IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA

v. Case No. CRC91-07005CFANO

DENNIS D. CORREA
907337?

DEFENDANT DENNIS D. CORREA'S MEMORANDUM OF LAW IN SUPPORT OF A DOWNWARD DEPARTURE IN SENTENCING

Defendant, Dennis D. Correa, by and through his undersigned counsel, hereby submits this memorandum for the Court's edification in connection with sentencing. In furtherance of the goals underlying the Sentencing Guidelines, § 921.001 et seq., Florida Statutes (1988), it is appropriate to inform this Court of the existence of mitigating factors which warrant a downward departure from the recommended sentencing range of four and one-half to five and one-half years incarceration.[1] The mitigating factors which must be taken into account include Mr. Correa's amenability to rehabilitation, the substantial likelihood that rehabilitation will be successful and the defendant's genuine remorse and strong desire to accomplish complete restitution. Defendant Correa respectfully submits that a period of incarceration of no more than two and one-half years, followed by probation with the specific provision for long term treatment and victim restitution is appropriate in this instance. Moreover, any sentence in excess of the low end of the applicable guideline range would not further the ends of justice.

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[1]The permissive range in this case is between three and one-half and seven years.

I

The facts giving rise to the Information filed against Mr. Correa by the State are not a source of contention. Mr. Correa is charged with five counts of grand theft committed between approximately October 26, 1986 and October 27, 1992, in violation of Chapter 812.014, Florida Statutes. Throughout the course of both the Florida Bar's investigation and the subsequent inquiry by the State Attorney's Office, wrongdoing was neither denied nor covered up. Not only has Mr. Correa cooperated fully with investigating authorities by opening his records, he in fact voluntarily resigned from the Florida Bar Association in May of 1991. Moreover, on October 20, 1993, Mr. Correa voluntarily spoke under oath with the prosecutors assigned t this case. He candidly and completely detailed his criminal conduct and his desire t make full restitution.

In standing up to the pending charges with steadfast insistence on making restitution for his misdeeds, Mr. Correa has demonstrated his remorse for the breach of trust visited upon his clients by his actions. Mr. Correa's remorse is corroborated by mental health counselor Sarah R. Bradley, Ed.S., with whom he has been in treatment since approximately January of 1992. A copy of Ms. Bradley's curriculum vitae is attached hereto as Exhibit A. The authenticity of the Defendant's remorse has been empirically documented by Dr. Gerald E. Reynolds, Ph.D., whose clinical evaluation of Mr. Correa reveals not only that the Defendant is experiencing genuine remorse, but that his ability to accomplish victim restitution will play a

significant and therapeutic role in his rehabilitation effort. Dr. Reynolds' resume is attached hereto as Exhibit "B"

During his 20 year career as a practicing attorney in the State of Florida, Mr. Correa earned a reputation among his peers as a highly competent practitioner in the field of estate planning and investment counseling. In his personal life, Mr. Correa has been married for 25 years to his childhood sweetheart, Judy Correa. Together they have raised two children, Christopher Todd Correa and Colby Correa.

In addition to having wide based support among family and friends, Mr. Correa has lined up future employment opportunities which will enable him to make restitution and to which he looks forward with anticipation. James McGowen, President and Chief Executive Officer of Financial Focus, Inc., is fully aware of Mr. Correa's problems and is, nonetheless, prepared to employ the Defendant to market the company's services using his estate planning expertise. In an effort to assist in Mr. Correa's rehabilitation, Mr. McGowen would place restrictions on the Defendant's access to the corporate checking account. As will Sarah Bradley and Dr. Reynolds, Mr. McGowen will be present at the sentencing hearing to personally attest to his commitment to Mr. Correa and to address questions or concerns of the Court.

Mr. Correa has also been offered the opportunity to work with Tim Baxter in the construction business. Mr. Baxter will also be present at the sentencing hearing. Whatever job Mr. Correa takes,

however, he plans to devote a substantial portion of his income to victim restitution.

Because the Court will hear from the numerous individuals who wish to speak on Mr. Correa's behalf at the time of sentencing, further elaboration into the nature and extent of Mr. Correa's support network is unnecessary in the context of this memorandum. A compilation of letters from Mr. Correa's supporters has been submitted under separate cover, simultaneously with this memorandum. More pressing is the need to place Mr. Correa's situation in the context of the law as it pertains to application of the sentencing guidelines. The discussion which follows is, therefore, intended to give this Court an explication of the case law concerning when mitigating circumstances warrant departure from the guidelines.

II

In an effort to achieve a greater degree of consistency and fairness in the sentencing process throughout the State of Florida, sentencing guidelines were implemented in the fall of 1983. Rule 3.701, Fla.R.Crim.P. As articulated in the Statement of Purpose section of the guidelines:

> The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing practices throughout the state. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining their relative importance in the sentencing decision.

Rule 3.701(b), Fla.R.Crim.P. See also Dranan v. State, 554 So.2d 512 (Fla. 1990)(quoting In re Rules of Criminal Procedure (Sentenc-

ing Guidelines), 419 So.2d 848, 849 (Fla. 1981)). Significantly, the guidelines are not intended to eliminate judicial discretion in the sentencing process. Among the specifically enunciated principles embodied in the guidelines is the tenet that:

> While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made when circumstances or factors reasonably justify the aggravation or mitigation of the sentence. The level of proof necessary to establish a departure from a sentence under the guidelines is **a preponderance of the evidence.**

Rule 3.701(b)(6), Fla.R.Crim.P.[1] The guidelines specifically provide for departure when there exist "circumstances or factors that reasonably justify aggravating or mitigating the sentence." Fla. R.Crim.P., 3.701(d)(11).

Although the framers of the guidelines were careful not to place limitations on the factors properly considered in mitigation or aggravation of a sentence, the guidelines do contain the proviso that "[r]easons for deviating from the guidelines shall not include factors relating to prior arrests without conviction or the instant offenses for which convictions have not been obtained." Rule 3.701(d)(11), Fla.R.Crim.P. The Commission was careful to articulate, however, that "[o]ther factors, consistent and not in conflict with the statement of purpose, may be considered and utilized by the

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[1]Prior to the 1988 Amendments, the standard of proof required for departure from the guidelines was "clear and convincing" evidence. In Griffin v. State, 546 So.2d 91 (Fla. 1st D.C.A. 1989), the First Circuit Court of Appeal sustained the constitutionality of the reduction in the standard of proof to a preponderance of evidence.

sentencing judge." Sentencing Guidelines Commission Notes (d)(11) (1988 Amendments).

It is against this framework that the Florida courts have been grappling to define the parameters of judicial discretion in sentencing. See State v. Mischler, 488 So.2d 521 (Fla. 1986)(noting that, since the implementation of the guidelines the five district courts had come to disparate conclusions over whether an identical reason for departure is "clear and convincing"). The pervasive theme which has emerged in the case law is that mitigation of a recommended sentence is warranted when, for a variety of reasons, the defendant poses no future threat to society. See for example State v. Sachs, 526 So.2d 48 (Fla. 1988)(defendant's conduct being an isolated incident, there is no future threat to society); State v. Forbes, 536 So.2d 156 (Fla. 3d D.C.A. 1988)(strong motivation to rehabilitation and excellent probability of rehabilitation are valid bases for downward departure); State v. Regan, 564 So.2d 1208 (Fla. 2d D.C.A. 1990)(defendant did not constitute a threat to society where the particular circumstances of the crime ameliorated the level of the defendant's guilt or moral culpability); Pope v. State, 441 So.2d 1072, 1078 (Fla. 1983)(evidence of remorse may properly be considered in mitigation of sentence).

Perhaps because rehabilitation holds the key to insuring societies' protection against criminal recidivism, a defendant's amenability to rehabilitation is among the most frequently articulated reasons for downward deviation from a recommended sentence. The Florida Supreme Court recently emphasized the importance of

amenability to rehabilitation in the frequently cited decision, Herrin v. State, 568 So.2d 920 (Fla. 1990). In Herrin, the trial judge departed from the presumptive sentencing range of between three and one-half and four and one-half years incarceration and sentenced the defendant to two years community control, followed by one year of probation. Citing Barbera v. State, 505 So.2d 413 (Fla. 1987),[1] the trial judge assessed Herrin's amenability to treatment as evidenced by his voluntary enrollment in a drug treatment program.[2] Herrin, 568 So.2d at 921.

Based on a narrow reading of Barbera, the Second District Court of Appeal ignored the trial judge's finding with regard to amenability to rehabilitation and reversed. Focusing solely on the substance abuse aspects of Barbera, the district court determined that intoxication or substance abuse can be clear and convincing reason for downward departure in sentencing only where, as was the case in Barbera, the defendant is intoxicated at the time the crime was committed.[1]

Because the Second District Court of Appeal's strict interpretation of Barbera conflicted with that of other district courts, the Supreme Court accepted jurisdiction to hear the case. Herrin, 568 So.2d at 921. Significantly, the Court stated without hesitation its unwillingness to hold that substance abuse can only warrant

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[1]Barbera was subsequently receded from on other grounds in Pope v. State, 561 So.2d 554 (Fla. 1990).

[2]Barbera was decided prior to the 1988 Amendment reducing the standard of proof from "clear and convincing" to "a preponderance of the evidence."

departure in those cases in which there is an impairment at the time the crime is committed. In keeping with the guidelines underlying goal of uniformity in sentencing, the Court, likewise, stopped short of stating a rule which would permit downward departure in every case of drug or alcohol addiction. However, based upon the trial judge's finding of drug addiction coupled with amenability to rehabilitation, the Court astutely reasoned:

> For purposes of guidelines departures, . . . a defendant's substance abuse must be considered together with his or her amenability to rehabilitation. . . . (W)e hold that substance abuse, standing alone, cannot justify a departure. There must also be a finding based upon competent substantial evidence that if the defendant's sentence is reduced in order to permit treatment for the dependency, there is a reasonable possibility that such treatment will be successful.

Herrin, 568 So.2d at 922. See also State v. Traster, 610 So.2d 572, 574 (Fla. 4th D.C.A. 1992) (amenability to rehabilitation can itself be valid reason for departure, provided there is a reasonable possibility that rehabilitation will be successful).

In Herrin's case, the Court concluded that the evidence was sufficient to support the reduced sentence. The fact that Herrin had abstained from drugs for a period of time following an initial period of voluntary treatment was deemed sufficient evidence of the potential for rehabilitation. Herrin, 568 So.2d at 922. That further treatment was being sought was found to corroborate this conclusion. Herrin, 568 So.2d at 922.

As in Herrin, Mr. Correa's amenability to treatment and the strength of his commitment to rehabilitation are evidenced by his voluntary submission to counseling prior to the inception of the

criminal investigation, and by his continued participation in therapy through the present date. See also Traster, 610 So.2d at 574 (defendant's voluntary submission to counseling prior to sentencing and willingness to participate in treatment program are valid considerations in downward departure). At sentencing, Mr. Correa will attest to his commitment to continue treatment for as long as necessary to accomplish complete rehabilitation.

Although the Florida Supreme Court specifically determined that expert testimony is not necessary to support a finding of amenability to rehabilitation, Herrin, 568 So.2d at 922, this Court need not rely exclusively on Mr. Correa's self-serving representations in this regard. Having worked with both Mr. Correa and his wife for an extended period of time, Sarah Bradley will attest to the defendant's intense motivation to become rehabilitated and of her opinion that rehabilitation can be accomplished with continued therapy. Dr. Reynolds will tell the Court that Mr. Correa is not only experiencing reactive depression of clinical significance, but that he suffers from a personality disorder. Based upon extensive psychological testing and evaluation Dr. Reynolds will opine that with long-term treatment Mr. Correa will be able to maximize his recovery. According to Dr. Reynolds, Mr. Correa is an exceptionally intelligent individual who is readily amenable to rehabilitation on a rational cognitive level.

Although Herrin dealt with drug addiction, a factor not present in the case at bar, the courts of this state also recognize that a defendant can possess an emotional or intellectual state which may

justify mitigation of sentence when coupled with amenability to rehabilitation. Smith v. State, 512 So.2d 50 (Fla. 2d D.C.A. 1988); State v. Twelves, 461 So.2d 491 (Fla. 1d D.C.A. 1985); but cf. State v. Alexander, 591 So.2d 1029 (Fla. 1d D.C.D. 1991)(distinguishing Twelves on grounds that amenability to treatment is not equivalent to showing a strong motivation for rehabilitation).[1] In State v. Twelves, 461 So.2d 491 (Fla. 1d D.C.A. 1985), for instance, the Third District Court of Appeal sustained a mitigated sentence based upon expert evidence that the defendant suffered from Post Traumatic Stress Disorder which was amenable to treatment by designated outreach programs. The Court was persuaded further concerning the defendant's potential for rehabilitation by the testimony of support from family, friends and employers. In the instant case, the fact that Mr. Correa has the overwhelming support of his family, friends and potential employers greatly enhances his potential to become fully rehabilitated. See letters submitted under separate cover.

The Twelves decision was subsequently cited with approval by the Second District Court of Appeal in a case in which the defendant received a mitigated sentence for convictions on 12 counts of sending threatening letters and four counts of threatening harm to a public servant based upon the trial court's finding that his actions "were motivated by 'an extreme emotional condition'". Smith, 512 So.2d at 51. In affirming the downward departure, the

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[1]The age of the defendant has also been held to be a mitigating factor when, by virtue of age, the defendant is a good candidate for rehabilitation. State v. Morales, 522 So.2d 464 (Fla. 4th D.C.A. 1988).

district court observed that the evidence concerning the defendant's emotional or intellectual state justified mitigation, even though it stopped short of demonstrating incompetence or insanity. Id. As stated by the district court:

> Smith's punishment is . . . to be gauged by . . . such matters as his dangerousness, the likelihood of recidivism, the actual harm done, and the possibility that his behavior was influenced by factors not entirely within his control.

Smith, 532 So.2d at 54.

In addition to amenability to rehabilitation, a second factor frequently cited in support of downward departure is a defendant's genuine remorse. For constitutional reasons, lack of remorse cannot constitute a valid reason for an upward departure from the guidelines. Heartfelt remorse on the part of the defendant may, however, properly be considered as a mitigating factor. State v. Sachs, 526 So.2d at 51; Pope v. State, 441 So.2d at 1071 ("[a]ny convincing evidence of remorse may properly be considered in mitigation of the sentence); State v. Howell, 572 So.2d 1009 (Fla. 1st D.C.A. 1991).

In the instant case, Mr. Correa will speak personally of his remorse and of his intense desire to make full restitution to the victims of his crime. Again, however, the Court need not rely solely on the Defendant's self-serving testimony as proof of his remorse. Mr. Correa's remorse is corroborated by Dr. Reynolds' empirical findings, as well as by the testimony of treating mental health counselor, Sarah Bradley. Ms. Bradley will share with the Court the break through which occurred in Mr. Correa's treatment when he was finally able to reveal in therapy the facts underlying

the criminal charges for which he now faces sentencing. Only then was the Defendant able to begin to deal with the concomitant guilt and remorse which had, theretofore, weighed so heavily upon him.

III

Having voluntarily relinquished his license to practice law, Mr. Correa posses no future threat to society. Mr. Correa appreciates, however, the seriousness of the offense which he has committed and acknowledges that a period of incarceration is fitting. Accordingly, the defense does not seek to avoid incarceration. Rather, it is submitted that a departure sentence in the range of two and one-half years is appropriate under the circumstances of this case. Moreover, any sentence in excess of that which is requested would serve no tenable purpose other than to make an example of this defendant.

While a severe sentence can send an invaluable message to society when administered in the proper context, the existence of compelling mitigating factors in the case at bar counsel against such action. As the evidence demonstrates, Mr. Correa is both amenable to rehabilitation and strongly motivated to achieve the complementary goals of total rehabilitation and complete victim restitution. The substantial likelihood that the Defendant will be successful in his efforts to accomplish rehabilitation is illustrated by his genuine remorse and by his strong commitment to participation in a treatment regime. Both Mr. Correa's treating mental health counselor, Sarah Bradley, and evaluating psychologist, Dr. Gerald Reynolds, agree that a prison term in excess of that proposed

by the defense would, at best delay and, at worst substantially hamper, the ultimate goal of rehabilitation.

WHEREFORE, under the particular circumstances of this case, the Defendant prays that this Court will carefully consider the testimony to be presented at the hearing on November 8, 1991, and impose a mitigated sentence of two and one-half years incarceration, followed by probation with the specific provision for long-term treatment and victim restitution.

Respectfully submitted, this [illegible] day of November, 1991.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by hand, to ROBERT LEWIS, ESQUIRE, Assistant State Attorney, 5100 144th Avenue North, Clearwater, Florida 34620, on this 5th day of November, 1991.

Shawn A. Burkhain

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