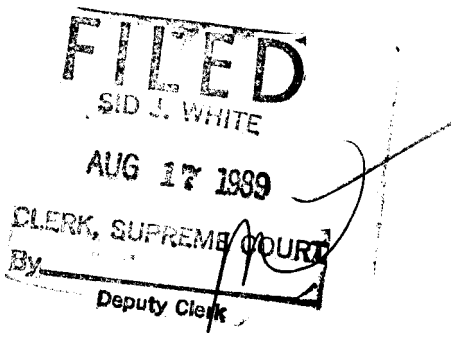
W00A

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
v.	)	**CASE NO. 73,531**
	)	
JEFFREY C. HIEBER,	)	
	)	
Respondent.	)	



AMENDED
BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On **March 27, 1986,** the State filed a Direct Information against Jeffrey C. Hieber (**"Defendant"**) in Hillsborough County Circuit Court Case No. 86-4408-D (R. **3-5)** for:

1. Count I - Armed Burglary (Conveyance); and
2. Count II - Grand Theft in the Second Degree.

On **Marc,,** 27, **1986,** the State filed a Direct Information against Defendant in Hillsborough County Circuit Court Case No. 86-4410 (R. 87-90) for:

3. Count I - Armed Burglary;
4. Count II - Grand Theft in the Second Degree:
5. Count III - Attempted Murder in the First Degree; and
6. Count IV - Criminal Mischief (Misdemeanor).

Hillsborough County Circuit Court Case No. 86-4408-D and Hillsborough County Circuit Court Case No. 86-4410-D were consolidated for purposes of disposition, judgment and sentencing.

On **February 1, 1987,** Assistant State Attorney Karen Schmid prepared and filed a Sentencing Guidelines Scoresheet **(R.** 55-56, 111-12).

On **February 16, 1987,** Defendant appeared before the trial court for sentencing. The trial court conducted an extensive Sentencing Hearing (R. 135-54). At this point, Defendant had already been incarcerated for **141 days.** The sentences announced were as follows:

No. of Years

0 5 10 15 20 **25**

Case No. #86-4408

Armed Burglary ├------- ----------
Grand Theft 2d° -------

Case No. #86-4410

Armed Burglary ------- ----------
Grand Theft 2d° -------
Attempted 1st° Murder ------- -------
Criminal Mischief - (Time Served)

On **February 16, 1987,** after announcing the particular punishment, the trial court articulated with specificity its reasons for deviating from the sentencing guidelines. The trial judge said:

> . . . part of the rationale of the [trial] court in departing downward substantially from the [sentencing] guidelines is that you're being sentenced for five felonies. They arose out of essentially the same set of facts situations (sic), one set of incidents where you went around burglarizing automobiles.
>
> Another is that while you have a prior record I have not found it to be a substantially significant prior record.
>
> I believe that by the time you are released from Florida State Prison system that you will be a young adult. . . . I believe with the supervision that you will have a reasonably good chance of returning to a productive member of our society.

(R. 151-52; see Exhibit "**A**" hereto).

On **February 16, 1987,** immediately upon the conclusion of the Sentencing Hearing, the trial court executed and entered the following orders:

(1) Judgments in Case No. 86-4408-D (R. 57-58) and in Case No.86-4410-D (R. 114-18); and

(2) Judgements (sic) of Guilt and Placing Defendant on Probation in Case No. 86-4408-D (R.59-60) and in Case No. 86-4410-D (R. 119-20).

On **March 11, 1987,** the Clerk of the Hillsborough County Circuit Court recorded the Judgment that was rendered by the trial court in Case No. 86-4410-D on February 16, 1987. At this point, Defendant had already been incarcerated for **166 days.**

On **March 13, 1987,** the Clerk of the Hillsborough County Circuit Court recorded the Judgment that was rendered by the trial court in Case No. 86-4408-D on February 16, 1987. At this point, Defendant had already been incarcerated for **168 days.**

On **March** 23, **1987,** the Clerk of the Hillsborough County Circuit Court received and filed the Judgements (sic) of Guilt and Placing Defendant on Probation in Case No. 86-4408-D and in Case Number 86-4410-D (R. 59-60, 119-20). At this point Defendant had already been incarcerated for **176 days.**

On **May** 12, **1987,** the trial court issued and filed with the Clerk of the Hillsborough County Circuit Court Written Reasons for Departure from Guidelines (R. 129). At this point, Defendant had already been incarcerated for 226 **days.**

On May 19, 1987, the State filed its Notice of Appeal and its Statement of Judicial Acts To Be Reviewed (R. 130-31). According to the State's Notice of Appeal, the sole judicial act to be reviewed is "the downward departure from the sentencing guidelines"[1] (R. 130-31). At this point, Defendant had already been incarcerated for 233 days.

On September 15, 1988, the State filed with the Clerk of the Hillsborough County Circuit Court the transcript of the February 16, 1987 Sentencing Hearing. At this point, Defendant had already been incarcerated for 617 days.

On October 5, 1988, the State filed with the Second District a Motion to Determine Jurisdiction. The State's Motion to Determine Jurisdiction acknowledged that the established law in the Second District is that the State's appeal in the instant case was untimely, but sought a declaration that the rule applied by the Second District conflicted with the rule applied by the Third District. At this point, Defendant had already been incarcerated for 737 days.

On December 21, 1989, the Second District filed its opinion in the instant case. At this point, Defendant had already been incarcerated for 814 days.

On June 6, 1989, the State filed its Brief on the Merits in the instant case. At this point, Defendant had already been incarcerated for 981 days.

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1 From this statement of the issue for review, one would think that the State has conceded that it is the sentence that is on appeal. However, in order to have any hope of prevailing, the State must now argue that the issues on appeal are the reasons for departure from the sentencing guidelines. Unless the State adheres to this novel position, the State cannot rely upon State of Florida v. Williams, which is the *only* precedent that even suggests that an appeal would be timely filed if filed within 15 days after filing the written statement of reasons for departure (whenever that may be).

SUMMARY OF KEY EVENTS

Event	Date	Number of Days Incarcerated
Filing of Sentencing Scoresheet	2/1/87	126
Sentencing Hearing (with Transcript Filed)	2/16/87	226
Expiration of 15-Day Appeal Period [Florida Rules of Crim. Proc. 9.140(c)(1)(J) and 9.140(c)(2)]	3/3/87	166
Filing of Written Reasons for Departure from Sentencing Guidelines	5/12/87	226
Filing of State's Notice of Appeal	5/19/87	226
Filing of Second District's Dismissal of Appeal	12/21/88	814

SUMMARY OF DISTRICT COURT RULINGS ON TIMING OF APPEAL

Case Name	Date of Sentencing	Appeal Date	Decision Date
First District			
No applicable cases.	--	--	--
***Second District**			
State v. Ealy, 533 So.2d 1173 (appeal filed more than 15 days after sentencing was untimely)	8/3/87	10/3/87	9/2/88
State v. Cajunste, 532 So.2d 687 (appeal filed more than 15 days after sentencing was untimely)	11/6/87	12/3/87	8/24/88
Third District			
State v. Williams, 463 So.2d 525 (appeal filed more than 15 days after sentencing was timely)	3/12/84	4/3/84	2/12/85
***Fourth District**	10/18/83	10/26/83	6/13/84
Harvey v. State, 450 So.2d 926 (appeal properly based upon oral pronouncement of reasons at sentencing hearing)			
***Fifth District**	8/23/83	12/29/83	9/20/84
Burke v. State, 456 So.2d 1245 (appeal proper where reasons for departure were announced at hearing but no written statement was filed; oral explanation in the record by trial judge of reasons for departure was sufficient to support appeal)			

ISSUE ON APPEAL

WHETHER THE STATE'S APPEAL OF THE TRIAL COURT'S DOWNWARD DEPARTURE FROM THE SENTENCING GUIDELINES WAS TIMELY FILED. . . WHEN THE STATE'S NOTICE OF APPEAL WAS FILED MORE THAN 15-DAYS AFTER THE SENTENCING HEARING AT WHICH THE TRIAL COURT ARTICULATED WITH SPECIFICITY THE REASONS FOR DEPARTURE.

SUMMARY OF THE ARGUMENT

The subject matter of this appeal is the propriety of a criminal sentencing order that deviated from the sentencing guidelines. The sentencing order was rendered by the trial court on March 23, 1987.

The State's appeal of a downward departure from the sentencing guidelines should have been filed within 15 days after rendition of the subject sentencing order (i.e. by April 7, 1987). The State's failure to file a Notice of Appeal by that date constitutes a jurisdictional bar to appellate review.

The State first filed its Notice of Appeal **57** days after rendition of the sentencing order. Accordingly, this appeal should be dismissed for lack of jurisdiction.

The Florida Rules of Criminal Procedure and the law espoused by the majority of the District Courts of Appeal clearly and unequivocally require the notice of appeal to **be** filed within the 15-day window after rendition of the sentencing order. Only the Third District disagrees.

No matter what reasons the Third District may have had to justify prolonging the agony, those reasons are inapplicable to the case at bar. Even if one were to agree that clear articulation of the reasons for departure from the sentencing guidelines was a necessary prerequisite to meaningful appellate review, the reasons supporting the trial court's departure were well-known and susceptible to immediate transcription at the time the sentences were announced.

To require the Defendant to wait in limbo until the trial judge codifies his **reasons** for departure (whenever that may be) before the Defendant may know whether the sentencing order is final is **UNFAIR** and **UNREASONABLE.** Thus, the State should have and could have commenced its appeal within 15 days after rendition of the sentencing order without jeopardizing the viability of its appeal.

ARGUMENT

THE STATE'S APPEAL OF THE TRIAL COURT'S DOWNWARD DEPARTURE FROM THE SENTENCING GUIDELINES WAS **UNTIMELY**

A. The Rules Provide for an Appeal Within 15 Days from the Sentencing Order.

The State may appeal a sentence imposed outside the range recommended by the guidelines provided by Florida Statutes Section 921.001 and Florida Rule of Criminal Procedure 3.701. **See** Fla.R.App.P. **9.140(c)(1)(J).** In order to be timely filed, a notice of appeal relating to a sentence imposed outside the range recommended by the sentencing guidelines must **be** filed with the clerk of the lower tribunal within 15 **days** of rendition of the order to be reviewed. ***See*** Fla.R.App.P. **9.140(c)(2)** (emphasis added).

The rendition of an order occurs upon "the filing of a signed, written order with the clerk of the lower tribunal." **See** Fla.R.App.P. **9.020(g).** Accordingly, the 15-day period within which the State may initiate an appeal commences to run from the date the order forming the basis of the appeal is filed with the clerk of the lower tribunal.

In the instant case, the orders that collectively form the basis for the State's appeal of the trial court's departure from the sentencing guidelines are the Judgments and Probation Orders. The Judgments and Probation Orders (which were signed on February 16, 1987) clearly and unequivocally reflect the sentences meted out by the trial court to Defendant. The sentences themselves are the subject of the State's appeal (R. 130-31). No further order or report of the trial court was necessary in order to advise the State that the sentence imposed by the trial court upon this Defendant represented a downward departure from the sentencing guidelines.

In the case at bar, the first of the orders sentencing Defendant in a manner inconsistent with the sentencing guidelines was *filed* with the Clerk of the Hillsborough County Circuit Court on **March 11, 1987** (R. 114-18); and the last of the orders sentencing Defendant in a manner inconsistent with the sentencing guidelines was filed with the Clerk of the Hillsborough County Circuit Court on **March 23, 1987** (R. 59-60, 119-20). Accordingly, the rendition of the order(s) forming the basis of the State's appeal was complete on **March 23, 1987.**

If the State had desired to initiate an appeal of the sentencing orders on the basis that they departed from the sentencing guidelines, the Florida Rules of Appellate Procedure required the State to file its Notice of Appeal with the Clerk of the Hillsborough County Circuit Court no later than **April 7, 1987** (i.e. within 15 days after "rendition" of the last of the sentencing orders). Fla.R.App.P. **9.140(c)(2).** However, the State failed to file its Notice of Appeal until **May 19, 1987** (i.e. 57 days after rendition of the last sentencing order).

Therefore, under the Rules, the State's notice of appeal should have been (and certainly could have been filed **by** April 7, 1987. The State's failure to commence the appeal by April 7, 1987 renders the appeal untimely.[2]

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2 Cf. Jackson v. State of Florida, 454 So.2d 691, 692 n.2 (Fla. 1st DCA 1984). In Jackson, the First District points out that the Rules also require that the trial judge file a contemporaneous written statement supporting a departure from the sentencing guidelines. But . . . what if the trial judge neglects to **do** so? This First District opinion does not address that possibility and, therefore, provides no guidance in a situation such **as** that presented by the instant case. Presumably, neither the First District nor any other court would penalize a defendant for the trial court's failure to follow the Rules.

B. Three of Four District Courts Agree that Appeal of Downward Departure Must Be Commenced Within 15 Days After Rendition of the Sentencing Order . . . Whether or Not Written Reasons are Filed Contemporaneously[3]

In State of Florida v. Cajunste, 532 So.2d 687 (Fla. 2d DCA 1988), the Second District was asked to dismiss a Notice of Appeal filed by the State more than 15 days after the filing of the judgment and sentence, but less than 15 days after entry of the written reasons supporting the downward departure from the sentencing guidelines. Under the facts presented, the Second District held that appellate jurisdiction did **not** exist because the State did not file its Notice of Appeal within 15 days after the judgment and sentence were filed with the trial court.

In Cajunste, the Second District distinguished other precedent and found that "the record reveals that the scoresheet used at the ... sentencing hearing and filed with the ... judgment and sentence [satisfies the requirement of] written reasons for departure."? Id. In the case at bar as in Cajunste, the Assistant State Attorney prepared and filed the sentencing scoresheet setting forth written support for the trial court's downward departure from the sentencing guidelines, including (a) Defendant lacks a significant prior record, (b) all offenses arose from a single episode, and (c) Defendant was a juvenile at the time of the episode (R. 55-56, 111-12, 129). Accordingly, even if this Court were to believe the appeal time does not run until the written reasons for

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3 The First District Court of Appeal has not faced the issue head-on. In Jackson v. State of Florida, 454 So.2d 691, 692 n.2 (Fla. 1st DCA 1984), the court stated (in dictum) that Rule 3.701 "rather noticeably emphasizes the requirements of a contemporaneous written statement . . . to be made at the time of sentence". The dissent focused on this dictum and concluded that the "the failure to provide a contemporaneous written statement [is] harmless error where an oral statement is promptly reduced to writing in a manner so as not to prejudice in any way an appellant's right of review." Id. at 693. In **the case at bar, there is no way that the trial court's failure to file a contemporaneous written statement could have caused any prejudice whatsoever to the State's right of review.**

departure are filed, the requirement for written reasons of departure was satisfied by the State's gratuitous filing of the sentencing scoresheet (R. 55-56, 112-13).

In State of Florida v. Ealy, 533 So.2d 1173 (Fla. 2d DCA 1988), the Second District held that "the sentence, which is the orders being appealed herein, should have been appealed within 15 days of the time it was filed in the clerk's office. An order stating reasons for departure, while relevant to an appeal raising guideline issues, is not the order from which the state or defendant may appeal." Id. (emphasis added). The order being appealed in the instant case are the Judgments and Probation Orders that were "rendered" on March 11 & 13, 1987; and the State's failure to commence its appeal within 15 days thereafter raises a jurisdictional bar.

In Harvey v. State of Florida, 450 So.2d 926 (Fla. 4th DCA 1984), the Fourth District dealt with the propriety of an appeal when oral reasons for departure are announced at the sentencing hearing, but no written statement is filed. In accepting jurisdiction of the appeal, the court held that an "oral explanation in the record sufficiently provides the opportunity for meaningful appellate review . . . ." Therefore, since the failure to provide a written statement providing reasons for departure does not impede or inhibit appellate review, the absence of a written statement cannot serve as a basis for altering the appellate timetable. Id. at 927-28.

In Burke v. State of Florida, 456 So.2d 1295 (Fla. 5th DCA 1984), the Fifth District held that the trial court's dictation of its reasons for departure directly into the record at the hearing sufficiently provides the opportunity for meaningful appellate review. Accordingly, when oral reasons for departure are available in verbatim transcription, the right to appeal a departure matures as soon as the Sentencing Order is filed with the Clerk of Court. The appellate clock starts to tick away from that date

and cannot be delayed until some indeterminate time when someone finally gets around to preparing the written statement.

Although the Second, Fourth and Fifth District Courts of Appeal ostensibly agree that the Notice of Appeal from a guidelines departure must be filed within 15 days after the Sentencing (whether or not written reasons for departure are contemporaneously filed), the Third District disagrees. In State of Florida v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985), the Third District held that the appeal "matures" upon the filing of the written statement delineating the reasons for departure. Id. at 526. The Third District's holding is based upon the philosophy that it is not the sentence that is the subject of such an appeal, but the reasons for the sentence.

The Third District's position is incongruous. Before this opinion, no one would have even dreamt that the "reasons" for the departure were the subject matter of the appeal as opposed to the sentence itself. Of course, the reasons for departure are matters to be considered on appeal . . . but it is clearly the sentence that is being appealed.

Even the Third District felt a little sheepish about its rather unique viewpoint and decided to bolster its position by "mentioning" that the requirement of a written statement was not satisfied by oral pronouncements in the record. According to the Third District, the requirement of a written statement was not satisfied in Williams because the State inexplicably failed to order a transcript of the sentencing hearing until well after the appeal was lodged. Unfortunately, the court's vain attempt to invest its ruling with some logical underpinnings only makes the ruling that much harder to swallow.

The only plausible rationale for the Third District's approach is that the propriety vel non of a sentence imposed outside of the recommended guideline range cannot be known until the written reasons for the departure from the guidelines are given. Unfortunately for the State, this rationale for delay is inapplicable to the instant case. Here, the trial court fully and cogently articulated its reasons for downward departure from the sentencing guidelines at the February 16, 1987 Sentencing Hearing. The trial court based its departure upon the well-known record facts and the previously filed Sentencing Scoresheet. The trial court's reasons for the departure transcribed and filed for use upon appeal. Therefore, the State was well aware of the reasons for the departure and the State had a record susceptible to appellate review on February 16, 1987, and in any event by March 3, 1987.

For reasons entirely beyond Defendant's control, the written reasons for departure from the sentencing guidelines were not prepared and filed by the trial court until May 12, 1987. However, the written reasons supporting the trial court's downward departure from the sentencing guidelines neither varied from nor expanded upon the reasons announced verbally by the trial court at the February 16, 1987 Sentencing Hearing (R. 151-152) (see Exhibit "A" hereto).

C. The Rule Suggested by the State is Unfair Because it Created Excessive Uncertainty and Impermissibly Shifts the Risks/Burdens of Finality to the Defendant.

If adopted by this Court, The rational employed by one and only one case suggesting that the State's appeal of a sentence outside the sentencing guidelines may be filed more than 15 days after sentencing leads us to the following rules and results:

(a) It is not the particular sentence that is susceptible to appeal; instead, it is the allegedly improper reasons for the particular sentence that are the subject matter of the appeal.

(b) If it is the reasons that are the subject matter of the appeal, there can be no appeal unless and until the written reasons for departure are filed.

(c) If the written reasons for departure are not filed, then the sentence is not ripe for appeal.

(d) Unless and until the written reasons for departure are filed, the appeal period will not expire and the act of sentencing may never become final.

(e) Nothing short of the actual filing of written reasons will satisfy the prerequisites to appeal.

Could this mean that, when a trial judge does not adhere strictly to the rules and file a contemporaneous written statement codifying the reasons for departure, a defendant may remain in limbo without knowing (i) how long he will ultimately have to serve,-or even (ii) when that decision may ever be made? Should the defendant bear the burden of creating finality in his own sentence . . . or should the State who procured the sentence bear responsibility for resolving the issues with finality?

Clearly, the State has the power to address the matter expeditiously and efficiently and must bear responsibility therefor. In the case at bar, the reasons were cogently stated and were readily susceptible to meaningful appellate review. If the State felt that it needed a written memorandum signed by the trial judge, the State should have appealed in a timely manner (within 15 days after sentencing) and then asked the appellate court to relinquish jurisdiction for a limited time for the limited purpose of supplementing the record with the trial court's written statement of reasons for departure from the sentencing guidelines.

Under the circumstances, where the reasons were clearly articulated (albeit orally), there is not plausible reason or justification for delaying the appellate timetable. Why would we want to sit idly by for the occurrence of some event (over which the litigants have no control) that may take an indeterminate period of time to accomplish . . . particularly when all of the facts and all of the reasons (both good and bad) have been properly established and susceptible to appellate review since the sentencing hearing.

The State should be bound by the rule of trial evidence that requires objections to be presented as soon as the basis therefor becomes apparent or they shall be deemed to have been waived. The rule stated in Ealy is imminently reasonable, whether or not one adopts a strict literal interpretation of Florida Rules of Appellate Procedure 9.020(g) and 9.140(c)(2). On **February 16, 1987,** the State had actual knowledge that the trial court was departing from the sentencing guidelines and the State had actual knowledge of several reasons for the downward departure. Even if the State was asleep at the **February 16, 1987** Sentencing Hearing, the State should be charged with constructive notice of the downward departure and the reasons therefor, by virtue of the numerous independent filings of the Judgments and the Probation Orders.

Armed with actual and constructive knowledge of the sentences imposed by the trial court upon Defendant and the reasons therefor, the State was under a duty of good faith and fair dealing to initiate its appeal expeditiously in the manner contemplated by the Florida Rules of Appellate Procedure. Nevertheless, in complete disregard of Defendant's welfare and in direct contravention of the procedures mandated by prevailing Florida law, the State allowed an inordinate and unreasonable period of time to pass between the sentencing and the appeal. By the time the State chose to appeal the sentences, Defendant had already been incarcerated a total of 241 days **(149 days**

before sentencing and 92 days after sentencing). For the State to wake up at that late stage, after all of the facts and rulings necessary to support an appeal had been well known for an extended period, is unfair and should not be condoned.

CONCLUSION

No Court should permit a procedure that is designed to enable the State to create recurring trauma regarding length of incarceration many months after a defendant has suffered the initial shock of sentencing. The appellate rules were designed and should be construed to require the judicial process to reach final resolution expeditiously and fairly.

This Court should take this opportunity to affirm Ealy and disavow affection for the State's propensity to ignore the emotional impact of its actions upon defendants and their innocent families. This appeal should be dismissed with prejudice for lack of jurisdiction.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing was furnished by United States mail to Katherine V. Blanco, Assistant Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, on August 16, 1989.

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