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FILED
SID J. WHITE
JUL 15 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO: 83,954

1ST DCA CASE NO: 92-3833

ROBERT DAVID DOMBERG, JR.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF ON JURISDICTION OF PETITIONER ROBERT DAVID DOMBERG

BRADLEY R. STARK, ESQUIRE
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(305) 372-1223

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STATEMENT OF THE CASE AND FACTS

This is a petition asking this court to invoke its discretionary jurisdiction and review the opinion of the First District Court of Appeal in *Domberg v. State,* 19 Fla. L. Weekly D430 (Fla. 1st DCA Mar. 4, 1994).[1] Appendix A. Judgment and conviction were entered in the Second Judicial Circuit in and for Leon County, Florida after a change of venue from the Third Judicial Circuit in Columbia County, Florida. The guidelines score sheet reflects a recommended range of 15 years incarceration. The trial court departed upward and sentenced Domberg to 110 years. Domberg appealed his conviction and the First District Court of Appeal affirmed. *Domberg v. State,* 518 So. 2d 1360 (Fla. 1st DCA), *rev. denied*, 529 So. 2d 693 (Fla. 1988).[2] Appendix B. On November 10, 1992 Domberg filed a Petition for Writ of Habeas Corpus for Ineffective Assistance of Appellate Counsel. The court denied the petition. The Petition for Rehearing was denied. Appendix C.

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1 The recent opinion of the First District Court of Appeal is referred to as *Domberg II.*

2 The direct appeal is referred to as *Domberg I.*

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SUMMARY OF ARGUMENT

I

DOMBERG II CREATES CONFLICT BY REFUSING TO RECOGNIZE THE "PIPELINE DOCTRINE"

The "pipeline doctrine" requires a court to apply the law as it exists at the time of direct appeal rather than the time of the error in the trial court. Instead in *Domberg II* the court applied the law as it existed at the time of sentencing rather than as it existed at the time the appeal became final four years later. This conflicts with precedent in this court and every district court of appeal.

II

DOMBERG II CREATES DIRECT CONFLICT WHEN IT HOLDS THAT THE SENTENCING JUDGE "IMPLICITLY ADOPTED" THE ARGUMENTS OF THE STATE WITH NO ORAL AND EFFECTIVELY NO WRITTEN REASONS FOR DEPARTURE

There were no oral and effectively no written reasons for departure. Instead *Domberg II* holds that the filing of a motion for departure and argument of the motion by the state were sufficient to satisfy the requirement of contemporaneous written reasons for departure. *Domberg II* holds that the trial court "implicitly adopted" the argument of the state by imposing a departure sentence. This clearly conflicts with established precedent at the time *Domberg I* became final on direct appeal. This court and two other district courts of appeal clearly hold that a trial judge cannot adopt the argument or pleadings of a party to satisfy "a function committed exclusively to the judiciary" for the filing of contemporaneous written reasons for departure.[3] As *Domberg II* noted, because the written reasons were filed after the court was divested of jurisdiction there were no oral and effectively no written reasons for departure.

III

DOMBERG II CORRECTLY HOLDS THAT WRITTEN REASONS FOR DEPARTURE CANNOT BE FILED AFTER THE COURT IS DIVESTED OF JURISDICTION, BUT CREATES DIRECT CONFLICT WHEN IT FAILS TO APPLY THIS PRINCIPLE IN *DOMBERG II*

If *Domberg II* considered the written reasons filed after the court was divested of jurisdiction, despite the recitation by the court of a rule stating that written reasons filed after divestment of jurisdiction cannot be

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[3] Johnson v. State, 483 So. 2d 839 (Fla. 2d DCA 1986).

considered, then *Domberg II* also conflicts with this court and three other district courts of appeal. Once the court was divested of jurisdiction the filing of written reasons for departure was a nullity and could not be considered.

IV

REASONS TO ACCEPT JURISDICTION

Domberg II is a major inroad into the separation between the branches of government. *Domberg II* establishes dangerous separation of powers precedent by holding that the actions of the state in the filing and arguing of a motion for departure were a sufficient substitute for a legislatively mandated action on the part of the trial judge. No citizen can ever feel that the judiciary is independent and fair when an argument and motion by a prosecutor is a complete and satisfactory substitute for the exclusively judicial function of issuing "contemporaneous written reasons" for a 110 year departure sentence.

The "pipeline doctrine" is fundamental to the appellate process. Every appellate case is affected by this doctrine. Post conviction proceedings comprise a large amount of all appellate litigation. *Domberg II* creates precedent which insures that a large number of future cases will be wrongly decided. An illegal departure sentence from 15 years to 110 years is too great an injustice to go uncorrected.

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ARGUMENT

I

DOMBERG II CREATES CONFLICT BY REFUSING TO RECOGNIZE THE "PIPELINE DOCTRINE"[4]

The lower court held that to determine whether Domberg received ineffective assistance of appellate counsel, it must "'turn back the appellate clock,' to determine whether an absence of contemporaneous written reasons was cognizable error in 1984 when Domberg was sentenced." *Domberg II,* at 431. The *Domberg II* court denied the Writ of Habeas Corpus because "(i)n view of the unsettled state of guidelines sentencing law in 1984," appellate counsel was not ineffective.[5] *Id.* This was error because the direct appeal was not final until 1988. *Domberg I,* 518 So. 2d 1360.[6] Thus in *Domberg II* the First District Court of Appeal erroneously used the case law in 1984 to determine the adequacy of appellate counsel in an appeal that was decided four years later.[7] Clear precedent as to sentencing issues establishes that an appellate court should apply the law as it exists at the time of the appeal since the case was in the "pipeline" on appeal at the time other precedents were established. This clearly conflicts with the law in this court and in every other district court of appeal in the state.

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[4] The application of the law as it exists at the time of appeal rather than the time of the error in the trial court is known as the "pipeline doctrine". This phrase was coined in Smith v. State, 496 So. 2d 983 (Fla. 3d DCA 1986), as this court noted in Smith v. State, 598 So. 2d 1063 (Fla. 1992). Although the term "pipeline doctrine" was adopted in 1986, the rule of law that the term describes was the rule of law at the time *Domberg I* became final. *E.g.,* Lowe v. State, 437 So. 2d 142, 144 (Fla. 1983); *see also* State v. Jones, 485 So. 2d 1283 (Fla. 1986) (case law at time of appeal controls); Duggan v. Wainwright, 470 So. 2d 697 n.13 (Fla. 1984) (in a habeas corpus proceeding for ineffective assistance of appellate counsel, determination is made at the time of appeal).

[5] The court in *Domberg II* cites Frazier v. Singletary, 622 So. 2d 88 (Fla. 1st DCA 1993), a habeas corpus case for ineffective assistance of appellate counsel, for this proposition. *Frazier* holds that in making a determination regarding ineffective assistance of appellate counsel the issue is whether the "error (was) cognizable at the time Petitioner directly appealed his convictions in 1963." *Id.* at 89. *Frazier* was decided on direct appeal in 1963. Frazier v. State, 488 So. 2d 166 (Fla. 1st DCA 1986) *rev. denied* 494 So. 2d 1150 (Fla. 1986). It is not clear whether Frazier was sentenced in 1963 or the appeal was decided in 1963. It appears that the *Domberg II* court has misapplied its own precedent by 'turning the clock back' to the time of sentencing.

[6] A determination of the ineffective assistance of appellate counsel claim should be guided by the law applicable when *Domberg I* became final. The conviction became final when review was denied in *Domberg I. See,* State v. Gallo, 491 So. 2d 541 (Fla. 1986). Until that time, the case was in the "pipeline".

[7] No contemporaneous objection was required to raise the issue of an illegal departure sentence on appeal, therefore the issue was preserved and the "pipeline doctrine" was applicable. *E.g.,* State v. Whitfield, 487 So. 2d 645 (Fla. 1986); Bruton v. State, 489 So. 2d 1195 (Fla. 1st DCA 1986), *rev'd. on other grounds,* 510 So. 2d 1243 (Fla. 1st DCA 1987).

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This court and every other district court is in conflict with *Domberg II*. All of the following cases are ineffective assistance of appellate counsel claims in which courts have applied the law at the time the appeal was decided and not the law at the time the error occurred in the trial court, to determine the effectiveness of appellate counsel. All of these cases are in direct conflict with *Domberg II*. *Hill v. Dugger,* 556 So. 2d 1385 (Fla. 1990); *Fitzpatrick v. Wainwright,* 490 So. 2d 938 (Fla. DCA 1986); *Wigfals v. Singletary,* 624 So. 2d 320 (Fla. 2d DCA 1993); *Jones v. Singletary,* 621 So. 2d 760 (Fla. 3d DCA 1993); *Wilson v. Singletary* 601 So. 2d 311 (4th DCA 1992); *Disinger v. State,* 574 So. 2d 268 (Fla. 5th DCA 1991). These cases involve ineffective assistance of appellate counsel for the failure to raise issues regarding written reasons for departure sentences.

The case of *Hernandez v. State,* 501 So. 2d 163 (Fla. 3d DCA 1987) also directly conflicts with the holding in *Domberg II*. In *Hernandez* the court granted a Writ of Habeas Corpus for ineffective assistance of appellate counsel for the failure to raise as error on appeal a sentence outside the guidelines, without written reasons. The court in *Hernandez* applied the law as it existed at the time of the appeal, rather than at the time of sentencing.[8]

The holding in *Domberg II* refuses to recognize the "pipeline doctrine".[9] The First District Court of Appeal also failed to apply the "pipeline doctrine" to departure sentencing issues in *Kilo v. State,* 578 So. 2d 833 (Fla. 1st DCA 1991). Despite the clear rule this court articulated in *Williams v. State,* 576 So. 2d 281 (Fla. 1991) which held that cases in the "pipeline" receive the benefit of *Ree*,[10] the First District Court of Appeal in *Kilo* erroneously applied the laws that existed at the time of sentencing rather than as they existed at the time the appeal was decided.

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[8] The court in *Domberg II* notes that the law regarding contemporaneous written departure reasons "was not settled definitively until 1990 with the issuance of *Ree*." *Domberg II* at 431. Merely because the law was in flux does not mean that an appellate attorney could not render ineffective assistance of appellate counsel on a sentencing issue between 1984 and 1990. *Wigfals,* 624 So. 2d 320; *Jones,* 621 So. 2d 760; *Wilson,* 601 So. 2d 311; *Hernandez,* 501 So. 2d 163.

[9] This court recently clarified and reaffirmed this doctrine as a "blanket application" to all cases. *Smith,* 598 So. 2d 1063.

[10] Ree v. State, 565 So. 2d 1329 (Fla. 1990).

II

DOMBERG II CREATES DIRECT CONFLICT WHEN IT HOLDS THAT THE SENTENCING JUDGE "IMPLICITLY ADOPTED" THE ARGUMENTS OF THE STATE WITH NO ORAL AND EFFECTIVELY NO WRITTEN REASONS FOR DEPARTURE[11]

Absolutely no oral reasons were articulated, either directly or indirectly by reference, at the time the departure sentence was imposed. Appendix D. *Domberg II* holds that the motion for departure by the state and its debate by the prosecutor at the sentencing hearing, satisfies the legislative requirement of contemporaneous written reasons for the imposition of a departure sentence. *See* § 921.001(5) Fla. Stat. 1987; Note to Fla. R. Crim. P. 3.701(d)(11).[12]

The *Domberg II* court found that because there were reasons for departure urged by the state in a memorandum "ten days prior to the sentencing hearing", and because "the transcript reflects these proposed reasons were referred to by respective counsel at the sentencing hearing", it can be inferred that the reasons for departure suggested by the state were "implicitly adopted" by the trial court when it announced that a departure sentence would be imposed." *Id.* at 431. This directly conflicts with precedent in this court and two district courts of appeal.

In *Barbera v. State,* 505 So. 2d 413 (Fla. 1987) the court orally announced that it was adopting the pleading filed by defense counsel as its written order of departure. This court in *Barbera* held that "a formulation of reasons for departure is 'a function committed exclusively to the judiciary'. *Johnson,* 483 So. 2d at 839. That function must be performed by the trial judge and cannot be delegated to others. *See Id.* at 840. *Wilson v. State,* 485 So. 2d 42 (Fla. 5th DCA 1986)." *Barbera,* 505 So. 2d at 414. This court noted in *Barbera* that the trial court "accepted someone else's reasons for departure and did not, himself, express those reasons in an appropriate manner." *Id.* at 414. *See also Graynor v. State,* 479 So. 2d 246 (Fla. 2d DCA 1985) (sentencing judge may not

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[11] *Domberg II* held that "we find the *Lyles* rationale to be particularly relevant." *Id.* at 431. *Domberg II* found this to be "(a) further basis to reject petitioner's claim of ineffective assistance of appellate counsel." *Id.*

[12] A departure sentence with absolutely no oral or written reasons was clearly prohibited at the time *Domberg I* was decided. *E.g.,* State v. Jackson, 478 So. 2d 1054 (Fla. 1985) (oral reasons alone are insufficient); Shull v. Dugger, 515 So. 2d 748 (Fla. 1987) (no departure permitted once appellate court reverses reasons for departure sentence).

merely adopt the argument of a party reasons for departure but must articulate his own reasons for departure); *Carnegie v. State,* 473 So. 2d 782 (Fla. 2d DCA 1985) (court must articulate reasons for departure and may adopt by reference those urged by party). The facts in *Domberg II* where the sentencing judge made absolutely no statement, are more egregious than in *Barbera.* Clearly *Domberg II* explicitly conflicts with *Barbera, Wilson, Johnson, Graynor* and *Carnegie.*

The case of *Wilson* illustrates the nature of the conflict with *Domberg II.* In *Wilson* the court held that it was not sufficient for the sentencing judge to orally announce that it was following the recommendation made by the state for departure. In *Domberg II* the trial court made no announcement that it was adopting the argument of the state, but merely that the trial court "implicitly adopted" this argument by imposing a departure sentence. Thus the error in *Domberg II* is more egregious than in *Wilson.*

Domberg II creates conflict by misapplying the rationale of *State v. Lyles, 576 So. 2d 706* (Fla. 1991) when it held that from the imposition of a departure sentence, it can be concluded that the trial court has 'implicitly adopted' the argument of the state.[13] In *Lyles* the trial judge gave detailed oral reasons for departure totaling approximately two hundred words. *Lyles*, 576 So. 2d at 707. *Lyles* held that when express oral findings of fact and articulated reasons for the departure are made from the bench and then reduced to writing without substantive change at a later date, the written reasons for the departure sentence are contemporaneous, in accordance with *Ree.*[14] This is in great contrast to the sentencing hearing in *Domberg II* where the court gave absolutely no oral reasons and effectively no written reasons, since the written reasons could not be considered because the court was divested of jurisdiction when filed.[15] *Domberg II* at 431.

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[13] Because *Domberg II* misapplies *Lyles*, it is in direct conflict with *Lyles. Lyles* holds that a written order is contemporaneous when detailed oral reasons are given at a sentencing hearing and the subsequent written order is essentially the same. Since the facts in *Domberg II* are completely inapposite, with absolutely no oral reasons and effectively no written reasons, *Domberg II* conflicts with the holding in *Lyles.*

[14] *Ree,* 565 So. 2d 1329. As the *Domberg II* court noted "*Ree* is not applicable in this case." *Domberg II* at 431. Thus the reliance upon *Lyles,* a case which interprets *Ree*, is not applicable to the case before the court.

[15] *Domberg II* correctly stated that "(t)he notice of appeal was filed timely on November 21, 1984, at which point jurisdiction vested in this court." *Id.* at 430. Written reasons filed after the divestment of jurisdiction are a nullity and cannot be considered by the court. As *Domberg II* correctly noted "(o)nce a notice of appeal has been filed from a properly rendered judgment, a trial court is without jurisdiction to file written reasons for

III

DOMBERG II CORRECTLY HOLDS THAT WRITTEN REASONS FOR DEPARTURE CANNOT BE FILED AFTER THE COURT IS DIVESTED OF JURISDICTION, BUT CREATES DIRECT CONFLICT WHEN IT FAILS TO APPLY THIS PRINCIPLE IN *DOMBERG II*

Domberg II held that the untimely written reasons were "redundant".[16] The order filed December 3, 1984 was after the notice of appeal had been filed and jurisdiction had vested in the appellate court. It is not clear whether the court in *Domberg II* considered the untimely written reasons for departure or whether this ruling that the written reasons were redundant was an alternative argument by the court. If the court in *Domberg II* considered these untimely written reasons, then conflict is created because the court lacked jurisdiction to file them. If the court in *Domberg II* did not consider these written reasons, then the opinion creates conflict.

Domberg II holds that "(i)n view of the unsettled state of guidelines sentencing law in 1984, particularly with respect to guidelines departure sentences, we conclude petitioner's appellate lawyers were not outside the range of professionally acceptable representation in failing to challenge the departure sentence on the jurisdictional grounds asserted in Domberg's petition." *Id.* at 431. In effect *Domberg II* holds that the lack of jurisdiction to file written reasons for departure after a notice of appeal had been filed was an issue that was unsettled in 1984. This ruling conflicts with long established precedent not only at the time of appeal, but also at the time of sentencing. This precedent holds that the court is divested of jurisdiction upon the filing of a notice of appeal. *Wilson v. State,* 437 So. 2d 174 (Fla. 2d DCA 1983) (court divested of jurisdiction upon filing notice of appeal); *Smith v. State,* 407 So. 2d 399 (Fla. 1st DCA 1981) (after notice of appeal court cannot modify or correct or change a sentence). *Green v. State,* 527 So. 2d 277, 278 (Fla. 2d DCA 1988) and *State v. Williams*, 515 So. 2d 1051 (Fla. 3d DCA 1987) clearly conflict with *Domberg II* and were precedent at the time *Domberg*

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departure. Davis v. State, 606 So. 2d 470 (Fla. 1st DCA 1992); Wright v. State, 617 So. 2d 837, 841 (Fla. 4th DCA 1993); Vara v. State, 575 So. 2d 306, 307 (Fla. 2d DCA 1991); State v. McCray, 544 So. 2d 313 (Fla. 2d DCA 1989), *approved*, 557 So. 2d 33 (Fla. 1990); Hawryluk v. State, 543 So. 2d 1318 (Fla. 5th DCA 1989); State v. Ealy, 533 So. 2d 1173, 1174 (Fla. 2d DCA 1988)." *Domberg II* at 430.

[16] *Domberg II* concludes that because the trial court "implicitly adopted" the position of the state by imposing a departure sentence, "in essence, the order filed December 3, 1984, setting forth the aggravating factors, was redundant." *Id.* at 431.

I became final on appeal.

The court in *Green* held that where a trial court "did not enunciate any reasons for departure at sentencing"... "and the written order containing the reasons was not entered until one month after entry of the written judgment and sentences"... the departure must be reversed. *Green,* 527 So. 2d at 278. Similarly *Williams*, 515 So. 2d 1051 also conflicts with *Domberg II* and was also precedent prior to the time that *Domberg I* became final. In *Williams* at "the sentencing hearing the court did not announce the reasons it later expressed in its order, and that the order, signed more than two months after the sentencing, fails to comply" with the requirement of contemporaneous written reasons. *Id.* at 1053.

IV

REASONS TO ACCEPT JURISDICTION

Domberg II establishes dangerous separation of powers precedent by holding that the actions of the state in the filing and arguing of a motion for departure were a sufficient substitute for a legislatively mandated action on the part of the trial judge. *Domberg II* is a major inroad into the separation between the branches of government. No citizen can ever feel that the judiciary is independent and fair when appellate courts hold that an argument and motion by a prosecutor is a complete and satisfactory substitute for the exclusively judicial function of issuing "contemporaneous written reasons" for a 110 year departure sentence. Why have a judge, why should the legislature bother enacting the safeguards of "contemporaneous written reasons" for departure, when the prosecutor can satisfy these legislative mandates and judicial functions by filing a motion and arguing it.

The "pipeline doctrine" is fundamental to the appellate process. Every appellate case is affected by this doctrine.[17] Post conviction proceedings comprise a large amount of all appellate litigation. *Domberg II* creates precedent which insures that a large number of future cases will be wrongly decided. The First District Court of Appeal also misapplied the "pipeline doctrine" in *Kilo*.

This court should also accept jurisdiction because, instead of a fifteen year guideline sentence which would have expired, Domberg will remain incarcerated until the guideline sentence of 110 years expires,

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[17] This court in *Smith,* 598 So. 2d 1063, recently attempted to remove all doubt as to the application of the "pipeline doctrine".

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effectively the rest of his natural life. This inequity is too egregious to remain uncorrected. Cases involving more severe penalties are accorded a greater degree of review. Death penalty cases and capital punishment cases receive greater constitutional protection. The 110 year guideline sentence in the case before the court is effectively more severe than any penalty that can be imposed, with the exception of the death penalty, which this court must review. To allow Domberg to effectively spend the remainder of his natural life in prison because the First District Court of Appeal created a conflict in the case law and misapplied established principles of law, is wrong.

CONCLUSION

This court should accept jurisdiction to correct the conflict created by *Domberg II* with the opinions of this court and all of the other district courts of appeal.

Respectfully submitted,

Bradley R. Stark per pro

Bradley R. Stark, Esq.

CERTIFICATE OF SERVICE

I certify that a copy of the above was mailed to Gypsy Bailey, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399, on July 14, 1994.

Bradley R. Stark per pro

Bradley R. Stark, Esq.
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Appendix

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ROBERT DAVID DOMBERG,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED.

CASE NO: 92-3833

Opinion filed February 18, 1994.

Petition for Writ of Habeas Corpus-Original Jurisdiction.

Bradley R. Stark, Miami, for Appellant.

Robert A. Butterworth, Attorney General, and Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

JOANOS, J.

Robert David Domberg petitions this court for a writ of habeas corpus based upon claims that the trial court lacked jurisdiction to file written reasons for a sentence in excess of the recommended guideline sentencing range, and ineffective assistance of appellate counsel. We deny the writ.

On October 26, 1984, petitioner Domberg was convicted of kidnapping, conspiracy to commit murder, and violation of the Florida RICO Act. Domberg elected to be sentenced in accordance

with the sentencing guidelines; the recommended guideline sentencing range was fifteen years. The trial court imposed a sentence in excess of the recommended guideline sentence and provided written reasons for the departure. A more detailed recitation of the underlying facts is set forth in this court's opinion of January 15, 1988. See Domberg v. State, 518 So. 2d 1360 (Fla. 1st DCA), review denied, 529 So. 2d 693 (Fla. 1988).

One of the issues raised on appeal was the question of the contemporaneity, as well as the validity, of the reasons provided by the trial court for the departure sentence. The opinion addressed the sentencing disposition briefly, noting that the departure sentence was supported by written departure reasons, some of which were valid, and affirmed the judgment and sentences in all respects. 518 So. 2d at 1362.

In the instant petition filed November 12, 1992, Domberg contends the trial court lacked jurisdiction to enter written departure reasons, because the notice of appeal was filed before the departure reasons were filed, thereby divesting the trial court of jurisdiction. Domberg further contends his appellate counsel was ineffective for failing to raise the jurisdictional issue on appeal. The state responds that although the issue raised on appeal was cast in terms of a failure to provide contemporaneous written reasons for departure, the issue was the same as that presented in this petition. If this court concludes the precise issue was not raised on direct appeal, the state maintains that habeas corpus is not available, because the matter could have been

raised on direct appeal, or challenged in a postconviction motion. As to the claim of ineffective assistance of appellate counsel, the state maintains petitioner cannot meet the first Strickland v. Washington[1] requirement to show that counsel's performance was deficient.

The threshold requirement for filing a notice of appeal is the existence of a written, signed judgment filed by the clerk for recording. Fla.R.App.P. 9.020(g); Williams v. State, 324 So. 2d 74, 76 (Fla. 1975); Owens v. State, 579 So. 2d 311, 312 (Fla. 1st DCA 1991); Miller v. State, 564 So. 2d 259, 261 (Fla. 1st DCA 1990). That is, the time for appeal from a departure sentence "begins to run from the date the sentencing judgment is filed, not the written reasons." State v. Lyles, 576 So. 2d 706, 708 (Fla. 1991). This is because "[t]he sentence, rather than the written reasons for departure, constitutes the final order appealed." Fox v. District Court of Appeal, Fourth District, 553 so. 2d 161, 163 (Fla. 1989). Once a notice of appeal has been filed from a properly rendered judgment, a trial court is without jurisdiction to file written reasons for departure. Davis v. State, 606 So. 2d 470 (Fla. 1st DCA 1992); Wright v. State, 617 So. 2d 837, 841 (Fla. 4th DCA 1993); Vara v. State, 575 So. 2d 306, 307 (Fla. 2d DCA 1991); State v. McCray, 544 So. 2d 313 (Fla. 2d DCA 1989), approved, 557 So. 2d 33 (Fla. 1990); Hawryluk v. State, 543 So. 2d 1318 (Fla. 5th DCA 1989); State v. Ealy, 533 So. 2d 1173, 1174 (Fla. 2d DCA 1988).

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[1]466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In the instant case, the portions of the record furnished by the parties establish that the subject judgment and sentences were rendered October 26, 1984. The notice of appeal was filed timely on November 21, 1984, at which point jurisdiction vested in this court. In somewhat analogous circumstances, this court observed that claims such as those raised in Domberg's petition require the court to "turn back the appellate clock," to determine whether an absence of contemporaneous written departure reasons was cognizable error in 1984 when the petitioner was sentenced. See Frazier v. Singletary, 622 So. 2d 88 (Fla. 1st DCA 1993). The matter was not settled definitively until 1990, with the issuance of Ree v. State, 565 So. 2d 1329 (Fla. 1990), holding that written reasons for departure must be produced at the sentencing hearing. The Ree opinion also instructed that the decision applied prospectively only.

In view of the unsettled state of guidelines sentencing law in 1984, particularly with respect to guidelines departure sentences, we conclude petitioner's appellate lawyers were not outside the range of professionally acceptable representation in failing to challenge the departure sentence on the jurisdictional grounds asserted in Domberg's petition. A further basis to reject petitioner's claim of ineffective assistance of appellate counsel is found in State v. Lyles, 576 So. 2d 706, 707-708 (Fla. 1991), in which the court clarified Ree, stating:

> when express oral findings of fact and articulated reasons for the departure are made from the bench and then reduced to writing without substantive change on the same date,

> the written reasons for the departure sentence are contemporaneous, in accordance with Ree. To adopt a contrary view would be placing form over substance. The ministerial act of filing the written reasons with the clerk on the next business day does not, in our view, prejudice the defendant in any respect.

Although Ree is not applicable to this case, we find the Lyles rationale to be particularly relevant. The sentencing transcript in this case reflects that ten days prior to the sentencing hearing, the state provided petitioner's trial counsel with a copy of aggravating factors which the state had filed with the trial court as grounds for a departure sentence. The transcript further reflects that the reasons for departure were discussed at sentencing, and implicitly adopted by the trial court when it announced that a departure sentence would be imposed. Since the petitioner was furnished written notice of the aggravating factors well in advance of the sentencing hearing, and was apprised fully of the reasons for departure at the sentencing hearing, we decline to place form over substance for purposes of invoking appellate jurisdiction. We find the departure reasons were contemporaneous with the pronouncement of sentence for purposes of petitioner's notice of appeal. In essence, the order filed December 3, 1984, setting forth the aggravating factors, was redundant. Since the petitioner was provided with actual written notice of the reasons for departure prior to sentencing, and the transcript reflects the written reasons were referred to by respective counsel at the sentencing hearing, Domberg was not prejudiced in the prosecution

of his appeal, and his appellate lawyers cannot be viewed as ineffective.

Accordingly, the petition for writ of habeas corpus is denied.

MINER and KAHN, JJ., CONCUR.

provision contained in sections 194.171(2) and (6), Florida Statutes, which is to ensure prompt payment of taxes due and making available revenues that are not disputed. *Bystrom v. Diaz*, 514 So. 2d 1072, 1074 (Fla. 1987). We cannot, however, ignore the plain language that the 60-day period begins to run from the certification of the tax roll for collection under section 193.122(2).

In drafting section 193.122(2), the Legislature went to considerable lengths to ensure, as far as practical, that taxpayers would receive prompt notice of the certification of the tax roll. This section requires notice by publication in a periodical *and* by public posting at the office of the property appraiser, both within one week of the date of certification. The Legislature stopped short of requiring actual notice to all taxpayers as such a requirement would have been impractical and unduly burdensome. *See Markham v. Moriarty*, 575 So. 2d 1307, 1310 (Fla. 4th DCA 1991) (holds that the notice requirements of section 193.122(2) satisfy the requirements of due process).

Appellee's interpretation of the jurisdictional time limit would make gratuitous the notice provision of section 193.122(2) which says that the property appraiser *shall* provide notice at the time and in the manner specified. Despite the mandatory language, the notice requirement would be meaningless under appellee's interpretation because the only potential plaintiffs having standing to challenge the defective notice—those whose assessments were allegedly improper and who did not bring suit within 60 days—would be barred from the courts. It is improbable that the Legislature intended that a property appraiser could certify and extend the tax roll, fail to provide the required notice by publication and posting, wait 61 days and then be assured that no court could exercise jurisdiction over a taxpayer's claim of incorrect or invalid assessment.

In addition, in light of the severe consequences imposed upon the expiration of 60 days, strict compliance with the statutory notice requirements would appear to be consistent with the legislative purpose.

We, therefore, hold that the factual dispute concerning posting of the required notice was material to the issue of whether the statutory nonclaim period had run and, therefore, the trial court erred in granting summary judgment.

We do, however, certify the following question to be one of great public importance:

> WHETHER THE FAILURE TO STRICTLY COMPLY WITH THE STATUTORY NOTICE PROVISIONS CONTAINED IN SECTION 193.122(2), FLORIDA STATUTES (1989), TOLLS THE RUNNING OF THE 60-DAY PERIOD CONTAINED IN SECTION 194.171(2), FLORIDA STATUTES (1989).

Reversed and remanded. (ZEHMER, C.J., and MINER, J., concur.)

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[1]Appellant paid the disputed tax under protest on November 30, 1990.

[2]In an earlier ruling prior to the adoption of subsection (6), the court had held that subsection (2) constituted a statute of limitations. *Miller v. Nolte*, 453 So. 2d 397 (Fla. 1984).

* * *

Criminal law—Sentencing—Appeals—In challenge to sentencing which occurred prior to supreme court decision holding that written reasons for departure sentence must be produced at hearing, departure reasons were contemporaneous with pronouncement of sentence for purposes of defendant's notice of appeal, which was filed before trial court filed written reasons for departure, where defendant was furnished written notice of aggravating factors providing grounds for departure from sentencing guidelines well in advance of sentencing hearing, and was apprised fully of reasons for departure at sentencing hearing—Counsel—Appellate—Ineffectiveness—Defendant's appellate attorneys were not outside range of professionally acceptable representation in failing to challenge departure sentence on jurisdictional grounds

ROBERT DAVID DOMBERG, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 92-3833. Opinion filed February 18, 1994. Petition for Writ of Habeas Corpus-Original Jurisdiction. Bradley R. Stark, Miami, for Appellant. Robert A. Butterworth, Attorney General, and Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

(JOANOS, J.) Robert David Domberg petitions this court for a writ of habeas corpus based upon claims that the trial court lacked jurisdiction to file written reasons for a sentence in excess of the recommended guideline sentencing range, and ineffective assistance of appellate counsel. We deny the writ.

On October 26, 1984, petitioner Domberg was convicted of kidnapping, conspiracy to commit murder, and violation of the Florida RICO Act. Domberg elected to be sentenced in accordance with the sentencing guidelines; the recommended guideline sentencing range was fifteen years. The trial court imposed a sentence in excess of the recommended guideline sentence and provided written reasons for the departure. A more detailed recitation of the underlying facts is set forth in this court's opinion of January 15, 1988. *See Domberg v. State*, 518 So. 2d 1360 (Fla. 1st DCA), *review denied*, 529 So. 2d 693 (Fla. 1988).

One of the issues raised on appeal was the question of the contemporaneity, as well as the validity, of the reasons provided by the trial court for the departure sentence. The opinion addressed the sentencing disposition briefly, noting that the departure sentence was supported by written departure reasons, some of which were valid, and affirmed the judgment and sentences in all respects. 518 So. 2d at 1362.

In the instant petition filed November 12, 1992, Domberg contends the trial court lacked jurisdiction to enter written departure reasons, because the notice of appeal was filed before the departure reasons were filed, thereby divesting the trial court of jurisdiction. Domberg further contends his appellate counsel was ineffective for failing to raise the jurisdictional issue on appeal. The state responds that although the issue raised on appeal was cast in terms of a failure to provide contemporaneous written reasons for departure, the issue was the same as that presented in this petition. If this court concludes the precise issue was not raised on direct appeal, the state maintains that habeas corpus is not available, because the matter could have been raised on direct appeal, or challenged in a postconviction motion. As to the claim of ineffective assistance of appellate counsel, the state maintains petitioner cannot meet the first *Strickland v. Washington*[1] requirement to show that counsel's performance was deficient.

The threshold requirement for filing a notice of appeal is the existence of a written, signed judgment filed by the clerk for recording. Fla.R.App.P. 9.020(g); *Williams v. State*, 324 So. 2d 74, 76 (Fla. 1975); *Owens v. State*, 579 So. 2d 311, 312 (Fla. 1st DCA 1991); *Miller v. State*, 564 So. 2d 259, 261 (Fla. 1st DCA 1990). That is, the time for appeal from a departure sentence "begins to run from the date the sentencing judgment is filed, not the written reasons." *State v. Lyles*, 576 So. 2d 706, 708 (Fla. 1991). This is because "[t]he sentence, rather than the written reasons for departure, constitutes the final order appealed." *Fox v. District Court of Appeal, Fourth District*, 553 So. 2d 161, 163 (Fla. 1989). Once a notice of appeal has been filed from a properly rendered judgment, a trial court is without jurisdiction to file written reasons for departure. *Davis v. State*, 606 So. 2d 470 (Fla. 1st DCA 1992); *Wright v. State*, 617 So. 2d 837, 841 (Fla. 4th DCA 1993); *Vara v. State*, 575 So. 2d 306, 307 (Fla. 2d DCA 1991); *State v. McCray*, 544 So. 2d 313 (Fla. 2d DCA 1989), *approved*, 557 So. 2d 33 (Fla. 1990); *Hawryluk v. State*, 543 So. 2d 1318 (Fla. 5th DCA 1989); *State v. Ealy*, 533 So. 2d 1173, 1174 (Fla. 2d DCA 1988).

In the instant case, the portions of the record furnished by the parties establish that the subject judgment and sentences were rendered October 26, 1984. The notice of appeal was filed timely on November 21, 1984, at which point jurisdiction vested in this court. In somewhat analogous circumstances, this court observed

that claims such as those raised in Domberg's petition require the court to "turn back the appellate clock," to determine whether an absence of contemporaneous written departure reasons was cognizable error in 1984 when the petitioner was sentenced. *See Frazier v. Singletary*, 622 So. 2d 88 (Fla. 1st DCA 1993). The matter was not settled definitively until 1990, with the issuance of *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), holding that written reasons for departure must be produced at the sentencing hearing. The *Ree* opinion also instructed that the decision applied prospectively only.

In view of the unsettled state of guidelines sentencing law in 1984, particularly with respect to guidelines departure sentences, we conclude petitioner's appellate lawyers were not outside the range of professionally acceptable representation in failing to challenge the departure sentence on the jurisdictional grounds asserted in Domberg's petition. A further basis to reject petitioner's claim of ineffective assistance of appellate counsel is found in *State v. Lyles*, 576 So. 2d 706, 707-708 (Fla. 1991), in which the court clarified *Ree*, stating:

> when express oral findings of fact and articulated reasons for the departure are made from the bench and then reduced to writing without substantive change on the same date, the written reasons for the departure sentence are contemporaneous, in accordance with *Ree*. To adopt a contrary view would be placing form over substance. The ministerial act of filing the written reasons with the clerk on the next business day does not, in our view, prejudice the defendant in any respect.

Although *Ree* is not applicable to this case, we find the *Lyles* rationale to be particularly relevant. The sentencing transcript in this case reflects that ten days prior to the sentencing hearing, the state provided petitioner's trial counsel with a copy of aggravating factors which the state had filed with the trial court as grounds for a departure sentence. The transcript further reflects that the reasons for departure were discussed at sentencing, and implicitly adopted by the trial court when it announced that a departure sentence would be imposed. Since the petitioner was furnished written notice of the aggravating factors well in advance of the sentencing hearing, and was apprised fully of the reasons for departure at the sentencing hearing, we decline to place form over substance for purposes of invoking appellate jurisdiction. We find the departure reasons were contemporaneous with the pronouncement of sentence for purposes of petitioner's notice of appeal. In essence, the order filed December 3, 1984, setting forth the aggravating factors, was redundant. Since the petitioner was provided with actual written notice of the reasons for departure prior to sentencing, and the transcript reflects the written reasons were referred to by respective counsel at the sentencing hearing, Domberg was not prejudiced in the prosecution of his appeal, and his appellate lawyers cannot be viewed as ineffective.

Accordingly, the petition for writ of habeas corpus is denied. (MINER and KAHN, JJ., CONCUR.)

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[1]466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

* * *

Eminent domain—Inverse condemnation—Where uncontroverted testimony showed that city would discharge more than one inch of treated sewage effluent per acre per week onto property on a continuing basis, city's action amounted to taking of fee simple interest in property—Trial court erred in finding that city had taken easement rather than fee simple interest—Damages—On remand, trial court to conduct jury trial for purpose of determining fair market value of property taken by city

THOMAS MARTIN, JR. and CAROLYN MARTIN, Appellants, v. CITY OF MONTICELLO, Appellee. 1st District. Case No. 92-1080. Opinion filed February 18, 1994. An appeal from the Circuit Court for Jefferson County, Felix A. Johnston, Jr., Judge. Ford L. Thompson and Murray M. Wadsworth, Wadsworth & Davis, P.A., Tallahassee, for Appellants. Will J. Richardson, Richardson Law Offices, P.A., Tallahassee, for Appellee.

ON MOTIONS FOR REHEARING AND CLARIFICATION

[Original Opinion at 18 Fla. L. Weekly D2025]

(PER CURIAM.) Appellants' motion for clarification of our prior opinion is hereby granted. Appellants' motion for clarification of our prior order granting attorney's fees is hereby granted by unpublished order to be issued simultaneously with this opinion. Appellee's motion for rehearing and clarification of our prior opinion is hereby granted in part, but only for the purpose of clarification. We hereby withdraw our prior opinion and substitute the following opinion therefor.

Appellants, Thomas and Carolyn Martin, appeal the order of the circuit court finding that appellee City of Monticello had taken an easement to discharge treated sewage effluent onto a 190.5 acre tract of mostly wetland area owned by appellants rather than a fee simple interest in the affected property. Agreeing with appellants' contention that the City's discharge of treated sewage effluent constitutes a taking of the fee simple interest in the 190.5 acre parcel, we reverse and remand.

The uncontroverted testimony at hearing of appellants' inverse condemnation petition showed that the City had constructed a sewage treatment system consisting of three elements: a treatment plant; a manmade wetland; and a natural wetland, including approximately 160 acres of wetland owned by appellant. As designed, the City will discharge more than one inch of treated effluent per acre per week onto appellants' property on a continuing basis. We find such a continuing invasion of appellants' property to constitute a taking of the fee simple interest in the 190.5 acre parcel. On remand, we direct the trial court to conduct a jury trial for the purpose of determining the fair market value of the 190.5 acre parcel taken by the City of Monticello.

Appellants' motion for clarification of our prior opinion notes some variance between the legal description of the approximately 190.5 acre parcel of land as described in the City's application for a permit to construct a sewage system, submitted to the Department of Environmental Regulation, and the legal description prepared by property appraiser Albert Odom. Appellants point out that the description provided by Mr. Odom contains a typographical error, and request that such error be noted. We hereby adopt appellants' suggestion and specify that our decision pertains to the 190.5 acre parcel as described in the City's application for a permit to construct the sewage disposal system.

REVERSED and REMANDED for further consistent proceedings. (BARFIELD and MINER, JJ., and SHIVERS, Senior Judge, CONCUR.)

* * *

Criminal law—Community control—Revocation—Where lab reports setting forth urine test results were the only evidence that defendant tested positive for cocaine and marijuana in violation of community control condition, community control could not properly be revoked based on violation of that condition—Hearsay cannot be sole basis for revocation—Reversed and remanded for redetermination where record was unclear whether trial judge would have revoked community control or imposed same sentence for proven violations of other conditions

JEFFREY WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 92-3316. Opinion filed February 18, 1994. An appeal from Circuit Court for Leon County. Judge William L. Gary. Nancy A. Daniels, Public Defender, and Jamie Spivey, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Joseph S. Garwood, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Affidavits were filed alleging Jeffrey Bernard Williams violated the conditions of his community control by failing to pay court costs and restitution, testing positive for marijuana and cocaine, and being away from his approved residence without approval on three occasions. After a hearing the trial judge found that Williams had committed all the violations alleged, revoked his community control, and sentenced him to concurrent terms of five years' imprisonment and five and one-

APPENDIX B

We therefore agree with the Commission's conclusion that according to (2)(d), FDLE had no grounds to dismiss Hodges at that time.

[2] As a second ground, appellant argues that the Commission erred in failing to specifically determine whether FDLE had the authority to require body fluid analysis pursuant to Rule 22A-8.12(2)(a). We disagree. FDLE specifically stated in its exceptions to the recommended order that its termination of Hodges was not based on her refusal to submit to the analysis, but on its determination that she was unable to perform her assigned duties. Based on the position taken by FDLE, both in the exceptions and throughout this case, we find that such a determination was not warranted under the facts of this case.

Accordingly, the final order of the Public Employees Relations Commission is hereby AFFIRMED.

ZEHMER, J., concurs.

THOMPSON, J., concurs with result only.

Robert David DOMBERG, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. BD-335.

District Court of Appeal of Florida, First District.

Jan. 15, 1988.

Rehearing Denied Feb. 22, 1988.

Defendant was convicted by the Circuit Court, Columbia County, L. Arthur Lawrence, J., of kidnapping, conspiracy to commit murder, and violation of state RICO Act, and defendant appealed. The District Court of Appeal, Wentworth, J., held that: (1) evidence of predicate acts occurring outside state were properly admitted in RICO trial; (2) evidence which implicated defendant in several uncharged criminal acts was admissible; and (3) valid reasons were supplied by trial court to support departure from sentencing guidelines.

Affirmed.

1. Disorderly Conduct ⇐1

Conviction of defendant under state RICO statute could be based upon predicate acts which occurred outside state; defendant was properly subjected to prosecution within state and jury was entitled to consider evidence as related to overall drug conspiracy which encompassed repeated acts within state. West's F.S.A. § 910.005(1).

2. Criminal Law ⇐372(14)

Evidence which implicated defendant in several uncharged criminal acts was properly admitted in state RICO trial as it established ongoing pattern of criminality generally involving similar offenses and same participants, though evidence may also have had effect of impairing defendant's character before jury; such evidence was merely insubstantial portion of extensive evidence presented and any derogation of defendant's character would not have had significant impact on jury's verdict.

3. Criminal Law ⇐1171.5

Although prosecutor's questioning of defendant was fairly susceptible of being interpreted as comment on defendant's right to remain silent, such remarks did not impermissibly influence jury's verdict and, thus, reversal of conviction was not warranted.

4. Criminal Law ⇐986(3)

Court specified sufficient valid reasons to support departure from sentencing

guidelines range, though it also provided several factors which would not support departure. West's F.S.A. RCrP Rule 3.701.

Jerold S. Solovy, Glenn K. Seidenfeld, Barry Levenstam, Michael T. Brody, of Jenner & Block, Claude B. Kahn, of Kipnis, Kahn, Condon & Bruggerman, Chicago, for appellant.

Robert A. Butterworth, Atty. Gen., Gary L. Printy, Asst. Atty. Gen., for appellee.

WENTWORTH, Judge.

Appellant seeks review of judgments of conviction and sentences for kidnapping, conspiracy to commit murder, and violating the Florida RICO Act. Numerous issues have been presented for our review. We find that appellant has failed to demonstrate any point of reversible error and we therefore affirm the judgments and sentences appealed.

Appellant and other defendants, including Edward McCabe and Joseph Sallas, were variously charged by a grand jury indictment alleging the murder of agricultural inspector Austin Gay, the kidnapping of and conspiracy to murder agricultural inspector Leonard Pease, and violations of the Florida RICO Act based upon the murder of Gay, the kidnapping of and conspiracy to murder Pease, and numerous drug offenses. Extensive evidence was presented at a lengthy trial during which it was indicated that appellant was an organizational leader in a wide-ranging conspiracy involving the importation and sale of drugs. Appellant had proclaimed to various individuals that he controlled the sale of marijuana on Chicago's south side, and the evidence established that on numerous occasions these drugs were transported through Florida and ultimately received for distribution in Chicago with appellant's aid and assistance. During one such transaction inspector Pease was kidnapped when he discovered a large quantity of marijuana being transported in north Florida. Pease was left bound in north Florida and the individuals whom he had confronted fled the state. Appellant thereafter indicated that it would be necessary to have Pease killed and suggested that this could be arranged through Edward McCabe, who was involved with appellant in various drug transactions. McCabe arranged a meeting with Joseph Sallas who was then hired to kill inspector Pease. Sallas suggested that alibis should be arranged and he traveled to Florida. While Sallas was in Florida inspector Austin Gay was killed, whereupon Sallas abandoned the plan to kill inspector Pease.

Appellant was found guilty of kidnapping and conspiring to murder inspector Pease and violating the Florida RICO Act. McCabe was found guilty of conspiring to murder Pease and violating the RICO Act, and Sallas was found guilty of conspiring to murder Pease.

[1] Appellant's RICO conviction was based upon a charge and proof which included predicate acts occurring outside the state of Florida. Appellant was properly subjected to prosecution in Florida and the jury was entitled to consider this evidence as related to the overall drug conspiracy which encompassed repeated acts within the state. *See* section 910.005(1), Florida Statutes. Furthermore, even if the predicate acts which occurred outside the state were not considered, there was sufficient other proof to support the RICO conviction by overwhelming evidence.

[2] During the course of the trial testimony was presented implicating appellant in several uncharged criminal acts. This similar fact evidence established an ongoing pattern of criminality generally involving similar offenses and the same participants as the present case. The evidence was thus relevant and admissible under the rule announced in *Williams v. State*, 110 So.2d 654 (Fla.1959). *See also, Cotita v. State*, 381 So.2d 1146 (Fla. 1st DCA 1980). While this testimony may have also had the further effect of impairing appellant's

Digest

character before the jury, it did not become a featured aspect of the trial. Rather, it was merely an insubstantial portion of the extensive evidence presented and any derogation of appellant's character in this regard would not have significantly impacted the jury's verdict.

[3] During the trial it was also revealed that appellant had recently been convicted of another drug offense in Florida. Appellant attempted to explain this incident by suggesting that he was merely conducting a personal investigation into the Pease kidnapping. The prosecutor questioned appellant as to whether he had so advised law enforcement personnel after his arrest, and appellant admitted that he had not. This line of questioning was impermissible as it was fairly susceptible of being interpreted as a comment on appellant's right to remain silent. *See Hosper v. State*, 513 So.2d 234 (Fla. 3rd DCA 1987). The prosecutor also noted that "the jury didn't believe you there...." However, the court instructed that the latter remark should be disregarded and the jury was already aware of appellant's prior conviction. Considering the improper prosecutorial comment in context with the totality of the evidence presented, it is clear beyond any reasonable doubt that these remarks did not impermissibly influence the jury's verdict. The challenged prosecutorial comment thus does not warrant reversal of appellant's convictions. *See State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

[4] Appellant elected to be sentenced pursuant to the Fla.R.Crim.P. 3.701 sentencing guidelines. The court imposed sentences which exceed the recommended guidelines range, providing written reasons for this departure. Although the listed reasons include several factors which will not support a guidelines departure, the court also specified many valid reasons to support the departure. It is clear that even without the improper considerations the court would have imposed the same sentences. In accordance with *Albritton v. State*, 476 So.2d 158 (Fla.1985), we therefore decline to remand for resentencing.

The numerous other issues which appellant has raised on appeal are likewise without merit. We accordingly affirm the judgments and sentences appealed.

SMITH, C.J., and JOANOS, J., concur.

Joseph SALLAS, Appellant,

v.

STATE of Florida, Appellee.

No. BD–275.

District Court of Appeal of Florida, First District.

Jan. 15, 1988.

Rehearing Denied Feb. 22, 1988.

Appeal from the Circuit Court for Columbia County; L. Arthur Lawrence, Judge.

Michael Allen, Public Defender, Terry P. Lewis, Sp. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., Gary L. Printy, Asst. Atty. Gen., for appellee.

PER CURIAM.

AFFIRMED. *See Domberg v. State*, 518 So.2d 1360 (Fla. 1st DCA 1988).

SMITH, C.J., and WENTWORTH and JOANOS, JJ., concur.

APPENDIX C

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

June 7, 1994

CASE NO: 92-03833

Robert David Domberg, Jr. v. State of Florida

Petitioner(s), Respondent(s).

BY ORDER OF THE COURT:

Motion for rehearing and suggestion for certification of conflict, filed March 7, 1994, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

By: Sondra Joyner
Deputy Clerk

DISTRICT COURT OF APPEAL
SAT CITO SI RECTE
FIRST DISTRICT
STATE OF FLORIDA

Copies:

Bradley R. Stark

Gypsy Bailey

APPENDIX D