IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 73, 531

JEFFREY C. HIEBER,

Respondent.

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

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 327832
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

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SUMMARY OF THE ARGUMENT

The reasoning of the Third District Court in Williams, infra, is sound and should be adopted by this court. Just as the defendant is entitled to have a written order outlining the trial court's written reasons for an upward departure, the State's good faith notice of appeal is necessarily dependent upon the trial court's written order of departure.

ARGUMENT

ISSUE

IN ACCORDANCE WITH THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN STATE V. WILLIAMS, 463 So.2d 525 (Fla. 3d DCA 1985), THE STATE'S APPEAL OF A GUIDELINES DEPARTURE SENTENCE IS TIMELY WHEN TAKEN WITHIN FIFTEEN (15) DAYS OF THE WRITTEN ORDER SETTING FORTH THE REASONS FOR DEPARTURE, EVEN THOUGH THE NOTICE OF APPEAL WAS MORE THAN 15 DAYS AFTER RENDITION OF THE JUDGMENT AND SENTENCE.

The Respondent, Jeffrey C. Hieber, claims, inter alia, that the state was aware of the announced reasons for departure at the sentencing hearing and the State allowed an inordinate and unreasonable period of time to pass between the sentencing hearing and the notice of appeal in this case. It is undisputed that a trial judge may sentence a criminal defendant to more or less than the sentence recommended by the guidelines. However, in order for that departure sentence to be valid, it must be supported by clear and convincing reasons. Additionally, those clear and convincing reasons must be in writing. It has been consistently held by our courts that articulation in the record is not the writing contemplated under Rule 3.701, Florida Rules of Criminal Procedure. See, State v. Jackson, 478 So.2d 1054 (Fla. 1985). In Jackson this Court accepted the reasoning of the Fourth District in Boynton v. State, 473 So.2d 703 (Fla. 4th DCA 1985), explaining while oral pronouncements in the record will

not suffice as the written order for departure purposes. Judge Barkett said in Boynton:

> The alternative of allowing oral prounouncements to satisfy the requirement for a written statement is fraught with disadvantages which, in our judgment, compel the written reasons.
>
> First, it is very possible. . . that the "reasons for departure" plucked from the record by an appellate court might not have been the reasons chosen by the trial judge were he or she required to put them in writing. Much is said at hearings by many trial judges which is intentionally discarded by them after due consideration and is deliberately omitted in their written orders.
>
> Second, an absence of written findings necessarily forces the appellate courts to delve through sometimes lengthy colloquies in expensive transcripts to search for the reasons utilized by the trial courts.

This Court additionally indicated the requirement of a separate writing gives the trial court the opportuntiy to make precise and reasoned decisions that may not be reflected in the hectic setting of a sentencing hearing.

Just as the defendant is entitled to have a written order outlining the trial court's reasons for an upward departure, the State should have the same when reviewing a downward departure. As Justice Cardozo indicated in Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 687 (1933), "But justice, though due to the accused, is due to the accuser also." Justice for the

state requires there be something to appeal before filing a notice of appeal.

Sub judice, the State filed its notice of appeal after the filing of the trial court's order setting forth the reasons for the downward departure. Should the State have to proceed with an appeal before the filing of the order of departure, the courts will be burdened with two appeals. The first appeal would require remanding the case to the trial court for imposition of an appropriate order with clear and convincing reasons, and the second appeal would involve the validity of the reasons. At the very least, the parties would have to go through a relinquishment of jurisdiction to get an order. By filing the notice of appeal after the entry of the departure order, the State obviates the need for separate appeals and/or time spent in relinquishing jurisdiction. This procedure would also reduce the ultimate cost, time involved, appellate caseload and avoid wasting scarce judicial resources.

The ultimate question to be answered when the State appeals a sentence which is less than the guidelines recommended range is whether or not the reasons given in support of the departure are clear and convincing. That question can only be answered when there is an order containing reasons. The State can only make its decision to seek review of the order after having seen the order. It makes good sense to allow the filing of a notice of appeal after the order to be appealed has been entered. The Second District Court of Appeal erred in finding the notice filed

in this instance to be untimely. The State's notice was filed within 15 days from the entry of the written order setting forth the reasons for departure; and, in accordance with Williams the instant appeal should not have been dismissed.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, Petitioner respectfully requests this Court to approve the decision of the Third District Court in Williams, reverse the decision of the Second District Court in the instant case, and remand this appeal to the District Court for consideration of the merits of the instant appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Katherine Blanco
KATHERINE V. BLANCO
Assistant Attorney General
Fla. Bar #327832
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to STANDFORD R. SOLOMON, of RUDNICK & WOLFE, 101 E. Kennedy Blvd., Tampa, Florida 33602 this 18th day of September, 1989.

K Blanco
OF COUNSEL FOR PETITIONER