

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
QUESTION PRESENTED	4
WHETHER, UNDER RULE 3.701(d)(14) A PERSON FOUND GUILTY OF VIOLATION OF PROBATION MAY BE SENTENCED BEYOND THE NEXT HIGHER CELL UPON CONSID- ERATION BY THE TRIAL COURT OF CIRCUMSTANCES SURROUNDING THE VIOLATION FOUND BY THE TRIAL COURT TO BE CLEAR AND CONVINCING REASONS FOR DEPARTURE?	
SUMMARY OF ARGUMENT	5
ARGUMENT	6
<u>ISSUE</u>	
UNDER RULE 3.701(d)(14) A PERSON FOUND GUILTY OF VIOLATION OF PRO- BATION MAY BE SENTENCED BEYOND THE NEXT HIGHER CELL UPON CONSIDERATION BY THE TRIAL COURT OF CIRCUMSTANCES SURROUNDING THE VIOLATION FOUND BY THE TRIAL COURT TO BE CLEAR AND CONVINCING REASONS FOR DEPARTURE.	
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Gordon v. State,</u> 10 F.L.W. 2748 (Fla. 2d DCA December 11, 1985)	7
<u>Hall v. State,</u> 10 F.L.W. 2412 (Fla. 2d DCA October 23, 1985)	7
<u>Hutchinson v. State,</u> 10 F.L.W. 2691 (Fla. 1st DCA December 5, 1985)	7
<u>Pentaude v. State,</u> 10 F.L.W. 2625 (Fla. 1st DCA November 22, 1985)	3
<u>Riggins v. State,</u> 10 F.L.W. 2441 (Fla. 5th DCA October 31, 1985)	7
<u>Weems v. State,</u> 469 So.2d 128 (Fla. 1985)	9
<u>Williams v. State,</u> 11 F.L.W. 3 (Fla. 1st DCA December 19, 1985)	6
 <u>OTHER AUTHORITIES</u>	
Fla.R.Crim.P. 3.701	8
Fla.R.Crim.P. 3.701(d)(14)	3, 4, 5, 6, 7, 8

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Respondent,

vs.

CASE NOS. 68,081 & 68,088

MICHAEL ALLEN PENTAUDE,

Respondent/Petitioner.

_____ /

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner the State of Florida, the prosecution and appellee in the courts below, will be referred to as "Petitioner." Respondent, Michael Allen Pentaude, the criminal defendant in the trial court and the appellant in the First District Court of Appeal, will be referred to as "Respondent."

References to the record on appeal, which contains the legal documents filed in this cause, will be designated "(R)." References to the transcript of testimony and proceedings at the sentencing hearing will be designated "(T)."

All emphasis is supplied by Petitioner.

STATEMENT OF THE CASE AND FACTS

Respondent was placed on probation for a period of five years on January 31, 1984, after pleading guilty to grand theft (R 47-49).

An affidavit of violation of probation for violating conditions 3, 6, 7, 8 and 9 was filed on April 5, 1984. Respondent admitted the violations (R 52, T 2).

At the sentencing hearing the trial judge departed from the recommended guidelines sentences of any non-state prison sanction, or 12 to 30 months incarceration in the next higher cell, by imposing a sentence of five years imprisonment (R 87, T 7). The following reasons were given for the departure:

You have violated conditions of your probation and the trust imposed upon you not only by failing to abide by the technical conditions of probation, but apparently having been convicted of an additional crime which shows an utter disregard for the law and for the chances previously given you.

Those reasons the Court deems to be sufficient to aggravate your sentence beyond the sentencing guidelines.

(T 9-10).

Respondent appealed his sentence to the District Court of Appeal, First District, and the following question was certified to be of great public importance:

WHETHER, UNDER RULE 3.701(d)(14)
A PERSON FOUND GUILTY OF VIOLATION
OF PROBATION MAY BE SENTENCED BEYOND
THE NEXT HIGHER CELL UPON CONSID-
ERATION BY THE TRIAL COURT OF
CIRCUMSTANCES SURROUNDING THE
VIOLATION FOUND BY THE TRIAL COURT
TO BE CLEAR AND CONVINCING REASONS
FOR DEPARTURE?

Pentaude v. State, 10 F.L.W. 2625, 2626 (Fla. 1st DCA November
22, 1985).

QUESTION PRESENTED

WHETHER, UNDER RULE 3.701(d)(14)
A PERSON FOUND GUILTY OF VIOLATION
OF PROBATION MAY BE SENTENCED BEYOND
THE NEXT HIGHER CELL UPON CONSID-
ERATION BY THE TRIAL COURT OF
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VIOLATION FOUND BY THE TRIAL COURT
TO BE CLEAR AND CONVINCING REASONS
FOR DEPARTURE?

SUMMARY OF ARGUMENT

Florida Rule of Criminal Procedure 3.701(d)(14) is merely a codification of pre-existing case law and does not preclude a trial court from sentencing a defendant to any term within the statutory limits based solely upon a violation of probation as long as the court expresses its reasons for departure where the sentence imposed is greater than the "next higher cell."

ARGUMENT

ISSUE

UNDER RULE 3.701(d)(14) A PERSON FOUND GUILTY OF VIOLATION OF PROBATION MAY BE SENTENCED BEYOND THE NEXT HIGHER CELL UPON CONSIDERATION BY THE TRIAL COURT OF CIRCUMSTANCES SURROUNDING THE VIOLATION FOUND BY THE TRIAL COURT TO BE CLEAR AND CONVINCING REASONS FOR DEPARTURE.

In addressing this issue the lower court stated as follows:

[Respondent] contends that since the violation of probation is already accounted for by increasing the sentence to the next higher cell, departure beyond that cell may not be granted on any circumstances surrounding the violation but must be completely independent of the violation. We disagree. Where a trial judge finds that the underlying reasons for violation of probation (as opposed to the mere fact of violation) are more than a minor infraction and are sufficiently egregious, he is entitled to depart from the presumptive guidelines range and impose an appropriate sentence within the statutory limit. The sentencing guidelines were primarily intended to aid the trial judge in the consistent administration of justice, not to usurp his judicial discretion. Fla.R.Crim.P. 3.701(b)(6); Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984).

10 F.L.W. at 2625-26. Another decision of the lower court, as well as those of the Second and Fifth District Courts of Appeal, properly interpret Rule 3.701(d)(14). Williams v. State, 11 F.L.W. 3 (Fla. 1st DCA December 19, 1985);

Gordon v. State, 10 F.L.W. 2748 (Fla. 2d DCA December 11, 1985); Riggins v. State, 10 F.L.W. 2441 (Fla. 5th DCA October 31, 1985); Hall v. State, 10 F.L.W. 2412 (Fla. 2d DCA October 23, 1985); Hutchinson v. State, 10 F.L.W. 2691 (Fla. 1st DCA December 5, 1985). Petitioner agrees that this provision does not preclude a trial court from sentencing a defendant to any term within the statutory limits based solely upon the probation violation as long as the court expresses its reasons for such a departure.¹ It is submitted that implicit within the rule is the judge's prerogative to impose a sentence beyond the next higher cell based solely upon the probation violation and the surrounding circumstances.

Petitioner contends that Rule 3.701(d)(14) was not intended to alter in any way a trial judge's discretion to sentence a defendant to any sentence within the statutory limits, but rather was intended only to codify previous appellate court decisions holding that a violation of probation is a clear and convincing reason for departure and to make it clear that even if an individual was placed on probation prior to the effective date of the sentencing guidelines, sentencing following a violation is "to be in

¹Rule 3.701(d)(14) provides: Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

accordance with the guidelines," including the rules governing departures.

In the instant case, the trial court departed from the recommended range due not only to seven violations, but also because Respondent was convicted of a substantive crime during the same probationary period. Clearly, a judge must be allowed to exceed the next higher cell under these circumstances. It must also be noted that other reasons for departure which were stated at the sentencing hearing were inadvertently omitted from the separate written reasons, to wit: one of the violations was committed 18 days after Respondent was placed on probation and another was committed within two months after he was placed on probation (T 11). It is clearly within the trial court's discretion to consider an aggravating factor which is not provided for on the scoresheet and which is not precluded from consideration under Rule 3.701.

Rule 3.701(d)(14) merely states that the sentence imposed after revocation of probation may be included within the original cell or may be increased to the next higher cell without requiring a reason for departure. It does not purport to cover a revocation based upon violations of more than one condition or a revocation based upon repeated violations or a revocation of increased non-penal sanctions or a revocation based upon violations of penal statutes rather than "technical" conditions not involving criminal activity. Literally, the rule merely states that a revocation of probation or community


control, which might legally be predicated upon any violation of even one condition, can result in a one cell bump without any stated reasons. Of course, Petitioner does not view any violation of a judicial condition of probation as being merely technical. To do so would undermine the very concept of probation and would constitute an assault upon the validity of the condition itself. Clearly, the rule is meant to discourage a probationer from violating a condition of probation or community control with impunity by alleviating the necessity of stating reasons for a one cell departure.

The only rational understanding of the rule is that the trial judge has discretion to depart more than one cell depending upon the character of the violation, the number of conditions violated, the number of times he has been placed on probation, the length of time he has been on probation before violating the terms and conditions, and any other factor material or relevant to the defendant's character. Weems v. State, 469 So.2d 128 (Fla. 1985). This interpretation of course does not intrude upon the traditional discretion of the trial judges, which the guidelines were not intended to do.

Thus, Petitioner urges this Court to answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kenneth L. Hosford, 345 Office Plaza, Tallahassee, Florida, 32301, on this 17th day of January, 1986.


HENRI CHEVET CAWTHON