IN THE SUPREME COURT OF FLORIDA

TERRY B. HENDRIX,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 65,928
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

As stated by the district court's opinion, the defendant, on appeal, was challenging his four-year prison sentence imposed by the trial court outside the sentencing guidelines. Hendrix v. State, ___ So.2d ___, 9 FLW 1697 (Fla. 5th DCA Case No. 83-1702, 8/2/84). (Appendix 1) Hendrix, who had pleaded guilty to grand theft, had a total of twenty-five points under the guidelines, the maximum sentence under the matrix for category six crimes thus being "any nonstate prison sanctions." Of these twenty-five points, twelve resulted from the defendant's prior convictions for one third-degree felony and two misdemeanors. Hendrix, supra. Citing this prior record as justification, the trial court departed from the presumptive guidelines sentence, and imposed a sentence of four years imprisonment, a three-cell departure. Id.

On appeal, Hendrix contended that since his prior record was taken into account in calculating his guidelines

score, it was error to reconsider this same factor to justify departure from the guidelines. Id. The District Court of Appeal, Fifth District, affirmed by a two-to-one vote the trial court's departure, ruling that since the doubling was not specifically precluded by the sentencing guidelines rule, it was acceptable:

> Under Florida Rule of Criminal Procedure 3.701(d)(5), and the Committee Note thereto, each separate prior felony and misdemeanor conviction in an offender's prior record shall be scored. . . . The language of (d)(11) states that the court is prohibited from considering offenses for which the offender has not been convicted, but the state notes that it does not expressly state that the court cannot consider offenses for which the offender has been convicted. The appellant, on the other hand cites to cases from Minnesota, in which it has been held that the use of the same conviction as grounds for departure is, in effect, counting the conviction twice, which is contrary to the spirit and intent of the guidelines. See State v. Brusven, 327 N.W.2d 591 (Minn. 1982); State v. Erickson, 313 N.W.2d 16 (Minn. 1981); State v. Barnes, 313 N.W.2d 1 (Minn. 1981).
>
> There is merit in each argument. But we are more persuaded by that of the state. If Florida Rule of Criminal Procedure 3.701(d)(11) precludes consideration by the trial judge of past convictions, then it becomes only a political placebo to placate the trial courts and divert public attention from the legislature's ultimate responsibility for abbreviated sentences. If a trial judge cannot depart from the guidelines based on a defendant's prior criminal record of convictions, then that prohibition should be expressly defined and delineated by the Florida Legislature.

Id. Judge Sharp, dissenting, felt that the design of the guidelines implicitly prohibits the second use of a defendant's record to further enhance his punishment where the prior record was already used in determining the presumptive sentence. The dissent noted that if uniformity in sentencing is to be achieved through use of the guidelines, Fla.R.Crim.P. 3.701(b), its mandates and exclusions should control the whole sentencing process. She finally noted that the majority opinion will render the guidelines meaningless by allowing departures in violation of the guidelines rules and mandates. Id.

The defendant filed a timely motion for rehearing and a request for certification of the question to this Court as a matter of great public importance. (Appendix 2) The district court denied the motion on August 22, 1984. (Appendix 3) Notice to Invoke Discretionary Jurisdiction was filed on September 21, 1984. This brief follows.

ISSUE PRESENTED

WHETHER THE OPINION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF YOUNG V. STATE, ___ So.2d ___, 9 FLW 1847 (FLA. 1ST DCA CASE NO. AX-1, 8/24/84); SWAIN V. STATE, ___ So.2d ___, 9 FLW 1820 (FLA. 1ST DCA CASE NO. AV-290, 8/22/84); IN RE RULES OF CRIMINAL PROCEDURE (SENTENCING GUIDELINES), 439 So.2d 848 (FLA. 1983); PROVENCE V. STATE, 337 So.2d 783 (FLA. 1976); AND BAKER V. FLORIDA PAROLE AND PROBATION COMMISSION, 384 So.2d 746 (FLA. 1ST DCA 1980)?

The opinion of the District Court of Appeals, Fifth District, conflicts with decisions of this Court and of other district courts of appeal. Further, as stated in the dissenting opinion of Judge Sharp in the instant case, the majority has effectively eliminated the guidelines by allowing departures in violation of the guidelines rules and mandates. Hendrix v. State, ___ So.2d ___, 9 FLW 1697 (Fla. 5th DCA Case No. 83-1702, 8/2/84) (Sharp, J., dissenting). This Court should exercise its discretionary jurisdiction and remedy this problem.

In In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983), this Court adopted the Sentencing Guidelines, Rule 3.701, Florida Rules of Criminal Procedure. As outlined in that opinion, with the attached rule and committee notes, the guidelines were adopted to establish a "uniform set of standards to guide the sentencing judge" and to "eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense- and

offender-related criteria and in defining their relative importance in the sentencing decision." Id. at 849; Fla. R. Crim. P. 3.701(b). Among the offender-related criteria which the guidelines interpreted and assigned specific objective weight was the prior criminal record of the defendant. Fla. R. Crim. P. 3.701(b)4, (d)2-5. Departures from these objectively weighted presumptive sentences are to be avoided and can only be for clear and convincing reasons. In re Rules, supra at 851; Fla. R. Crim. P. 3.701(d)11.

The instant case conflicts with this Court's adoption of the rule, by allowing the trial judge to reinsert his subjectivity into an area which the guidelines already has weighed objectively (the defendant's prior record) in arriving at the appropriate score and presumptive sentence. The rule and this Court's adoption of it forbid this subjectivity into areas already computed into the guidelines scoresheet. The district court's holding to the contrary is thus in conflict.

The first district court of appeal has correctly followed this Court's adoption of the rule in two cases which directly conflict with the decision of the fifth district. In Young v. State, ___ So.2d ___, 9 FLW 1847 (Fla. 1st DCA Case No. AX-1, 8/24/84), the trial judge had listed the defendant's eleven convictions as the basis for his departure from the guidelines, complaining that the guidelines scoresheet did not allow him to take any more than four convictions for one category into account. The appellate court vacated the sentence, holding that the convictions, since scored in

determining the presumptive sentence, could not be used as a basis for departure:

> The opinion of the trial court that the guidelines form does not account for additional felonies beyond four is both inaccurate and an impermissable and an unconvincing reason for departure. The form contemplates more than four felonies and clearly states "4+". (emphasis added)

Young v. State, 9 FLW at 1848. The first district, in so deciding, recognized the purpose of the guidelines to eliminate unwarranted variances in sentencing and to reduce such subjectivity from the sentencing process. Contrarily, the fifth district has failed to recognize that its decision allows that unwarranted variation and subjectivity back into the sentencing determination. As such, the instant decision is at odds with the first district's decision in Young.

Similarly, the instant case directly conflicts with the decision of Swain v. State, ___ So.2d ___, 9 FLW 1820 (Fla. 1st DCA Case No. AV-290, 8/22/84). In Swain, the first district approved a guidelines departure based on the defendant's prior record only because the trial judge relied on the timing of the prior offenses, not just their occurrence. The court held that the timing of the offenses provided justification for departure because that factor, unlike the mere presence of prior convictions, was not already included in the criteria for determining the scoresheet:

> . . . [O]ne of the primary considerations for departure from the guidelines was the **timing** of the commission of the various offenses by

> the appellant. It was not merely that appellant had previously committed murder and petit theft, but that appellant had established a pattern of committing new crimes within a very short period of time after his release from any incarceration. The timing of the commission of offenses is not included in the criteria for determining a guidelines score.

Swain, supra. In so ruling, the appellate court has therefore held it proper to aggravate only for factors which are not included in calculating the guidelines score and presumptive sentence. Hence, under the holding of Swain, any factor such as prior record which is already considered in arriving at the presumptive sentence may not be used as a basis for aggravation, contrary to the holding of the fifth district.

Two other cases, following the same rationale, are Provence v. State, 337 So.2d 783 (Fla.1976), and Baker v. Florida Parole and Probation Commission, 384 So.2d 746 (Fla. 1st DCA 1980). In both these cases, the courts held that it is improper to consider twice the same factor in order to aggravate a sentence. In Provence the Court decried double consideration of the same aggravating factor in determining a sentence of death, while in Baker the court refused to allow the defendant's prior criminal record to be used to aggravate a presumptive parole release date where the prior record had already been used in determining that presumptive date. These holdings, therefore, also conflict with the instant decision allowing such improper doubling of the same aggravating factor.

In conclusion, the decision of the district court of appeal in the instant case, is in direct conflict with decisions of this Court and other district courts of appeal. The majority opinion allows departure for any reason whatsoever, whether or not already included in the computation of the presumptive sentence, as long as it is not explicitly prohibited from consideration by Rule 3.701, and thus effectively nullifies the guidelines. This Court should exercise its discretionary jurisdiction, vacate the decision of the fifth district court of appeal, and, in so doing, restore the guidelines and their purpose which the fifth district has rendered meaningless. Otherwise, as noted by the dissenting opinion, the "sentencing guidelines in Florida will [have] become an interesting but failed social experiment." Hendrix, supra (Sharp, J., dissenting).

CONCLUSION

BASED UPON the cases, authorities and policies cited herein, the Petitioner requests this Honorable Court to accept jurisdiction of this cause and to reverse the decision of the District Court of Appeal, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, FL 32014 on this 1st day of October, 1984.

JAMES R. WULCHAK
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