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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

RICHARD C. SMITH,

Petitioner,

v.

CASE NO. 76,659

STATE OF FLORIDA,

Respondent.

MERITS BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

A trial court may properly impose a departure sentence based upon the timing of the offenses in relation to prior offenses and release from incarceration in the absence of an escalating pattern of criminality.

ARGUMENT

THE CERTIFIED QUESTION SHOULD BE
ANSWERED AFFIRMATIVELY.

The Fifth District Court of Appeal certified the following question as one of major importance:

May a trial judge impose a departure sentence based solely on a persistent pattern of criminal activity, closely related in time, although the pattern is not escalating towards more violent or serious crimes?

Smith v. State, 566 So.2d 57, 59 (Fla. 5th DCA 1990).

The answer to the certified question already has been provided in previous opinions of this court. In order to justify a departure sentence, the record must reveal "additional facts concerning the timing of these offenses which were not already factored into the guidelines scoresheet." *State v. Rousseau*, 509 So.2d 281, 282 (Fla. 1987). In *Williams v. State*, 504 So.2d 392 (Fla. 1987), this court held:

Neither the continuing and persistent pattern of criminal activity *nor* the timing of each offense in relation to prior offenses and release from incarceration or supervision are 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 being a departure sentence on such factors.

Id., 393; also *Tillman v. State*, 525 So.2d 862, 864 (Fla. 1988) (emphasis added).

The above holding provides two distinct grounds for departure. First is a persistent pattern of criminal activity. Temporal proximity between the later crimes and prior offenses or between

the later crimes and release from incarceration or supervision also provides a proper basis for departure. As will be shown below, both grounds existed in this case.

This court later explained how a court is to determine whether or not a defendant has displayed an "involvement in a continuing and persistent pattern of criminal activity". Such a pattern is:

[E]videnced 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, 56 (Fla. 1988); see also *State v. Simpson*, 554 So.2d 506, 509 (Fla., 1989).

The pattern was established in this case by the short time span between the commission of the initial offenses and the later crimes, as well as the extremely short time that had elapsed between release from custody and the commission of the new offenses. The defendant committed a grand theft of an automobile, uttered a forgery, and fraudulently used a credit card on April 20, 1988 (R 10-11; 27).¹ He was placed on probation for these offenses on October 18, 1988 (R 13-18). He committed the later offenses only 30 days later on November 17, 1988 (R 58-59; 63). Hence, there was only a period of only seven months between the prior and later crimes; and less than one

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The parties are referred to as the defendant and the state. References to the record are indicated "(R and page)"; those to the merits brief of the petitioner denoted "(B and page)".

month between placement on probation and the commission of the new crimes.

The defense, like the dissenting judge below, mistakenly believes that the temporal proximity factor has already been weighed (B 9). While the defense is correct that points were scored for prior record and for prior convictions for the same type of offense, neither these nor any of the other items scored takes into consideration the short time span between the crimes committed by the defendant and his prior offenses and his placement on supervision. The issue has already been resolved contrarily to the defense position. "[T]he timing of offenses in relation to prior offenses and release from incarceration ... is an aspect of prior criminal history not already factored in to arrive at a presumptive guidelines sentence." *Tillman, supra*.

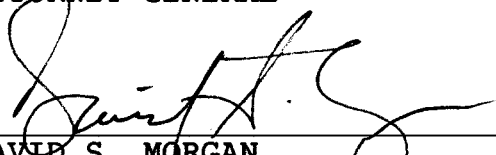
In sum, because the crimes committed by the defendant were in close temporal proximity to his prior offenses and to his placement on supervision, it was proper for the trial court to impose a departure sentence, irrespective of the fact that the crimes committed did not represent an escalation in severity. Therefore, the certified question should be answered in the affirmative.

CONCLUSION

The decision of the Fifth District Court of Appeal in this cause should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

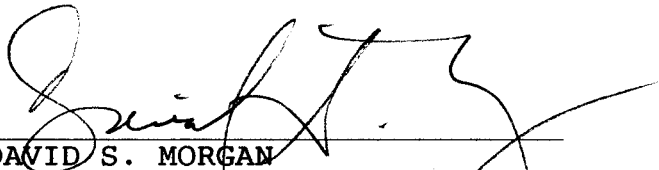


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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Barbara L. Condon, Assistant Public Defender, 112-A Orange Ave., Daytona Beach, FL 32114, by interoffice delivery on this 24th day of November, 1990.



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