IN THE SUPREME COURT OF FLORIDA

RICKY JARADE PAYNE,

Petitioner,

v. CASE NO. 68,180

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A three volume transcript will be referred to as "T". Attached hereto as Appendix A is the opinion of the lower tribunal dated September 18, 1985. Appendix B contains petitioner's motion for rehearing. Appendix C contains the opinion on rehearing filed December 19, 1985, reported as Payne v. State, 480 So.2d 202 (Fla. 1st DCA 1985). Appendix D contains petitioner's judgment and sentence.

II STATEMENT OF THE CASE

By information filed November 3, 1983, petitioner was charged with armed robbery with a firearm (R 5). Petitioner's motion to suppress evidence and motion to suppress identification testimony (R 17-22) were disposed of before trial (R 58-60). On April 19, 1984, the state filed an amended information, charging robbery with a BB gun (R 47). The state filed a second amended information on May 1, charging robbery with a pellet gun (R 68).

The cause proceeded to jury trial on May 2-3, and at the conclusion thereof petitioner was found guilty of robbery with a non-deadly weapon (R 79). On July 12, 1984, petitioner was adjudicated guilty and sentenced in excess of the recommended guideline sentence to 21 years in state prison, with the court retaining jurisdiction over parole for seven years (R 113-27; Appendix D).

On July 25, 1984, a timely notice of appeal was filed (R 129). On appeal, petitioner argued that the motion to suppress should have been granted, and that his guidelines departure sentence was illegal. The First District disagreed with the former and partially agreed with the latter (Appendix A and C). On January 16, 1986, a timely notice of discretionary review was filed. On April 29, 1986, this Court granted discretionary review.

III STATEMENT OF THE FACTS

The facts relevant to the suppression issue are contained in the lower tribunal's opinion:

> The robbery, involving the clerk of a convenience store, occurred on October 22, 1983. The stop in question, which occurred on October 26, 1983, was made by Officer Skie. At the suppression hearing Skie testified that at about five minutes before eleven p.m. on Wednesday, October 26, he observed a car with its lights off parked next to a business and two black males approaching the front of the business from the direction of the car. This took place at a small shopping center where all of the stores were closed except the convenience store, but the car was parked next to a closed laundry at the end of the shopping center farthest away from the convenience store. The car was pulled up several car lengths beyond the laundry. Skie said he thought he saw either brake lights or parking lights of the car on. He saw the two men walking past the laundry toward the convenience store. He turned his patrol car around and as he did so, he noticed one of the men going back toward the car, and he lost sight of the other man. The car began driving off hurriedly without its lights being turned on, and Officer Skie made the stop. Officer Skie also stated he associated the two black men with the parked car because the neighborhood was all white. He had no calls or BOLO (be on the look out) reports for this type of car or these suspects. There were no cars parked in the parking spaces directly in front of the convenience store, and the car in question was parked beyond the last store in the shopping center and to the side of the building. From the record there is no indication that at the time of the stop Officer Skie knew of the October 22 robbery which had occurred about one-and-a-half miles away.

> The trial court denied the motion to suppress based on the position in which the car was parked -- off to the side of the building rather than someplace where it could be seen, even though no cars were parked in front of the convenience store -- because of the all white makeup of the neighborhood, because when the officer drove up, the men turned around and walked back towards the car and drove away without turning on the driving lights, and because a convenience store was involved, which "probably only a newly arrived Martian would not know [is] subject to probably more robberies than any other type of institution in the city."

(Appendix C at 2).

Petitioner's recommended guideline sentence was 4 1/2 - 5 1/2 years (Appendix D at 5). He was sentenced to 21 years, and the court retained jurisdiction over parole for 1/3 of this sentence (Appendix D at 3). The court entered a nine page order justifying retention and departure from the guidelines, because petitioner was a habitual offender (Appendix D at 6-14).

On appeal, petitioner argued that both the retention and the departure were illegal. The First District's initial opinion merely struck the retention provision (Appendix A at 1). Petitioner argued on rehearing that the entire sentence should be vacated because the judge erroneously believed that petitioner was eligible for parole and because the departure was not justified (Appendix B). The First District's opinion on rehearing vacated the sentence but found the departure was justified because petitioner was a habitual offender (Appendix C at 1).

IV SUMMARY OF ARGUMENT

Petitioner will argue in the first issue that there was no reasonable suspicion to justify the stop of petitioner, a black male, who had just left an open convenience store and in all white neighborhood. This is because the facts did not give rise to the required founded suspicion that petitioner had committed, was committing, or was about to commit a crime. If the decision of the First District is upheld, the police will be allowed to stop any black male who is unfortunate enough to be passing through an all white neighborhood.

In the second issue, petitioner will attack the use of a habitual offender finding to justify a departure from the guidelines. Since this Court has previously ruled that a defendant's prior criminal record cannot be used twice, once on the scoresheet and again as a reason for departure, it follows that the prior record also cannot be used a third time, to support a habitual offender finding as a reason for departure from the guidelines. This Court must vacate that reason for departure and remand for resentencing.

V ARGUMENT

ISSUE I

THIS COURT SHOULD HOLD THAT THE PRESENCE OF TWO BLACK MALES OUTSIDE OF AN OPEN CONVENIENCE STORE IN AN ALL WHITE NEIGHBORHOOD DOES NOT GIVE RISE TO A REASONABLE SUSPICION THAT WOULD JUSTIFY A STOP AND SUBSEQUENT DETENTION.

The trial court's findings are quoted above and will not be repeated here. The First District approved the denial of the motion to suppress:

> We have examined the cases relied upon by appellant[1] to support his argument that there was not a founded suspicion for the stop, in particular the criteria set forth in State v. Stevens, 354 So.2d 1244, 1247 (Fla. 4th DCA 1978), and conclude that the trial court did not err in finding that a founded suspicion existed for the stop in this case.
>
> [1] Mullins v. State, 366 So.2d 1162 (Fla. 1978); Colodonato v. State, 348 So.2d 326 (Fla. 1977); Freeman v. State, 433 So.2d 9 (Fla. 2d DCA 1983); McClain v. State, 408 So.2d 721 (Fla. 1st DCA 1982); Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980); State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978); Lower v. State, 348 So.2d 410 (Fla. 2d DCA 1977).

(Appendix C at 2).

It is axiomatic that where, as here, a search and seizure is conducted without benefit of a warrant, the state has the burden of demonstrating the legality of that search and seizure. United States v. Jeffers, 342 U.S. 48 (1951); McDonald v. United States, 335 U.S. 451 (1948); and Coolidge v. New Hampshire, 403 U.S. 443 (1971). Since

the initial stop here was not based upon the well-founded reasonable suspicion as required by Section 901.151(1), Florida Statutes, the after-the-fact circumstances, clearly fruits of the initial illegality, cannot be relied upon to establish reasonable suspicion or probable cause. Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. State, 62 So.2d 348 (Fla. 1953); Collins v. State, 65 So.2d 61 (Fla. 1953); Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976), cert.dismissed, 347 So.2d 432 (Fla. 1977).

In order to justify a temporary detention of an individual, a police officer must possess a well-founded reasonable suspicion based upon objective, specific, articulable facts that the person temporarily detained "has committed, is committing, or is about to commit a violation of the criminal laws of this state", Section 901.151(1), Florida Statutes; Terry v. Ohio, 392 U.S. 1 (1968); State v. Webb, 398 So.2d 820 (Fla. 1981). In justifying a temporary detention, the Supreme Court has held that:

> [T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness

> of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: with the facts available to the officer at the moment of the seizure or search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?... Anything less would invite intrusion upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.... And simple "good faith on the part of the arresting officer is not enough".... If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects", only in the discretion of the police.

Terry v. Ohio, supra, at 21-22 (footnotes omitted). See also Brown v. Texas, 443 U.S. 47 (1979); Reid v. Georgia, 448 U.S. 438 (1980). The Terry standards have been codified in Section 901.151. In interpreting this provision, Florida courts have likewise required "founded" suspicion based upon a factual foundation that the individual encountered is involved in criminal activity in order to justify a stop, and have condemned stops based upon "mere" or "bare" suspicion. See e.g., State v. Levin, 452 So.2d 562 (Fla. 1984), adopting Levin v. State, 449 So.2d 288 (Fla. 3d DCA 1983); Mullins v. State, 366 So.2d 1162 (Fla. 1979); Coladonato v. State, 348 So.2d 326 (Fla. 1977); Vollmer v. State, supra; Stanley v. State, 327 So.2d 243 (Fla. 2d DCA 1976), cert.den., 336 So.2d 604 (Fla. 1976);

Parker v. State, 363 So.2d 383 (Fla. 3d DCA 1978); State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978). "Mere suspicion is no better than random selection, sheer guesswork, or hunch, and has no objective justification". State v. Stevens, supra, at 1247.

In determining whether the circumstances witnessed by the officer here constitute an objective foundation to his suspicion, Stevens, supra, enumerates certain factors to be evaluated to determine whether they reasonably suggest criminal activity. The First District has ignored or misapplied these factors: The time, the day of the week, the location, the physical appearance of the suspect, the behavior of the suspect, the appearance and manner of operation of any vehicle involved, and anything incongruous or unusual in the situation as interpreted in light of the officer's knowledge.

In Levin v. State, supra, the defendant was temporarily detained under the stop and frisk statute because: (a) he was walking along a public street at 3:00 or 3:30 a.m. in a "high class" residential area with a companion; (b) either he or his companion had a fishing pole; and (c) there had been prior residential burglaries committed in the area. In reversing the defendant's conviction, the Third District held that these facts were "patently insufficient to constitute a founded suspicion that the defendant was involved in any kind of criminal activity". Id. at 288-89. The court further noted:

> It has long been recognized in this state that being out on a public street during late and unusual hours cannot constitute a valid basis to temporarily detain and frisk an individual under the stop and frisk law.... Moreover, this result is not changed by the fact that the area in which the individual is traveling is one which has experienced crimes in the past. Jackson v. State, 319 So.2d 617 (Fla. 1st DCA 1985). This is plainly so because a contrary rule would impose a curfew on any person walking during late and unusual hours in most parts of our large metropolitan centers, which, unfortunately, have been plagued in recent years by various kinds of criminal activity. Even residents in these areas would be precluded from taking walks late at night without being subject to temporary detention and frisks. Something more, then, is required than simply being out on the street during late and unusual hours in an area where crimes have been committed in the past before the police may properly stop and detain an individual for possible criminal activity.

Id. at 298. The Third District expressly declined to follow Boal v. State, 368 So.2d 71 (Fla. 2d DCA 1979), stating:

> We disagree with the case because it, in effect, permits police officers to temporarily stop anybody who is out on the public street during late and unusual hours in most parts of crime-prone metropolitan areas. As we read the case law in this field, that is an insufficient basis for stopping someone under the stop and frisk law - at least in the absence of widespread civil disorders or war. This is as it should be, else we are surely a long way down the road toward creating a police state with enforceable curfews in our large metropolitan centers.

Id. Due to the conflict between Boal and Levin, this Court accepted jurisdiction and held that the Third District had

stated the proper status of the law. State v. Levin, supra, at 563.

As Levin notes, Boal was singular in its approval of a stop based upon such innocuous facts -- facts virtually identical to those existing here. Case law uniformly condemns such a stop. In Mullins v. State, supra, a police officer observed the defendant riding a bicycle slowly through a residential area in the very early morning hours. After the officer stopped the defendant, probable cause to arrest for possession of marijuana developed. This Court, holding the stop illegal, found that the defendant's actions "were clearly insufficient to give rise to anything more than a bare suspicion of illegal activity". Id. at 1163. Similarly, in Coladonato v. State, supra, the defendant was observed driving a U-Haul van with out-of-state plates in the business district of Boca Raton during the early evening hours. An officer stopped the vehicle after observing it for the third time in that area since "it was an unusual vehicle to be in the area at that time of night". Id. at 326. In invalidating the stop, this Court held that it could not "agree that the arresting officer's opinion that the vehicle was an unusual one to be seen in the area gave rise to the necessary 'founded suspicion' in this case". Id. at 327.

In Vollmer v. State, supra, a police officer observed the defendant walking along a Lakeland street at 3:00 a.m.

As the officer drove by, he noticed the defendant watching the patrol car. The Second District held that the initial stop of the defendant was not justified: "The fact that appellant was walking along a main public thoroughfare at 3:00 a.m. and turned to look at a police car is insufficient basis to justify a stop". Id. at 1026. See also Thomas v. State, 297 So.2d 850 (Fla. 4th DCA 1974); Lower v. State, 348 So.2d 410 (Fla. 2d DCA 1977); Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980).

Likewise, in a juvenile case, In the Interest of R.B., 429 So.2d 815 (Fla. 2d DCA 1983), the facts justifying the stop, that the defendant was walking along the sidewalk between 2:00 and 2:45 p.m. and upon spotting the police car, placed his hand in his jacket pocket and started walking faster, were held insufficient to constitute the required founded suspicion. See also McClain v. State, 408 So.2d 721 (Fla. 1st DCA 1982). A like result was reached in Freeman v. State, 433 So.2d 9 (Fla. 2d DCA 1983). Officers there observed three individuals, one of whom was carrying a lighted flashlight, walking in the parking lot of an apartment complex at 2:00 a.m. At that particular parking lot, there had been numerous automobile breakins, but there was no burglary in progress at the time. After circling the block, the officer stopped a vehicle, occupied by several individuals, which was exiting the parking lot. In voiding the stop, the court indicated that

"Although carrying a lit flashlight in the early morning hours through a parking lot which has suffered a rash of vehicle burglaries may give rise to a "'bare' suspicion of illegal activity, it does not, without more, give rise to a 'founded suspicion of illegal activity'". Id. at 10. See also Ward v. State, 453 So.2d 517 (Fla. 2d DCA 1984) (Fact that defendant was walking at midnight in an area recently victimized by burglary is insufficient to justify a stop: "In State v. Levin [supra] the Supreme Court disapproved this Court's holding in Boal [supra] making it abundantly clear that these two factors, standing alone, are insufficient to justify even an investigative stop under Section 901.151, Florida Statutes (1983)". Id. at 518); Hudnell v. State, 449 So.2d 930 (Fla. 3d DCA 1984) (Fact that defendant was walking down the street late at night in a Miami warehouse area "curiously looking at the businesses in the area" plainly insufficient to give rise to anything more than a bare suspicion of criminal activity).

In light of the foregoing, it is unquestionably clear that the First District has totally failed to realize that the stop of petitioner was predicated upon anything even approaching founded suspicion. The only thing the police officer knew in the instant case was that two black males had decided not to make a purchase at the convenience store in the all white neighborhood, and had driven away.

Petitioner submits that nowhere in the Fourth Amendment does the "newly-arrived martian" standard for reasonable suspicion appear. Since the investigatory stop was illegal, its fruits were illegally seized. The trial court's refusal to suppress the evidence and the lower tribunal's agreement with that order are patently incorrect and must be reversed.

ISSUE II

THIS COURT MUST HOLD THAT A FINDING OF HABITUAL OFFENDER STATUS DOES NOT CONSTITUTE, IN AND OF ITSELF, A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE GUIDELINES.

The First District made no reference to this issue in its initial opinion (Appendix A). Petitioner's motion for rehearing pointed out that the decisions of this Court in Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and Albritton v. State, 476 So.2d 158 (Fla. 1985) would seem to have overruled prior case law which held that a habitual offender finding was a sufficient justification for departure from the recommended guideline sentence (Appendix B at 1-2).

The First District's opinion on rehearing did not discuss Hendrix or Albritton, but merely affirmed on authority of Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985), pending, Case No. 67,053 (Appendix C at 1). The issue has also recently been certified to this Court by the Second District in Ferguson v. State, 481 So.2d 924 (Fla. 2d DCA 1985), pending, Case No. 68,146, and by the Fifth District in Vicknair v. State, 483 So.2d 896 (Fla. 5th DCA 1985), pending, Case No. 68,536. It is petitioner's contention that a finding of a habitual offender status cannot, in and of itself, be used as a reason for departure from the guidelines.

The sentencing in this case was a mixture of habitual offender and sentencing guidelines procedure. The trial

judge expressed the confusion caused by the intermingling of separate sentencing issues when he entered an order doing three separate sentencing functions: retaining jurisdiction, finding habitual offender status, and departing from the guidelines (Appendix D).

The relationship between habitual offender and guidelines sentencing was confused from the inception of the guidelines. Florida Rule of Criminal Procedure 3.701 does not say how Section 775.084, Florida Statutes, proceedings affect a recommended guideline sentence. A "comment" to the committee note to Rule 3.701(d)(10) seemed to equate enhancements of the maximum sentence under Section 775.084 with reclassification of the degree of the offense under Sections 775.087 (use of weapon or firearm) and 775.084, Florida Statutes (wearing a mask). This comment proved to be erroneous because habitual offender enhancements were not reclassifications of the degree of the offense. See, e.g., Hall v. State, 483 So.2d 549 (Fla. 1st DCA 1986), and the cases cited therein. See also the amendment to Florida Rule of Criminal Procedure 3.701(d)(10) as contained in The Florida Bar: Amendments to Rules of Criminal Procedure, 468 So.2d 220, 225 (Fla. 1985). Thus, it is now clearly this Court's intent to require clear and convincing reasons for departure in addition to a habitual offender finding. That finding provides a greater maximum sentence, but does not constitute an automatic

reason for departure.

Still to be answered then is what effect should be given an enhancement order when considering a guidelines sentence. The practice used in this case, of commingling the habitual offender and departure orders, automatically makes the habitual offender finding a basis for deviation. No rule or statute allows that kind of automatic aggravation of a guidelines sentence and it should not be allowed. The issues are not the same.

In Eutsey v. State, 383 So.2d 219, 223 (Fla. 1980), this Court said:

> The purpose of the habitual offender act is to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism.

The guidelines, on the other hand, have as their purpose:

> 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.

Florida Rule of Criminal Procedure 3.701(b). Among the principles embodied in the guidelines is the rule that "the severity of the sanction should increase with the length and nature of the offender's criminal history". Florida Rule of Criminal Procedure 3.701(b)(4). The objective of the guidelines, therefore, is uniformity in sentencing offenders who commit similar crimes and whose criminal histories are similar. By incorporating increasingly

severe sanctions as the number and the seriousness of the offenses increases, the guideline structure takes recidivism into account. Being essentially redundant, the habitual offender statute should not be used to allow a second enhancement for past offenses already counted in guideline scoring. The only exception to this position would be where the recommended guideline sentence is greater than the statutory maximum for the particular crime; in that case, the habitual offender statute could be used to increase the statutory maximum. However, that is the only situation which would justify the implementation of the habitual offender statute.

The habitual offender statute, moreover, was enacted when parole was available. Now persons who are sentenced under the guidelines are not eligible for release on parole. Section 921.001(8), Florida Statutes. The length of a guideline sentence is intended to reflect the time to be served, shortened only by gain time. Id.; Florida Rule of Criminal Procedure 3.701(b)(5). By applying the enhanced penalties available under the habitual offender statute to sentences without parole, habitual offenders will be given sentences which are disproportionately harsh when compared with other offenders who have committed similar crimes and who have similar criminal histories, but who were not subjected to habitual offender proceedings. In addition, if an order finding a defendant

to be a habitual offender is automatically a clear and convincing reason for departure, the avowed purpose of sentencing uniformity will be thwarted. Habitual offenders, sentenced without either the restraint of the guidelines or the leveling effects of parole, will be a separate class of offender sentenced without regard to guidelines criteria.

The trial judge here improperly merged what are two distinct proceedings. Under the habitual offender statute, the question is whether the maximum statutory penalty could be enlarged. Deviation from the guidelines is quite a different inquiry, being whether there are clear and convincing reasons for departure from a sentence within the guidelines range, in which criminal history has already been taken into consideration. The habitual offender proceeding was superfluous in this case because the maximum sentence for the first degree felony of robbery with a weapon was 30 years, and the maximum guideline sentence was 4 1/2 years. The gap between the maximum guideline sentence and the statutory maximum was 24 1/2 years. Instead of considering other reasons for departure to close some or all of that span, if desirable, the trial judge seized upon the habitual offender finding, and, without additional explanation, imposed a sentence five times greater than the recommended guideline sentence. This process did not advance the valid guidelines goal of uniformity, but

instead produced a sentence out of proportion to the guidelines.

Because of the different issues and criteria, the enhancement order cannot stand in and of itself as a reason for departure from the guidelines. This will become particularly clear when the order itself if examined. The guidelines rule prohibits consideration as aggravation of arrests for which there have been no convictions. Florida Rule of Criminal Procedure 3.701 (d)(11). The order relies in part upon petitioner's prior juvenile arrests for petit larceny on May 4, 1973, and malicious mischief on February 25, 1975. (Appendix D at 2). This is true even though no convictions were obtained for these arrests. The order also relies upon adult arrests for three crimes on October 26, 1983, and a battery arrest on October 28, 1983 (Appendix D at 3). The order also relies upon a juvenile disorderly intoxication arrest which was dropped by the prosecutor in adult court (Appendix D at 2). This conduct cannot be validly used to aggravate the guideline sentence because petitioner has not been convicted of these offenses. The order's recital of petitioner's prior arrests is violative of Rule 3.701(d)(11) which prohibits use of prior arrests when no conviction ensued. Likewise, the order does not apportion the weight given those arrests which did not

result in conviction from those that did, thus violating Crosby v. State, 429 So.2d 421 (Fla. 1st DCA 1983), which held that while prior arrests may be considered in sentencing, they may not be recognized as convictions. Thus, the mixture of factors going into the habitual offender decision is not the same as the mixture of factors going into the guidelines departure pot.

In Hendrix v. State, 475 So.2d 1218, 1220 (Fla. 1985), this Court held:

> To allow the trial judge to depart from the guidelines based upon a factor which has already been weighed in arriving at a presumptive sentence would in effect be counting the convictions twice which is contrary to the spirit and intent of the guidelines. Accord, 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). We agree with the First District Court of Appeal in that "[w]e find a lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the same factor is included in the guidelines for purposes of furthering the goal of uniformity." Burch v. State, 462 So.2d 548, 549 (Fla. 1st DCA 1985).

Although Hendrix was not a habitual offender case, its holding has been so applied by the Fifth District, since habitual offender status is largely based upon a defendant's prior record:

> Under the habitual offender act (§ 775.084, Fla.Stat.), a defendant's prior convictions and current conviction are the sole necessary factual basis for the determination that the defendant is an habitual

offender under section 775.084(1) and (2). The only additional requirement is a finding by the trial court (by a preponderance of the evidence) that it is necessary for the protection of the public to sentence the defendant to an extended term. § 775.084(3), Fla. Stat. Therefore, this finding can be but a conclusion based solely on the defendant's prior record and current conviction. When this is the case, the finding under section 775.084(3) that the defendant is an habitual offender is not a sufficient ground for departure under Hendrix[2].

2. In cases where the sentencing judge has departed for reasons similar to the determining factors under the habitual offender act (though not under that act), those reasons have been found to be impermissible under Hendrix. See, e.g., Fowler v. State, 482 So.2d 602 (Fla. 5th DCA 1986)(the fact that trial court was compelled, "for the protection of society," to institutionalize defendant for a term in excess of that provided by the guidelines is insubstantial reason because Hendrix so holds); Casteel v. State, 481 So.2d 72 (Fla. 1st DCA 1986) ("reason ... that defendant's pattern of conduct renders him a continuing threat to the community" is factually based on defendant's prior convictions and on the current conviction and is improper basis for a departure); Pilgrim v. State, 480 So.2d 688 (Fla. 5th DCA 1986) (finding that defendant "has shown by his actions that he is inherently dangerous to society and, unless put away from society for a sufficient period of time, will continue in his pattern of criminal conduct ..." is not clear and convincing reason for departure).

Vicknair v. State, supra at 897. See also Moultrie v. State. 11 FLW 913 (Fla. 5th DCA Apr. 17, 1986) and Bouthner v. State,

No. 85-1455 (Fla. 5th DCA May 8, 1986). The First District in the instant case and the Second District in Ferguson, supra, and Fleming v. State, 480 So.2d 715 (Fla. 2d DCA 1986) have disagreed with this most logical extension of Hendrix.

One more problem needs to be addressed, that of the different standards of proof involved in the interplay between the guidelines and the habitual offender statutes. This Court held in State v. Mischler, 11 FLW 139, 140 (Fla. Apr. 3, 1986):

> Accordingly, "clear and convincing reasons" require that the facts supporting the reasons be credible and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief for conviction, without hesitancy, that departure is warranted.

The habitual offender statute, on the other hand, provides only a lesser standard of proof:

> Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence ....

Section 775.084(3)(d), Florida Statutes. Again, the separate statutory sentencing schemes are in conflict. The sentencing judge here expressly relied upon the preponderance standard (Appendix D at 5). His reliance on that standard, which is not as heavy as the reasonable doubt standard, causes his findings to fail the Mischler reasonable doubt test. This Court, even if it rejects the bulk of petitioner's argument and holds that the

declaration of a habitual offender status is, in and of itself, sufficient to justify departure, must reverse this departure sentence because it does not satisfy Mischler.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests two alternative forms of relief. As to Issue I, he requests that this Court reverse the order denying the motion to suppress, and remand for a new trial. As to Issue II, petitioner requests that this Court vacate the sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Ms. Barbara Ann Butler, Assistant Attorney General, Duval County Courthouse, Suite 513, Jacksonville, Florida, 32202; and to petitioner, Mr. Ricky J. Payne, #279058 C-62, Post Office Box 500, Olustee, Florida, 32072, this 16 day of May, 1986.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER