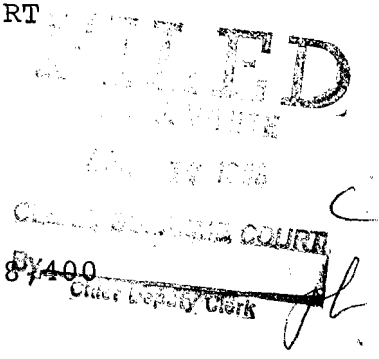
IN THE FLORIDA SUPREME COURT



DILAR S. BOOKER, :

Petitioner, :

v. : CASE NO. 68,400

STATE OF FLORIDA, :

Respondent, :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

This brief refers to the Record on Appeal as "R" followed by the appropriate page number. References to the prior record, Case Nos. 84-498, 84-500, Doby v. State, are designated "PR" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's Statement of the Case and Facts as a substantially accurate account of the proceedings below with such exceptions or additions as set forth in the Argument portion of this Brief.

SUMMARY OF THE ARGUMENT

As to Issue I: Booker chose to ignore the opportunities given to him by the trial court and repeatedly broke the law. Departure is warranted in such a case and is not limited to the one cell enchancement for one violation under Rule 3.701 (d)(14).

The record show that many factors are compounded into Petitioner's criminal history that are not included in a score for prior convictions; the similar nature of the offenses, the timing of the offenses, the failed attempts at rehabilitation; and the escalating nature of the offenses to increasing violence. These are factors that are before a trial judge that cannot be adequately scored on a scoresheet. The guidelines were not meant to totally usurp judicial discretion and when factors such as these are presented to a trial judge a departure is within his discretion.

As to Issue II: The guidelines commission recognized that a trial judge who is familiar with a particular defendant, has the defendant, the evidence, and the witnesses before him or her is in a better position to assess the exact sentence to be given than is an appellate court based on a cold record. Thus, much deference should be given to the trial court's decision. The Canakaris standard appre-

ciates this and yet allows for appellate review to prevent abuses of the necessary discretion.

ARGUMENT

ISSUE I

THE REASONS FOR GUIDELINES SENTENCING DEPARTURE APPROVED BY THE SECOND DISTRICT'S OPINION ARE NOT VALID REASONS FOR DEPARTURE.
(As stated by Appellant)

This case was brought before this Honorable Court pursuant to Fla. R. App. P. 9.030 (2)(A)(v). The Second District Court of Appeals certified the following question:

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE PERMISSIBLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, WHAT CRITERIA SHOULD AN APPELLATE COURT ADOPT IN DETERMINING IF THE SENTENCING COURT ABUSED ITS DISCRETION IN ITS EXTENT OF DEVIATION?

Petitioner's first issue on appeal was not certified to this Court and your Respondent respectfully urges this Court to decline review on this issue and strike it from the Petitioner's brief.

Should this Court choose to reach the merits of this issue your Respondent contends that the Second District Court of Appeals correctly held that the trial court's reasons for departure were clear and convincing.

The trial judge in the instant case entered a written "Order of Aggravating Circumstances" in which he

outlined in great detail the defendant's numerous violations of probation and past criminal history as grounds for departure.[1] Petitioner was sentenced to serve five consecutive five-year terms of imprisonment. The guidelines scoresheet had recommended a non-state prison sanction enchanced to 12 to 30 months. The Second District noted the departure was 10 times greater than the enhanced sentence recommended under the guidelines.

The appellate court noted that the first reason - violations of probation - included the violation for which the defendant was presently before the trial court and violations occuring in July 1981 and May 1983. Booker also had a technical violation on December 9, 1983. (R.157)

Booker argues that the July 1981 violation was not actually a violation because the offense occurred prior to his being place on probation for May 1980 offense. The record does not support this claim. The Judge's Order of Aggravating Circumstances shows he received 5 years probation for the violation to run concurrent with 80-4542 and 81-4022. Booker has violated his probation four times. Twice by committing a burglary, once for a technical violation and finally for a strong-arm robbery. As the appellate court noted this is a clear and convincing reason for departing. Booker v. State, Case No. 85-408, 85-409, 85-410 (Fla. 2 DCA December 13, 1985) [11 F.L.W. 275] Riggins v. State, No. 85-143 (Fla. 5th DCA Oct. 31, 1985)

1 This order was reprinted in full in Booker v. State, infra.

[10 F.L.W. 2441]. Gordon v. State, Case No. 85-274 (Fla. 2 DCA, December 11, 1985)[11 F.L.W. 2748]; Roberge v. State, Case No. 85-1591 (Fla. 2 DCA Opinion filed March 5, 1986)[11 F.L.W. 571].

Petitioner asserts that these violations have already been factored in the scoresheet because the sentences received for committing the substantative offenses were scored. The violations, however, were not scored. Under Petitioner's theory the penalty should be the same as if Booker had complied with the provisions of his probation and lived as a law-abiding citizen. The fact is Booker chose to ignore the opportunities given to him by the trial court and repeatedly broke the law. Departure is warranted in such a case and is not limited to the one cell enchancement for one violation under Rule 3.701 (d)(14).

The second reason cited by the trial court - Booker's past criminal history-was also approved by the Appellate Court:

> In Hendrix, the the Florida Supreme Court held that a defendant's prior convictions may not be considered as a valid reason for departure from the guidelines. However, we do not construe the court's opinion in Hendrix as implying that the trial judge cannot depart from the presumptive sentence where, as here, the defendant has failed to respond to past rehabilitative efforts, has continued to violate his probation, and has demonstrated an "evidently escalating criminal involvement." See also Johnson v. State, No. 85-33 (Fla. 5th DCA Oct. 24, 1985) [10 F.L.W. 2404]. In sum, we find that the trial court's departure was based on clear

and convincing reasons in accordance with Florida Rule of Criminal Procedure 3.701 (d)(11).

Petitioner argues that this reason is in conflict with this Court's opinion in Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and that the Appellate Court failed to adequately distinguish the trial court's use of Petitioner's "past criminal history" as a ground for departure from the use of prior record disapproved by this Court in Hendrix, supra. To the contrary, the record clearly shows that many factors are compounded into Petitioner's criminal history that are not included in a score for prior convictions; the similar nature of the offenses, the timing of the offenses, the failed attempts at rehabilitation; and the escalating nature of the offenses to increasing violence. These are factors that are before a trial judge that cannot be adequately scored on a scoresheet. The guidelines were not meant to totally usurp judicial discretion and when factors such as these are presented to a trial judge a departure is within his discretion.

ISSUE II

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE PERMISSIBLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, WHAT CRITERIA SHOULD AN APPELLATE COURT ADOPT IN DETERMINING IF THE SENTENCING COURT ABUSED ITS DISCRETION IN ITS EXTENT OF DEVIATION?

The above question was certified to this Court by the Second District Court of Appeals. Petitioner would answer this question by asserting that a sentencing court abuses its discretion when the extent of the departure is not limited to that justified by the reason for departure.

Your respondent, however, suggests that the Second District's reliance on the Canakaris[2] standard is not only proper but was the standard suggested by this Court in Albritton v. State, 476 So.2d 158 (Fla. 1985) n/3. In support thereof, this Court noted that the guidelines were not intended to usurp judicial discretion. The Court also clearly rejected the placement of an arbitrary cap on the sentencing judge.

Petitioner attempts to substitute his judgment as to what extent of departure is justified for that of the trial judge. Clearly, the guidelines commission recognized that a trial judge who is familiar with a particular defendant, has the defendant, the evidence,and the witnesses

2 Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980)

before him or her is in a better position to assess the exact sentence to be given than is an appellate court based on a cold record. Thus, much deference should be given to the trial court's decision. The Canakaris standard appreciates this and yet allows for appellate review to prevent abuses of the necessary discretion.

CONCLUSION

Based on the foregoing reasons and authorities cited therein, Respondent respectfully requests this Honorable Court to affirm the decision of the Second District Court of Appeals.

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 Douglas S. Connor, Assistant Public Defender, Hall of Justice Building, P.O. Box 1640, 455 Broadway Avenue, Bartow, Florida 33830 on this 14th day of April, 1986.

Of Counsel for Respondent