IN THE SUPREME COURT OF FLORIDA

JESSIE WILLIAMS, III,

Petitioner,

v. CASE NO. 68,505

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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PETITIONER'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner, as referred to in this brief, was the defendant in the trial court and the appellant in the First District Court of Appeal. Respondent, the State of Florida, was the prosecuting authority and appellee. All references shall be to the annexed appendix symbolized by "A".

II STATEMENT OF THE CASE AND FACTS

Petitioner pleaded guilty to burglary of a dwelling with intent to commit an assault and aggravated battery. The recommended guideline sentence was $4\frac{1}{2}$ to $5\frac{1}{2}$ years imprisonment. In imposing sentences of 10 years, the trial court gave the following reasons for departure:

> 1. The Defendant as a juvenile was committed to the Department of HRS for the offense of Arson dated January 11, 1977. He was committed also in Case No. 76-466 for Arson and Burglary of an Occupied Dwelling, and again committed for Shoplifting dated August 18, 1978. At age eighteen (18) years, the Defendant was sentenced to Department of Corrections for three (3) years for Burglary of a Structure dated February 19, 1979 and paroled September 16, 1980. He was charged with violation of his parole on March 3, 1981 having only been out of prison for some six months. On July 10, 1981 the Defendant was again sentenced to the Department of Corrections on the offense of Attempted Burglary for five (5) years. On December 10, 1983 he was discharged as to that sentence and after only approximately ten (10) months committed the instant offense on October 6, 1984.
>
> 2. The continuing criminal behavior since the Defendant's age of sixteen years demonstrates his total disregard for the rehabilitative efforts of the past depositions for his criminal behavior. There is no hope for rehabilitation of this individual.
>
> 3. The Defendant served approximately fourteen (14) months of his first three (3) year Department of Corrections sentence and some twenty-nine (29) months on the five (5) year Department of Corrections sentence. Under sentencing guidelines for standing convicted of Burglary of a Dwelling with Intent to Commit an Assault and Aggravated Battery, this Defendant would receive a recommended sentence of

> four and one-half ($4\frac{1}{2}$) to five and one-half years ($5\frac{1}{2}$) which with gain time might allow him to serve less time on these serious violations than he served on his last period of incarceration. This should not be the intent of a sentence and the punishment for his criminal conduct in the present cases should be substantially greater to protect society and deter him in future criminal activities.
>
> 4. To impose the suggested sentence under sentencing guidelines would make a mockery of this court's sentencing goal.
>
> 5. The frequency of the Defendant's criminal conduct and especially in view of the short duration from his previous periods of incarceration with the Department of Corrections demonstrates a need for punishment greater than that provided by Rule 3.701, Fla.R.Crim.P.

(A 2-3).

The District Court affirmed the guideline departure stating, in part:

> [W]e view the trial judge's narrative of this defendant's frequent contacts with the criminal justice system as something substantially more than a mere reference to the defendant's prior criminal record. Such a view is consistent with several recent post-Hendrix decisions of our sister courts. See Booker v. State, 10 F.L.W. 2751 (Fla. 2nd DCA Dec. 13, 1985); Smith v. State, 480 So.2d 663 (Fla. 5th DCA 1985); Johnson v. State, 477 So.2d 56 (Fla. 5th DCA 1985); and May v. State, 475 So.2d 1004 (Fla. 5th DCA 1985).
>
> The defendant's continuing and persistent pattern of criminal activity since age 16, together with the timing of such offenses relative to prior offenses and releases from incarceration or supervision, clearly demonstrated the inadequacy of sentences for the subject crimes within the guidelines range. Indeed, as the trial judge suggested in paragraph 3 of his

> order, a sentence of this defendant for these crimes of only $5\frac{1}{2}$ years would be inordinately low, particularly in light of the liberal gain time provisions of Section 944.275, Florida Statutes (1985).

(A 4).

Notice to invoke discretionary jurisdiction was timely filed (A 5).

III SUMMARY OF ARGUMENT

Petitioner contends jurisdiction should be accepted because conflict has been demonstrated.

IV ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD ACCEPT JURISDICTION SINCE THE DECISION IN WILLIAMS v. STATE, ___ So.2d ___ (Fla. 1st DCA 1986), EXPRESSLY AND DIRECTLY CONFLICTS WITH HENDRIX v. STATE, 475 So.2d 1218 (Fla. 1985).

In Hendrix v. State, 475 So.2d 1218 (Fla. 1985), this Court held that a sentencing guideline departure based upon a defendant's prior criminal convictions was improper. The Court reasoned:

> 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 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). Id. at 1220.

In Scott v. State, 11 F.L.W. 429 (Fla. 5th DCA February 13, 1986), the stated reasons for departure were:

> The Defendant, DRAYTON EUGENE SCOTT, JR., pleaded guilty to the offense of attempted sale or delivery of a controlled substance, cocaine. The Defendant has a prior criminal record of armed robbery and grand theft for which he was sentenced to the Department of Corrections. His record indicates that he cannot live within the framework of a free society without violating its laws.

> It is inconceivable that a non-state prison sanction would be sufficient punishment in this instance; therefore, this Court finds and determines that it is necessary to go outside the guidelines and impose a sentence accordingly.

Unlike the First District herein, the Fifth District Court of Appeal correctly recognized that Hendrix invalidated these reasons since "all ... are based on defendant's prior record, and are thus already factored into the guidelines score-sheet...." Id. Accord, e.t., Bentley v. State, 477 So.2d 58 (Fla. 5th DCA 1985); Roberson v. State, 11 F.L.W. 470 (Fla. 5th DCA February 20, 1986); Morris v. State, 11 F.L.W. 471 (Fla. 5th DCA February 20, 1986); Fowler v. State, 11 F.L.W. 427 (Fla. 5th DCA February 13, 1986). Proper application of Hendrix would invalidate most of the stated reasons for departure here.

The First District's approval of the departure by describing the judge's "narrative of this defendant's frequent contacts with the criminal justice system as something substantially more than a mere reference to the defendant's prior criminal record" (A 4) is a blatant attempt to circumvent this Court's rule in Hendrix. Semantics aside, the stated reasons [with the arguable exception of portions of reason 1, see Weems v. State, 469 So.2d 120 (Fla. 1985)][1] undoubtedly refer to petitioner's prior record, reasons clearly prohibited

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[1] Even if this reason were proper, Albritton v. State, 476 So.2d 158 (Fla. 1985) requires reversal of petitioner's departure sentence.

by Hendrix. Since the decision herein conflicts with Hendrix, review should be granted. If Hendrix can be ignored by characterizing repetitive, verbose references to prior record as "something more than a mere reference to the defendant's prior criminal record" that decision and its rationale will become totally meaningless. Such efforts should not be tolerated by this Court.

V CONCLUSION

Since direct and express conflict has been demonstrated, this Court should accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Henri C. Cawthon, The Capitol, Tallahassee, Florida, 32302, this 3rd day of April, 1986.

GLENNA JOYCE REEVES
Assistant Public Defender