



TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS . . . . .	i
TABLE OF AUTHORITIES . . . . .	ii
PRELIMINARY STATEMENT . . . . .	1
STATEMENT OF THE CASE AND FACTS . . . . .	2
SUMMARY OF ARGUMENT . . . . .	4
ARGUMENT	
THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE. . . . .	5
CONCLUSION . . . . .	11
CERTIFICATE OF SERVICE . . . . .	11

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Chanquet v. State</u> , 15 FLW D2017 (Fla. 3d DCA Aug. 7, 1990) . . . . .	7
<u>Farrey v. Bettendorf</u> , 96 So.2d 889 (Fla. 1957) . . . . .	6
<u>Frederick v. State</u> , 556 So.2d 471 (Fla. 1st DCA 1990) . . . . .	7, 10
<u>Gibson v. State</u> , 519 So.2d 756 (Fla. 1st DCA 1988) . . . . .	8
<u>Gibson v. State</u> , 553 So.2d 701 (Fla. 1989) . . . . .	8
<u>Hendrix v. State</u> , 475 So.2d 1218 (Fla. 1985) . . . . .	6
<u>Jordan v. State</u> , 15 FLW D1535 (Fla. 4th DCA June 6, 1990) . . . . .	7, 8
<u>McKinney v. State</u> , 559 So.2d 621 (Fla. 3d DCA 1990) . . . . .	7, 8
<u>Mott v. State</u> , 549 So.2d 1128 (Fla. 3d DCA 1989) . . . . .	7
<u>State v. Jones</u> , 530 So.2d 53 (Fla. 1988) . . . . .	7, 10
<u>State v. Simpson</u> , 554 So.2d 506 (Fla. 1989) . . . . .	6, 7, 10
<u>Williams v. State</u> , 504 So.2d 392 (Fla. 1987) . . . . .	7, 8

OTHER AUTHORITIES

Florida Rules of Criminal Procedure

3.701 . . . . .	6
-----------------	---

Florida Statutes

§ 921.001 . . . . .	6
---------------------	---

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the Fourth District Court of Appeal. He will be referred to as petitioner in this brief.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

On July 7, 1987, Petitioner, Willie Gordon, was charged with grand theft (R-651). On August 17, 1989, Petitioner was convicted of said offence (R-658). On September 22, 1989, and November 3, 1989, sentencing hearings were held (R-575-617,618-649). The guideline scoresheet reflects a recommended range of three-and-one-half (3 1/2) to four-and-one-half (4 1/2) years (R-665). However, at the first sentencing hearing, the parties agreed that appellant's total points was actually seventy-four (74) on a category six (6) scoresheet so that appellant's correct guideline range was two-and-one-half (2 1/2) to three-and-one-half (3 1/2) years. (R-596-597.

On November 3, 1989, the circuit court departed from the sentencing guidelines and sentenced Petitioner to ten (10) years in prison (R-658,666,667-668). The circuit court entered a written order of sentence declaring defendant an habitual felony offender and order for aggravation of sentence which read in pertinent part as follows:

The above-referenced Defendant was convicted of three (3) counts of GRAND THEFT on November 6, 1985. On that date, the Defendant was sentenced to two and one half (2 1/2) years Florida State Prison, and transferred from the Broward County Jail to the Department of Corrections. The Defendant was subsequently transferred from the Department of Corrections to the supervised release program on September 9, 1986. The Defendant was discharged from the supervised release program and released from the Department of Corrections on October 6, 1986.

The Defendant committed the offense of GRAND THEFT on March 24, 1987, a difference of SIX (6) MONTHS AND FIFTEEN (15) DAYS after the

Defendant's release from custody, and a difference of FIVE (5) MONTHS AND EIGHTEEN (18) DAYS after the Defendant's release from the Supervised Release Program. The court finds that this does constitute sufficient grounds for aggravation of sentence, based upon the Defendant's recent release from custody and/or supervision. See, e.g., Gibson v. State, 519 So.2d 756 (Fla. 1st DCA 1988); Tillman v. State, 522 So.2d 14 (Fla. 1988); Nixon v. State, 494 So.2d 222 (Fla. 1st DCA 1986); Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984); Mitchell v. State, 521 So.2d 185 (Fla. 4th DCA 1988).

(R-667).

On November 17, 1989, Petitioner filed a timely notice of appeal to the Fourth District Court of Appeal (R-670). On February 13, 1991, the district court issued its opinion which rejected Petitioner's argument that temporal proximity was an invalid reason for departure and affirmed Petitioner's departure sentence. The district court certified the following question to be one of great public importance:

DOES THE TEMPORAL PROXIMITY OF CRIMES ALONE  
PROVIDE A VALID REASON FOR DEPARTURE FROM THE  
SENTENCING GUIDELINES WITHOUT FINDING A PER-  
SISTENT PATTERN OF CRIMINAL CONDUCT?

On March 1, 1991, Petitioner timely filed his notice to invoke this Court's discretionary review. On March 12, 1991, this Court set forth a briefing schedule for this review.

SUMMARY OF ARGUMENT

Temporal proximity of crimes alone does not justify departing from the recommended guideline sentence. Such a departure would be arbitrary. Here, there was no persistent pattern of criminal conduct. Petitioner should be resentenced within the guidelines.

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT ERRED IN DEPARTING FROM THE  
RECOMMENDED GUIDELINE SENTENCE.

Petitioner's recommended guideline sentence was two-and-a-half (2 1/2) to three-and-a-half (3 1/2) years in prison (R-596-597). The trial court departed from the guidelines and sentenced Petitioner to ten (10) years in prison (R-658,666,667-668). The trial court's written reason for departure was as follows:

The above-referenced Defendant was convicted of three (3) counts of GRAND THEFT on November 6, 1985. On that date, the Defendant was sentenced to two and one half (2 1/2) years Florida State Prison, and transferred from the Broward County Jail to the Department of Corrections. The Defendant was subsequently transferred from the Department of Corrections to the supervised release program on September 9, 1986. The Defendant was discharged from the supervised release program and released from the Department of Corrections on October 6, 1986.

The Defendant committed the offense of GRAND THEFT on March 24, 1987, a difference of SIX (6) MONTHS AND FIFTEEN (15) DAYS after the Defendant's release from custody, and a difference of FIVE (5) MONTHS AND EIGHTEEN (18) DAYS after the Defendant's release from the Supervised Release Program. The court finds that this does constitute sufficient grounds for aggravation of sentence, based upon the Defendant's recent release from custody and/or supervision. See, e.g., Gibson v. State, 519 So.2d 756 (Fla. 1st DCA 1988); Tillman v. State, 522 So.2d 14 (Fla. 1988); Nixon v. State, 494 So.2d 222 (Fla. 1st DCA 1986); Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984); Mitchell v. State, 521 So.2d 185 (Fla. 4th DCA 1988).

(R-667). On appeal the district court upheld the departure and certified the following question of great public importance:



DOES THE TEMPORAL PROXIMITY OF CRIMES ALONE  
PROVIDE A VALID REASON FOR DEPARTURE FROM THE  
SENTENCING GUIDELINES WITHOUT FINDING A PER-  
SISTENT PATTERN OF CRIMINAL CONDUCT?

(A-2). As will be explained, the trial court's reason for departure is invalid and the certified question should be answered in the negative.

The purpose of the guidelines is to ensure uniformity and to eliminate unwarranted variation in the sentencing process, and to prevent overcrowding in our prison system. Fla.R.Crim.P. 3.701; § 921.001, Fla.Stat. (1983). Since the purpose of the guidelines is to remedy subjective variations in the sentencing process, any exceptions should be narrowly construed. Cf. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957). While the rule does not eliminate judicial discretion, it does seek to discourage departures from the guidelines. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted. Id. The reason in this case does not justify the guideline departure.

As this Court has unequivocally made clear in State v. Simpson, 554 So.2d 506 (Fla. 1989) temporal proximity of the crimes by itself will not be a valid reason for departure:

In State v. Jones, 530 So.2d 53, 55 (Fla. 1988), we again held that timing of offenses could be a valid reason for departure under certain conditions. However, we cautioned the trial courts:

Before temporal proximity of the crimes can be considered as a valid reason for departure, it must be shown that the crimes committed

demonstrate a defendant's involvement in a continuing and persistent pattern of criminal activity as evidenced by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision.

Id. at 56. Applying this standard in Jones, we held that the defendant did not evince such a continuing and persistent pattern. In Jones, the defendant had committed a burglary and grand theft about one year after release from prison on earlier charges, and then he trafficked in stolen goods five months later.

554 So.2d at 509-510 (emphasis added) (footnotes omitted); see also Frederick v. State, 556 So.2d 471 (Fla. 1st DCA 1990); State v. Jones, 530 So.2d 53 (Fla. 1988); Chanquet v. State, 15 FLW D2017 (Fla. 3d DCA Aug. 7, 1990); Mott v. State, 549 So.2d 1128 (Fla. 3d DCA 1989) (2 1/2 month timing does not justify departure). However, timing combined with facts showing an escalating pattern of crime will be a valid reason for departure. See State v. Simpson, 554 So.2d 506 (Fla. 1989) (fn. 3 -- holding that timing alone invalid was "entirely in harmony with Williams v. State, 504 So.2d 392 (Fla. 1987), in which sufficient additional facts were introduced to establish an escalating pattern of criminality").

The use of temporal proximity alone would result in arbitrary and disparate sentences -- as opposed to the goal of the sentencing guidelines -- uniform sentencing. For example, in McKinney v. State, 559 So.2d 621 (Fla. 3d DCA 1990), the timing of six months from release from prison was held to be an invalid reason for departure. Whereas in Jordan v. State, 15 FLW D1535 (Fla. 4th DCA June 6, 1990), a timing of six months was held to be a valid reason for departure. More disturbing is the reasoning behind the holding

in Jordan. The district court noted that this Court "spoke of a defendant's release from prison 'only months before'" and from that concluded that temporal proximity of "any period of less than a year" would justify departure.<sup>1</sup> Of course, placing a random number for timing results in arbitrary type of sentencing arrangements.

Without the requirement of an escalating pattern, the use of mere temporal proximity will result in unwarranted disparity in sentencing. Any decision there is as to the specific timing required for departure will be arbitrary. By only considering temporal proximity, there must be some bright-line test which in itself would be arbitrary and contribute to disparity in sentencing. For instance, if the test were six months, would it be logical to permit unlimited departure<sup>2</sup> because the offense was committed 5 1/2 months after release from prison as opposed to 6 1/2 months?<sup>3</sup> Without an explanation which can be analyzed objecti-

---

<sup>1</sup> While apparently overlooking this Court's limitation of Williams v. State, 504 So.2d 392 (Fla. 1987) by the necessity of providing facts to establish an escalating pattern of criminal activity (see fn. 3 in Simpson, supra), the district court cited Williams for the proposition that a timing of ten months is a valid reason for departure.

<sup>2</sup> Appellate review of extent of departure is no longer permitted.

<sup>3</sup> Again, an example of this is where one court has held that a temporal proximity of 6 months justifies departure, Jordan, supra, while another has ruled a temporal proximity of 6 months does not justify departure. McKinney, supra. The temporal proximity sufficient for departure rests with the subjective beliefs of the sentencer. In Gibson v. State, 553 So.2d 701 (Fla. 1989), this Court reversed a sentence which demonstrated the arbitrariness of using solely temporal proximity to justify departure. In Gibson v. State, 519 So.2d 756 (Fla. 1st DCA 1988) the district court held that the timing of the offense 14 months

vely, timing is not a valid reason for departure.

In addition to the arbitrary and subjective sentencing which results from considering temporal proximity, it must be noted that temporal proximity is a related aspect of prior offenses which have already been scored. Prior offenses are scored in computing the guidelines. Each offense has to occur at some point in time. Thus, each offense will have some temporal proximity to another event or offense. Of course, the point in time involved is not as significant as the fact that the offense occurred.<sup>4</sup> Mere temporal proximity should not be exalted over other aspects of offenses such as nature of the offense, degree and quantity of offenses, legal constraint, victim injury, etc. Mere temporal proximity should not override other facts of the guidelines which have been deemed important enough to be scored.

In summary, temporal proximity of crimes alone does not provide a valid reason for departure without a finding of an

---

after release from prison was a clear and convincing reason for departure. The 14 month timing was held to be valid not because of any explanation as to why this particular timing was relevant, but because the court had previously held a timing of 10 months to be a valid reason. Without any bright-line test or further explanation, logic would dictate that an 18 month timing would be valid because the 14 month timing was valid. Future cases would then hold that a 22 month timing is valid because the 18 month timing was valid. Using this logic, eventually any timing would become a valid reason to depart. In other words, it is not logical to base departure merely on timing. There must also be some explanation of its significance.

<sup>4</sup> While timing of an offense can be an indication of the recidivism of an offender, the recidivism is more precisely defined by prior convictions which are already factored into the guideline recommendation.

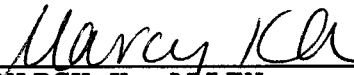
escalating pattern of criminal conduct. Simpson, supra; Jones, supra; Frederick, supra. Therefore, Petitioner's sentence must be reversed and this cause remanded for resentencing within the recommended guideline range.

CONCLUSION

Based on the foregoing argument and authorities cited therein, petitioner respectfully requests this Court to reverse his sentence and remand for resentencing within the recommended guideline range.

Respectfully Submitted,

RICHARD L. JORANDBY  
Public Defender

  
\_\_\_\_\_  
MARCY K. ALLEN  
Assistant Public Defender  
Florida Bar No. 332161  
15th Judicial Circuit  
9th Floor, Governmental Center  
301 North Olive Avenue  
West Palm Beach, Florida 33401  
(407) 355-2150

Counsel for Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOAN FOWLER, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 25<sup>th</sup> day of March, 1991.

  
\_\_\_\_\_  
MARCY K. ALLEN  
Assistant Public Defender