.e.*, reckless driving, I respectfully dissent.

Appellant was convicted of armed robbery of a motor vehicle. The recommended guideline sentence was seven to nine years

and the permitted guideline sentence was 5½ to 12 years in prison. The court imposed an upward departure sentence of 25 years and gave as its sole reason for departure appellant's "flagrant disregard for the safety of others," as evidenced by his flight from the police to avoid capture and his reckless driving which exposed numerous citizens to serious harm. As the majority points out, evidence was presented disclosing that appellant led the police on a high speed chase on a busy interstate highway. Speeds exceeded 125 mph; appellant made several illegal U-turns and nearly caused several accidents during the pursuit.

I consider that reversal is required under *Felts v. State*, 537 So. 2d 995, 997-98 & n.7 (Fla. 1st DCA 1988), *approved*, 549 So. 2d 1373 (Fla. 1989). In *Felts*, the defendant was convicted of armed robbery, and a departure sentence was imposed, partly because he drove the victim's car at excessive speeds in an attempt to elude the authorities, resulting in an accident which killed an accomplice. The state argued that the defendant's high speed flight from the pursuing officers constituted an extreme risk to the physical safety of both citizens and law enforcement officers, that such conduct was not inherent in the offense of robbery, and that it could support departure as it was not factored in the scoresheet. Therefore, the state contended that the court could lawfully depart from the guidelines based on circumstances surrounding the offense, and it cited *Garcia v. State*, 454 So. 2d 714 (Fla. 1st DCA 1984). This court, relying on *Williams v. State*, 500 So. 2d 501 (Fla. 1986), and *State v. Tyner*, 506 So. 2d 405 (Fla. 1987), held that the departure reason given was invalid, because it involved circumstances surrounding the offense for which a conviction was not obtained. *Accord Bass v. State*, 496 So. 2d 880, 881-82 (Fla. 2d DCA 1986) (rejecting as a valid departure reason the fact that the defendant had endangered the lives of many people during a high speed chase, because such conduct constituted a charge arising from the same criminal episode which was not filed against the defendant, *i.e.*, reckless driving).

Rather than follow the above case law, the majority chooses instead to follow *Garcia*. *Garcia*, however, was decided before the two supreme court decisions cited in *Felts*, namely, *Williams* and *Tyner*, both of which held that rule 3.701(d)(11) prohibits departure sentences based on reasons relating to the instant offense for which convictions have not been obtained.[2]

The other cases the majority cites, *Campos v. State*, 515 So. 2d 1358 (Fla. 4th DCA 1987), and *Miller v. State*, 549 So. 2d 1106 (Fla. 2d DCA 1989), *rev'd on other grounds*, 573 So. 2d 337 (Fla. 1991), merely cite *Garcia* or *Scurry v. State*, 489 So. 2d 25 (Fla. 1986) (finding that conduct evincing flagrant disregard for the safety of others may be a valid reason for departure). These cases do not mention the rule applied in *Williams* and *Tyner*.

Because *Garcia* was decided prior to *Williams* and *Tyner*, and because *Campos* and *Miller* do not refer to these two supreme court decisions, I consider the better course is to follow *Felts*, which clearly applied the precedent established in the two supreme court decisions. In so saying, I note that cases which have upheld departure sentences based on conduct evincing flagrant disregard of the safety of others involve situations where the conduct could not be separately charged as another crime. *See, e.g.*, *Burgess v. State*, 524 So. 2d 1132 (Fla. 1st DCA 1988) (upholding departure based on flagrant disregard for safety of others where defendant shot two victims who were standing in an alley while three bystanders stood nearby); *Webster v. State*, 500 So. 2d 285 (Fla. 1st DCA 1986) (approving departure based on flagrant disregard for the safety of others where defendant shot the victim outside a nightclub in the presence of 30 to 40 witnesses, and there was evidence that one witness was within three feet of the victim).

In the case at bar, appellant clearly could have been charged with reckless driving, which is defined in section 316.192(1), Florida Statutes (1993), as driving a vehicle "in willful or wanton disregard for the safety of persons or property." The statute makes no mention of the number of persons whose safety is threatened; consequently, whether a defendant threatens the safety of one or many, the charge of reckless driving applies. Departure based on criminal conduct for which appellant was neither charged nor convicted, in my judgment, amounts to the imposition of an additional 13-year sentence for conduct which would, at most, be punishable by six months of imprisonment for a second violation. § 316.192(2), Fla. Stat. (1993). This type of departure sentence is precisely that which *Williams* prohibits.

I would therefore reverse appellant's departure sentence and remand for imposition of a guideline sentence. *See Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987).

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[1]Even if other charges could have been brought, we are unaware of any offense where it is an inherent factor of the offense that a large group of people's lives were endangered.

[2]In *Williams*, the trial court's reason for departure was the defendant's failure to appear for sentencing. In determining the same to be invalid, the supreme court explained that failing to appear for sentencing in a criminal case is itself a criminal offense, yet the defendant was not charged or convicted of such crime. Permitting deviation from the guidelines for failure to appear would, in essence, be circumventing established legislative punishments by eliminating a trial. Moreover, a departure sentence based on such reason was violative of rule 3.701(d)(11), which prohibits departures based on offenses for which the defendant was not convicted.

In *Tyner*, the supreme court reversed an upward departure based in part upon the deaths of two persons during a burglary. The court explained that departure could not be grounded on the deaths, because the defendant was not convicted of them.

* * *

Criminal law—Probation revocation—Remanded for entry of written order

WALTER HAROLD MOSLEY, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 94-4091. Opinion filed May 12, 1995. An appeal from the Circuit Court for Escambia County. Edward P. Nickinson, Judge. Counsel: Nancy A. Daniels, Public Defender and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for appellant. Robert A. Butterworth, Attorney General and James W. Rogers, Senior Assistant Attorney General, Tallahassee, for appellee.

(PER CURIAM.) We affirm the judgment and sentence but remand to the trial court with directions to enter a written order of probation revocation. *Maxlow v. State*, 636 So. 2d 548 (Fla. 2d DCA 1994). Appellant need not be present for this purpose. *Sing Eng v. State*, 350 So. 2d 559 (Fla. 2d DCA 1977). (WOLF, WEBSTER and LAWRENCE, JJ., CONCUR.)

* * *

Dissolution of marriage—Award of rehabilitative alimony to wife inappropriate in absence of evidence that wife contemplates retraining, further education, or other rehabilitation to enhance her earning ability—On remand, trial court may reconsider economic distribution effected by remaining provisions of judgment as well as amount of life insurance necessary to secure permanent alimony obligation

GEORGE A. KENNEDY, Appellant, v. RUBY KENNEDY, Appellee. 1st District. Case No. 94-2248. Opinion filed May 12, 1995. An appeal from the Circuit Court for Okaloosa County. Keith Brace, Judge. Counsel: Tonya M. Collins and John P. Townsend of John P. Townsend, P.A., Fort Walton Beach, for Appellant. Tracy O. Strom of Richard H. Powell, P.A., Fort Walton Beach, for Appellee.

(PER CURIAM.) George Kennedy appeals from a final judgment of dissolution, alleging several points of error. We find merit in Mr. Kennedy's assertion that there is no adequate basis in the record to support the trial court's award of rehabilitative alimony. We reverse that award and remand to the trial court for further proceedings.

The record in this case is devoid of evidence that the former wife contemplates any retraining, further education, or other "rehabilitation" to enhance her earning ability. Ms. Kennedy worked prior to and throughout most of the more than seven years she was married to Mr. Kennedy, and she testified at the