

IN THE SUPREME COURT OF FLORIDA

JESSIE WILLIAMS, III,
PETITIONER,

-VS-

STATE OF FLORIDA,
RESPONDENT.

FILED
CLERK OF THE SUPREME COURT
BY: [Signature]
CASE NO. 68,505

RESPONDENT'S JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

The Petitioner and the Respondent were the defendant and the State respectively in the trial court below and were the Appellant and Appellee in the District Court of Appeal. They will be referred to as the Petitioner and the Respondent in this brief.

All inferences are supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Petitioner's Statement of the Case and Facts as being supported by the record. Additional facts deemed relevant and necessary to a disposition of the jurisdictional question will be included in the argument portion of Respondent's brief.

SUMMARY OF ARGUMENT

Respondent submits that Petitioner has failed to demonstrate a conflict between the opinion rendered below and this Court's decision in **Hendrix v. State**, 475 So.2d 1218 (Fla.1985). The lower court properly read **Hendrix** to mean that a trial court may not depart from a recommended guideline sentence based solely upon the defendant's prior record. Nothing in the **Hendrix** opinion prevents a judge from considering aspects of the prior record which are not automatically factored into the score sheet. Thus, because the trial court in the instant case based its departure upon the timing of Petitioner's prior offenses, conflict jurisdiction cannot be demonstrated.

ISSUE PRESENTED

PETITIONER HAS FAILED TO DEMONSTRATE
CONFLICT JURISDICTION SINCE THE DECISION
IN **WILLIAMS V. STATE**, ___ So.2d ___ (Fla.
1st DCA 1986), CORRECTLY INTERPRETS **Hendrix**
v. State, 475 So.2d 1218 (Fla.1985).

ARGUMENT

Petitioner claims that the "proper application of **Hendrix** would invalidate most of the stated reasons for departure. . ." cited by the trial court below (Pet. Br. p. 7). Respondent disagrees.

Much of the trial court's stated "reasons" is actually a rendition of Petitioner's prior record along with the timing of the offenses. Respondent submits that the overriding reason for departure was stated in the conclusion of the judge's written reasons:

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.

(Slip Opinion p. 3). That this was the major, if not only, reason for departure was obvious to the appellate court:

The defendant's continuing and persistent pattern of criminal activities 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.

(Slip Opinion p. 4). Thus, the instant case is factually distinguishable from **Hendrix** where the trial judge had based

based its departure solely upon the number of prior convictions-- a factor already scored into a presumptive sentence. 475 So.2d at 1220.

Moreover, the cases cited by Petitioner are distinguishable from those cited in the opinion below. In **Bentley v. State**, 477 So.2d 58 (Fla.5th DCA 1985), **Morris v. State**, 11 F.L.W. 471 (Fla.5th DCA Feb. 20, 1986), and **Fowler v. State**, 11 F.L.W. 427 (Fla.5th DCA Feb. 13, 1986), the opinions properly relied upon **Hendrix** because in each case at least one of the stated reasons for departure was based on the number of prior convictions as opposed to the nature of the offenses. In **Roberson v. State**, 11 F.L.W. 470 (Fla.5th DCA Feb. 20, 1986) the trial court stated it was departing because of prior arrests and the number of convictions. It is submitted Petitioner has failed to distinguish between quantity and quality.

Since the **Hendrix** decision, the First, Second, and Fifth District Courts of Appeal have held that circumstances relating to prior convictions which are not factored into the score sheet can support clear and convincing reasons for departure. In **Johnson v. State**, 477 So.2d 56 (Fla.5th DCA 1985), **May v. State**, 475 So.2d 1004 (Fla.5th DCA 1985), **Smith v. State**, 480 So.2d 663 (Fla.5th DCA 1985), **Booker v. State**, 10 F.L.W. 2751 (Fla.2d DCA Dec. 13, 1985), it was held that **Hendrix** does not preclude consideration of a defendant's escalating pattern of criminal involvement for departure purposes. Nor does **Hendrix** preclude a trial court's consideration of the

timing of prior offenses as a basis for habitual offender status. **Payne v. State**, 11 F.L.W. 26 (Fla.1st DCA Dec. 19, 1985).

Respondent submits that the lower court has properly found that **Hendrix** does not preclude a trial judge from considering the nature of a defendant's prior record for purposes of departure as long as the factors have not already been calculated into the presumptive guidelines sentence.

CONCLUSION

WHEREFORE, jurisdiction should be denied for failure to demonstrate conflict.

Respectfully submitted,

JIM SMITH
Attorney General

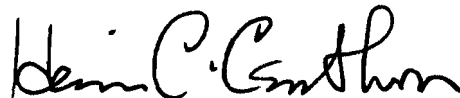


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Jurisdictional Brief has been forwarded to Ms. Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 23rd day of April 1986.



Henri C. Cawthon
Assistant Attorney General