

OA 1-7-87

IN THE SUPREME COURT OF FLORIDA

JESSIE WILLIAMS, III,
PETITIONER,

-VS-

CASE NO. 68,505 *m*

STATE OF FLORIDA,
RESPONDENT.

RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

HENRI C. CAWTHON
ASSISTANT ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TOPICAL INDEX

	<u>Page</u>
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ISSUE	4
ARGUMENT	4
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

	<u>Page</u>
Davis v. State, 458 So.2d 42 (Fla.4th DCA 1984)	7
Hendrix v. State, 475 So.2d 1218 (Fla.1985)	4,5,8
Payne v. State, 480 So.2d 202 (Fla.1st DCA 1985)	5
Rodrigue v. State, 481 So.2d 24 (Fla.5th DCA 1985)	5
State v. Mischler, 488 So.2d 523 (Fla.1986)	4
Torrey v. State, 482 So.2d 552 (Fla.2d DCA 1986)	5
White v. State, 481 So.2d 993 (Fla.5th DCA 1986)	5
Whitehead v. State, 467 So.2d 779 (Fla.1st DCA 1985)	5
Williams v. State, 484 So.2d 71 (Fla.1st DCA 1986)	5,8

OTHER

Fla.R.Crim.P. 3.701	4,6
§775.084, Fla.Stat.	5

IN THE SUPREME COURT OF FLORIDA

JESSIE WILLIAMS, III,

PETITIONER,

-VS-

CASE NO. 68,505

STATE OF FLORIDA,

RESPONDENT.

-----/

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Jessie Williams, III, was the criminal defendant in the trial court and the appellant in the First District Court of Appeal. Respondent, the State of Florida, was the prosecuting authority at trial and the appellee.

The record on appeal containing the legal documents filed in this cause and the transcript of testimony and proceedings at the hearings will be designated "(R)."

All emphasis is supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as being supported by the record. Additional facts deemed relevant and necessary to the proper disposition of the issue raised will be included in the argument portion of Respondent's brief.

SUMMARY OF ARGUMENT

The trial court's reasons for departure were clear and convincing because they were supported by factors not calculated into the presumptive guidelines sentence, to-wit: Petitioner's juvenile record and the short period of time between the completion of rehabilitation efforts and the recurring offenses. Petitioner's argument that the trial court cannot base a departure upon its disagreement with the guidelines is inapplicable here in that the trial court enunciated his "disagreement" with the recommended sentence in the particular case before it, not with the guidelines in general.

ISSUE

THE TRIAL COURT STATED CLEAR AND
CONVINCING REASONS FOR DEPARTING
FROM THE RECOMMENDED GUIDELINES
SENTENCE.

Petitioner argues that the stated reasons for departure were improper because they revealed "a disagreement with the guidelines range" (See Pet. Brief, p. 6) and were based upon Petitioner's prior record. **Hendrix v. State**, 475 So.2d 1218 (Fla.1985). Respondent disagrees.

It is conceded that the stated reasons for departure indicate the trial judge's disagreement with the sentencing guidelines "suggested sentence" in the instant case (R 22-23). However, nothing in the statement can be interpreted as a general opposition to Fla.R.Crim.P. 3.701. Of course, a departure is always based upon the trial court's "disagreement" with the presumptive sentence. For Petitioner to argue that a sentencing court cannot disagree with the recommended sentence is to argue against any and all departures!

Here, the trial judge stated specifically why the "suggested sentence" in the case at bar was inappropriate and required departure. To be valid, reasons for departure must be factually "proven beyond a reasonable doubt" **State v. Mischler**, 488 So.2d 523 (Fla.1986), and must be legally "clear and convincing," Fla.R.Crim.P. 3.701(b)(6), which means as a threshold matter that they may not be "based upon a factor which has

already been weighed in arriving at [the] presumptive sentence." **Hendrix, supra.** The District Court of Appeal, First District, correctly applied these general principles in affirming the departure.

Since the Court's decision in **Hendrix**, the appellate courts of this State have held that because the timing of a defendant's prior offenses is not factored into the scoresheet, it is a valid reason for departure. **Torrey v. State**, 482 So.2d 552 (Fla.2d DCA 1986); **White v. State**, 481 So.2d 993 (Fla.5th DCA 1986); **Rodrigue v. State**, 481 So.2d 24 (Fla.5th DCA 1985). Moreover, habitual felony offender status, one of the requirements of which is the commission of a prior felony within five years of the instant offense, has been found to be a valid reason for departure. **Payne v. State**, 480 So.2d 202 (Fla.1st DCA 1985); **Whitehead v. State**, 467 So.2d 779 (Fla.1st DCA 1985), pending, No. 67,053; §775.084, Fla.Stat. (See also the opinion below citing to post-**Hendrix** decisions. **Williams v. State**, 484 So.2d 71 (Fla.1st DCA 1986)).

This was not a case in which the judge based the departure solely upon the number of prior convictions or upon a general reference to criminal history. Here, the trial court adequately distinguished Petitioner's record by referring to the timing of his offenses "relative to prior offenses and releases from incarceration or supervision." 484 at 72-73.

The stated purpose of the sentencing guidelines includes:

2. The primary purpose of sentencing is to punish the offender.

4. The severity of the sanction should increase with the length and nature of the offender's criminal history.

7. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons . . . who have longer criminal histories.

Fla.R.Crim.P. 3.701. Committee Note (b)(11) authorizes departure based on factors which are consistent with the statement of purpose. Of course, in a non-departure sentence, the guidelines scoresheet is the instrument of choice. However, when the trial judge exercises his discretion to depart from the presumptive range, the scoresheet is not the sentencing instrument, but becomes merely a tool by which he can measure the extent of his departure. This does not result in double imposition of penalty or aggravation of a sentence.

Under Fla.R.Crim.P. 3.701(d)(5), and the Committee Note thereto, each prior felony and misdemeanor conviction in an offender's prior record shall be scored. This rule, when read in conjunction with (d)(11), provides that an offender cannot be punished due to offenses which do not result in conviction. But the language of (d)(11) does not expressly prohibit consideration of offenses for which the defendant has been convicted. Moreover, those who have longer criminal histories are to be accorded incarcerative sanctions. Fla.R.Crim.P. 3.701(b)(7). There is no limitation in the guidelines as to how those incarcerative sanctions are to be imposed.

To accept Petitioner's argument that the guidelines already take prior convictions into account on the scoresheet

and that the consequences of such a departure would be an improper double consideration "would be to remove the trial judge's right to exercise his discretion for clear and convincing reasons . . . our system of criminal justice, is in part predicated on enhanced punishment for incorrigibles. If this be true, it cannot help but be a clear and convincing reason for aggravation, notwithstanding built-in provisions for prior criminal convictions." **Davis v. State**, 458 So.2d 42-44 (Fla.4th DCA 1984).

A scoresheet does not reflect the timing, violent nature or escalating pattern of a defendant's record, and nothing in Rule 3.701 or this Court's decision in **Hendrix** prohibits their consideration for departure purposes. The guidelines do however preserve the trial judge's discretionary power to impose a sentence outside the presumptive sentence and within the statutory maximum where the circumstances are clearly stated, have not previously been factored, and demand departure.

CONCLUSION

Wherefore, Respondent submits that the decision in **Williams v. State, supra**, be affirmed as being a proper application of the sentencing guidelines and as being in harmony with **Hendrix v. State, supra**.

Respectfully submitted,

JIM SMITH
Attorney General



HENRI C. CAWTHON
Assistant Attorney General
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been forwarded to Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 20th day of October 1986.



Henri C. Cawthon
Assistant Attorney General