IN THE SUPREME COURT OF FLORIDA

RICHARD C. SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.: 76,659

REPLY BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BARBARA L. CONDON
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ATTORNEY FOR PETITIONER

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ARGUMENT

IN RESPONSE TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT TIMING IS A FACET OF THE RELATIONSHIP THAT EXISTS BETWEEN BEING PLACED ON PROBATION AND THE VIOLATION OF THAT PROBATION AND AS SUCH DEPARTURES ARE LIMITED TO A ONE-CELL BUMP-UP.

Petitioner's brief on the merits did not cite a case which is in agreement with the position taken that the timing of a violation of probation is but a facet of the relationship which exits between the probation ordered and the violation of the probation, whether it arises from the commission of a new substantive offense or a technical violation. In Favors v. State, 564 So.2d 284 (Fla. 5th DCA 1990) (the same court which certified the question in this case) the defendant was sentenced for two drug offenses. The trial court departed from the guidelines sentence because one of the offenses followed shortly after the defendant had been placed on probation for the other charge. The court stated:

> Both of these convictions were pending before the court for sentencing and were included in

> the same scoresheet. The fact that the subsequent offense occurred while the Appellant was on probation, and just because it was within a short time after he was placed on probation are insufficient reason to depart from the recommended guidelines sentence. It is proper to give the one-cell bump-up.
> (citations omitted)

Id. at 284.

The Favors decision represents the lower court's acknowledgement and faithful adherence to the decision rendered by this court that held:

> [N]o further increase or departure [beyond the one-cell on a violation of probation] is permitted for any reason.

Franklin v. State, 545 So.2d 851, 853 (Fla. 1989) (emphasis supplied); see also, Lambert v. State, 545 So.2d 838 (Fla. 1989); Ree v. State, 15 FLW 395 (Fla. July 19, 1990); Wesson v. State, 559 So.2d 1100 (Fla. 1990); Dewberry v. State, 546 So.2d 409 (1989); Eldridge v. State, 545 So.2d 1356 (Fla. 1989).

Finally, the criminal activity demonstrated in Petitioner's record does not evidence a progression from non-violent to violent crimes or progression of increasingly violent crimes. Moreover, the Petitioner's criminal history falls woefully short of being an escalating or for that matter a persistent pattern. The Petitioner's two contacts with the criminal system does not demonstrate a pattern of criminal activity.

Once again, Petitioner reiterates that this court should answer the certified question in the negative. Petitioner's

sentence must be vacated and the cause remanded for resentencing within the recommended guidelines.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave, Suite 447, Daytona Beach, FL 32114 in his basket at the Fifth District Court of Appeal, this 19th day of December, 1990.

Barbara L. Condon

BARBARA L. CONDON
ASSISTANT PUBLIC DEFENDER

CONCLUSION

Based on the foregoing reasons and authority cited in this brief as well as in the initial brief, Petitioner urges this Honorable Court to vacate the sentence and remand the cause for resentencing within the recommended guidelines.

Respectfully submitted,

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