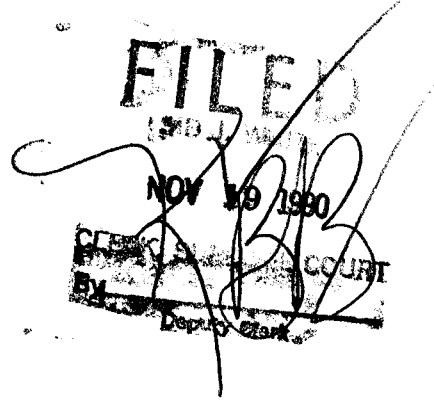
IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 76,524



TOBIAS BARFIELD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. The Respondent was the appellee and the prosecution, respectively, in the lower courts. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"AB"	Petitioner's Brief
"SR"	Supplemental Record
"A"	Appendix

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts, as it appears at pages 2 through 3 of his initial brief, to the extent the statement represents an accurate, non-argumentative recitation of the proceedings below, and only to the extent necessary for the resolution of the issues raised on appeal. The State accepts the statement subject to the following emphasis and clarifications:

The Petitioner was found guilty of trafficking and conspiracy to traffick in cocaine in an amount of four hundred (400) grams or more. (R 448).

Federal Agent William Stringer was introduced to co-defendant Ivey through a confidential informant. Ivey identified himself as a middleman. He was merely making a connection for another individual. Ivey wanted a $1,000. for each kilo of cocaine delivered for his part in introducing the buyer and seller to each other. (R 68,70).

During a phone conversation with Ivey, Stringer heard someone's voice in the background. Ivey identified the voice as "Tobias", the Petitioner. Stringer asked to speak to Tobais [Petitioner]. Stringer wanted to speak to the gentleman that was in the background directing the questions. (R 124). The Petitioner told Stringer that he was concerned about the quality of the cocaine. Stringer assured him it was good quality. (R 72,104). This was on April 4 that Petitioner talked to Stringer about the quality of the

cocaine. (R 74). Petitioner then set up a meeting with Stringer to consummate the sale. (R 76,77) Stringer was instructed by the Petitioner from the beginning. (R 146).

On April 5, 1988 undercover agent William Stringer was to meet with Ellwood Ivey and Tobias Barfield [Petitioner] at Wendy's at 6:00 P.M. Stringer arrived at the Wendy's at ten till 6:00. (R 80) Deputy Sheriff Willaim Hoffman positioned himself inside the Wendy's as backup for Stringer. (R 193). At approximately 6:05 both officers observed a white van driven by Ivey drive around Wendy's Restaurant without stopping. (R 80,195). Ivey eventually parked his car in the adjacent parking lot at the Shell station. (R 279,314). A few minutes later another vehicle pulled in through the light occupied by two black males. The car was a 1981 Ford Granada. A young black male got out of that car and came into the restaurant. He identified himself to Stringer as Toby [Petitioner]. Stringer asked Petitioner if he had the money. Petitioner stated that the money was in the car with "his man". (R 80,81,100).

Stringer told Petitioner to bring "his man" into the restaurant. Petitioner went outside and brought Terry Reed back into the restaurant with him. (R 81,206). Petitioner told Stringer that he controlled the money through "his man", Reed. (R 99,100). Petitioner described co-defendant Reed as "his man." (R 96). Both Petitioner and Reed were facing Joseph Hoffman, the backup police officer in Wendy's. Deputy Sheriff Hoffman testified that Petitioner and Reed engaged in

conversation with Stringer. (R 206).

Seconds later Ivey came in from the east side of the building. Ivey said he was nervous and wanted to get the deal over with. All agreed to go outside, observe the money and then Stringer would give them the cocaine. (R 81).

Inside the restaurant Stringer discussed with all three individuals the quality of the cocaine, the money, and who would go outside to look at the cocaine. (R 125). Petitioner was also advised by Stringer of the terms of the negotiations - two kilos of cocaine for $25,000.00 and about what was going to happen. (R 124,128).

All four people got up to go outside to complete the transaction. Stringer did not know if he was in a trap or a ripoff at that time and there were three people against one so he requested Petitioner to stay behind. (R 83,151,206). Ivey and Reed proceeded to the parking lot with Stringer, the undercover agent. (R 83,206).

Officer Hoffman testified that when Petitioner came back in the restaurant he took up a position at the window of Wendy's which was facing the parking lot. From there he watched what was going on between Reed, Ivey and Stringer. (R 206,208). His face was up against the window watching the action outside in the parking lot. (R 208,209).

From the window in Wendy's Petitioner could observe all that was happening outside. All three proceeded to Reed's car. Reed opened the door and took out a bag containing several bundles of U.S. currency in large

denominations. At this point Reed was in total control of the money. (R 99). After viewing the money Stringer went to the rear of his van and removed a brown paper bag containing two kilos of cocaine. Stringer opened the bag to allow Reed to view the contents. At this time Ivey turned around and returned to the restaurant. Reed stated to Stringer that he wanted to test the contents. Stringer said fine. (R 83,208).

Officer Hoofman testified that when Ivey returned to Wendy's he joined Petitioner at the window to observe what was now happening between Reed and Stringer. (R 208). Reed stated that he wanted to check the quality of the cocaine. (R 129-130). He said that he had a knife in his car, and that he would retrieve it. Reed got the knife from his car. Reed was approaching Stringer with the knife when Stringer signaled the police officers to come in and effectuate the arrest. (R 84,129,130,210).

As the agents were closing in on Reed in the parking lot, Ivey and Petitioner turned to run. Deputy Sheriff Hoffman placed both under arrest. (R 211).

The State moved to aggravate the Petitioner's sentence based on the following:

1. The Petitioner was convicted of trafficking in cocaine and sentenced on January 27, 1987 to two years Florida State Prison, as a youthful offender.

2. He was released on January 5, 1988 to community control under an early release program. The formal expiration of the prison sentence for the prior conviction was June 17, 1988.

3. The instant offense was April 5, 1988.

4. The State moved for aggravation because the Petitioner was under legal constraint by the Department of Corrections for the same type of offense at the same time of committing the substantive offense.

(R 459). At the sentencing hearing the trial judge agreed to aggravate the sentence because of the Petitioner's recent release from prison and that he committed the same crime right after his release. (R 196). On the sentencing guideline scoresheet written contemporaneously with the oral pronouncements the trial judge stated as reasons for departure: "Defendant was recently convicted of trafficking in cocaine and was in community on SCRAP program when offenses were committed." (R 476).

No objection was made to the sentencing or to the factual reasons for aggravating the sentence.

SUMMARY OF ARGUMENT

This Court has held that the temporal proximity of crimes can be a valid reason for departure when the timing of an offense relates to prior offenses and the release from incarceration or other supervision, as those aspects of prior criminal history are not factored in to arrive at presumptive guidelines sentence. Williams v. State, 504 So.2d 392 (Fla. 1987); State v. Jones, 530 So.2d 53, 55 (Fla. 1988). Here the Petitioner was not due to be released from prison until June, 1988. He was released on a early release program but was still in the control of the Department of Corrections on January 5, 1988. This crime was committed three months later, April 5, 1988. Whereas, the crime he was convicted of involved 28 grams or more. This crime involved 2000 grams of cocaine. Thus, there was a showing of both a temporal proximity of crimes as well as a persistent pattern of criminal activity
relating to the same type of crime - trafficking in cocaine.

Moreover, a lack of rehabilitation was not given as a reason for departure but rather to show the persistent nature of the Petitioner's criminal activity in trafficking in cocaine.

Finally, the reasons for departure were filed contemporaneously with the impostition of the departure sentence. The reasons were written on the guideline scoresheet which was also signed by the trial judge as well as the defense counsel and the state prosecutor. (R 476).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE

This Court in Williams v. State, 504 So.2d 392 (Fla. 1987) held that the timing of an offense in relation to prior offenses and release from incarceration or supervision are not aspects of a defendant's prior criminal history which are factored in to arrive at a presumptive guidelines sentence. Therefore, there is no prohibition against basing a departure sentence on such factors. The following year this Court held that timing of offenses could be a valid reason for departure if it is shown that "....the crimes committed demonstrate a defendant's persistent pattern of criminal activity as evidence by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision." State v. Jones, 530 So.2d 53, 55 (Fla. 1988). Again this Court pointed out in Simpson v. State, 554 So.2d 506 (Fla. 1989) a departure sentence can be upheld based on an escalating pattern of criminal activity or a continuing and persistent pattern of criminality. Simpson, 554 So.2d at 510.

The Fourth District Court noted in Jordan v. State, 15 F.L.W. D1535 (Fla. 4th DCA, June 6, 1990) that this Court has not set an arbitrary number of days or months which would demonstrate, or not demonstrate, a continuing and persistent pattern of criminal activity. However, the Fourth District

Court of Appeal surmised, based on the case law, that any period less than a year is sufficient. Finally, based on Justice Barkett's specially concurring opinion in Gibson v. State, 553 So.2d 701, 702 (Fla. 1989) it appears that timing alone is an appropriate reason for departure.

The facts in this case show that approximately one year before the instant offense the Petitioner was convicted of trafficking in 28 grams or more, but less than 200 grams, and was sentenced to two years Florida State Prison, as a youthful offender. His schedule release was June, 17, 1988 but he was released on a SCRAP Program on January 5, 1988. Therefore, Petitioner was under legal constraint at the time he committed this offense, which was one of the reasons the trial judge aggravated his sentence. (See Sentencing Guideline Scoresheet and point 2 on the trial judges order). The instant crime was committed just three months after the Petitioner was released on this special program. He now stands convicted of trafficking in 2000 grams of cocaine which, had he completed the deal, would have cost him $25,000. The facts of the case indicate that he was the key man in negotiating the deal and called the money man "his man". The seriousness of this offense is shown by the minimum mandatory requirement of 15 years as opposed to 3 years for trafficking in 28 grams or more, but less than 200 grams. Furthermore, for a young man recently released from prison to be dealing in 2000 grams of cocaine and $25,000 in cash shows a continuing and persistent pattern of criminality

which Williams, Jones, and Simpson seek to address. Section 893.135, Florida Statute (1989). Moreover, the instant crime occured about 1 year and three months after his first conviction for dealing in 28 grams to 200 grams of cocaine. A lack of rehabilitation was not given as a reason for departure but rather to show the persistent nature of the Petitioner's criminal activity in trafficking in cocaine.

There is a strong public policy for allowing a trial judge to depart from the recommended sentence when it is shown that the defendant is recently released from prison and immediately commits a similar but more serious crime as his prior conviction. As Judge Glickstein points out in his concurring opinion in Jordan v. State, 15 F.L.W. D1535 (Fla. 4th DCA, June 6, 1990), the prisons in Florida are full because of the explosion of drug-related crimes and the public's growing demands for protection from offenders coupled with the legislative response to those public demands in the form of permitting more flexiblity for judges in the state's sentencing guidelines and more severe penalties for habitual and violent offenders. Judge Glickstein questions the effectiveness of warehousing defendants at a cost to the taxpayers of $28,000 per year. The value of imprisonment decision depends primarily on the accuracy of how much public safety is purchased for $28,000.

Calculating the cost of crime remains an inexact sceince. In one study by the Office of Justice Program's National Institute of Justice which calculated the total

expenditures on crime for 1983, including victim losses, criminal justice, commercial security costs, etc. the cost of crime that was arrived at was $99.8 Billion. By dividing the number of victimizations for that year, 42.5 million, into the expenditures, the researchers arrived at an average cost per crime of $2,300. Applying this figure to the information on offense rates gleaned from the Rand research, which concluded that inmates averaged between 187 and 287 crimes per year, exclusive of drug deals, they concluded that a "typical inmate" is responsible for $430,000 in crimes costs per year, or 17 times the $28,000 cost of incarceration. (See, The Compelling Economics of Prison Construction, by Richard B. Abell, Human Events, March 4 1989).

Recently, the Florida Department of Law Enforcement published its 1989 Annual Report on Crime in Florida. In a letter to the Governor and the Members of the Cabinet the Commissioner pointed out that "Statewide, for all serious crimes there were 1,395,902 victims of crime reported with an overall property loss of over $1.2 Billion." There was another $51 Million in property loss to 115,828 individuals/business in miscellaneous crimes such as forcible sodomy, forcible fondling, kidnap/abduction, drugs, bribery, embezzelment and fraud. This report does not calculate the cost of processing these criminals through the criminal justice system. Nor does it calculate other losses to the victim such as doctors, psychological care, the impact on

losing a loved one. How much higher would the cost to the taxpayers be when those figures are calculated into the figure of $1.25 Billion? And how much of this cost is attributed to defendants who committ crimes while on probation or other supervising program? How much cost to society would there have been had the instant 2000 grams of cocaine reached its intended victims? And not just the intended victims but the cost in ancillary crimes commited by those intended victims?

The first goal of our criminal justice system must be to protect the innocent; the second, to punish the guilty. The public recognizes that a growing percentage of crimes are committed by defendants such as the Petitioner. Had the Petitioner not been released on an early release program he would not have committed this particular crime. Petitioner's involvement in a deal involving 2000 grams of cocaine over the 26 grams, but less than 200 grams, of cocaine he was previously convicted shows a continuing and persistent pattern of criminal activity. Petitioner is exactly the type of criminal that the Williams/Jones/Simpson line of cases seeks to address. The temporal proximity of crimes alone does, and should provide, a valid reason for departing from the sentencing guidelines even if this Court determines that a persistent pattern of criminal conduct was not shown below.

The Respondent would also point out that there was no objection below raised by the defense counsel as to the underlying factual matters supporting the factors for

departure. Had there been such a contemporaneous objection the trial court could have gone into more detail in its order, thus, rectifying any objection to lack of facts.

Finally, the Petitioner notes **for the first time** that the written reasons for departure were not contemporaneous to the sentencing. Respondent would point out that the reasons were listed on the sentencing scoresheet which was signed by the trial judge contemporaneously with the sentencing. There is no formal requirement that the reasons be in an order. The only requirement is that the written reasons be contemporaneously entered and filed at the time of imposition of the sentences, which was done. Ree v. State, 15 F.L.W. S395 (Fla. July 19, 1990). Recently, the Fourth District Court of Appeals held that written reasons articulated on the scoresheet was sufficient to satisfy Ree. Jordan, supra.

In conclusion, the temporal proximity of crimes, standing alone, constitutes a sufficient basis for departure. Accordingly, the Petitioner's conviction and sentence must be affirmed.

CONCLUSION

Respondent, based on the foregoing arguments and authorities cited herein, requests this Honorable Court to affirm the conviction and sentence of the Petitioner.

Respectfully submitted,

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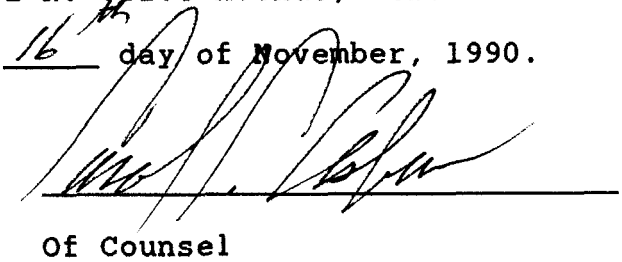
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail/courier to JEFFERY L. ANDERSON, Assistant Public Defender, Fifteenth Judicial Circuit, The Governmental Center/9th Floor, 301 N. Olive Avenue, West Palm Beach, Florida 33401, this 16th day of November, 1990.



Of Counsel