Of 7

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	**CASE NO. 84,411**
Petitioner,	
-VS-	4th DCA Case No. 93-1708
MARTY DARRISAW,	
Respondent.	

ANSWER BRIEF
OF RESPONDENT
MARTY B. DARRISAW

COUNSEL FOR RESPONDENT,
LAWYER NELSON E. BAILEY
FLORIDA BAR BOARD CERTIFIED CRIMINAL TRIAL LAWYER
Commerce Center, Suite 300
324 Datura Street
West Palm Beach, Florida 33401

Telephone (407) 832-7941

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For purposes of the certified question submitted to the Supreme Court, Respondent accepts Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Under the Sentencing Guidelines a "pattern" of criminal conduct is not proved merely by commission of a prior and a current offense not in temporal proximity to each other or of a related nature, even though of increasing seriousness; therefore the certified question must be answered in the negative.

The correct answer to the certified question submitted to the Supreme Court revolves around the meaning of "an escalating pattern of criminal conduct" as that term is used in **§ 921.001(8), Florida Statutes.** When a prior conviction is for a less serious offense than the current crime, is that fact standing alone sufficient to support an upward departure sentence? Or is something more required? And if so, what is that something more?

The District Court found, in effect, that the Sentencing Guidelines require a factual predicate not only of "escalating" crimes, but also of a "pattern" either to the crimes or to the escalation. Because that finding is based on a correct application of the plain meaning of the words of the statute, it is correct. Likewise, the answer to the certified question put to the Supreme Court lies no deeper than the plain meaning of the statute's words.

The dictionary says "escalate" means "to increase in scale or intensity." It says "pattern" means "a recurrent set of features or characteristics." Put the words "escalate" and "pattern" together as the statute does, apply them to criminal conduct, and

they mean crimes increasing in seriousness, scale, or intensity, and also having a recurring set of features or characteristics.

So, an "increasing pattern of criminal conduct" means either that the nature of the crimes themselves show a pattern of increase in seriousness or scale, or if they do not show an increase in seriousness or scale, together they show a pattern of increasing intensity or frequency. The statute simply requires, to authorize a departure from the sentencing guidelines, that either the crimes themselves show, or the frequency of them over time shows, a "pattern" of increase. It is no more complicated than that.

This reading of the statute is consistent with the plain meaning of the words in the statute, and absolutely nothing about this reading of it is inconsistent with the opinion in **Barfield v. State**, 594 So.2d 259 (Fla. 1992). In **Barfield** the court merely held that the temporal pattern was not present, but the pattern of increasing seriousness or scale to the crimes themselves was.

POINT I

Under the Sentencing Guidelines a "pattern" of criminal conduct is not proved by the commission of a prior offense and a current offense not in temporal proximity to each other or of a related nature, but merely of increasing seriousness. Absolutely nothing in **Barfield v. State**, 594 So.2d 259 (Fla. 1992) suggests to the contrary. Therefore, the certified question must be answered in the negative.

Respondent Marty Darrisaw was employed as a state prison guard. While off duty in civilian clothes in another county from where employed, he took a gun in to a Checker's hamburger stand and robbed the store's manager. While fleeing the store he drove the manager's car several yards before abandoning it. In the parking lot as he drove away, he pointed the gun at an employee of the store and demanded the employee leave. (See: Brief of Appellant below.) Respondent Darrisaw was convicted of robbery with a firearm, grand theft auto, and aggravated assault. **Darrisaw v. State**, 19 Fla.L.Weekly D1870 (Fla. 4th DCA Sept. 9, 1994).

Under the Sentencing Guidelines, Respondent's "point total" for a Category 3 offense (*i.e.*, robbery) placed him in the Recommended Range of 3 1/2 to 4 1/2 years incarceration, with a Permitted Range of 2 1/2 to 5 1/2 years. (1312G; 1329) The sentence recommended to the court by the Department of Corrections in the Presentence Investigation Report was any sentence "within

the recommended range." (1312G) Nevertheless, the trial judge imposed an upward-departure sentence of 40 years. (1313, 1318-9)

According to law, the reasons for any departure from the presumptive sentences established in the guidelines are required to be articulated in writing; departures may be made only where circumstances or factors reasonably justify the aggravation or mitigation of the sentence; and the level of proof required to establish facts supporting a departure from a guidelines sentence is by "a preponderance of the evidence." ***Rule 3.701(b)(6), Florida Rules of Criminal Procedure.***

Here, the trial judge gave two reasons for upward departure. First, wrote the judge, the defendant "seriously breached a position of public trust" by committing the offense, inasmuch as he was a state correctional officer at the time. Second, wrote the judge, the defendant's past record reflects an incident where he was convicted for trespass and resisting an officer without violence, both charges being misdemeanors, and therefore the present offense reflects "an escalating pattern" of criminal conduct from non-violent to violent, from non-personal to personal, and from misdemeanor to felony. (1330)

On appeal the District Court found that neither reason given by the trial judge is a valid ground for a departure sentence. On the latter point, it found the record fails to reflect an "escalating pattern of criminal conduct." (1330)

The Attorney General objects to the latter finding, complaining that the District Court appears to be incorrectly

reading the Sentencing Guidelines to require, in support of an upward departure sentence, not only "escalating" criminal conduct but also "a pattern" to the crimes.

It is more accurate to say the District Court found the Sentencing Guidelines require a factual predicate not only of "escalating" crimes but also of a "pattern" to either the crimes or the escalation. It is perhaps a subtle difference, but an important one.

The certified question put to the Supreme Court revolves around the meaning of "an escalating pattern of criminal conduct," as that term is used in **§ 921.001(8), Florida Statutes.** Is the fact that the prior conviction was for a less serious crime enough, by itself, to support an upward departure sentence? Is only "escalation" of crimes necessary? Or is something more required? If so, what is the nature of that something more?

Section 921.001(8), Florida Statutes, authorizes departure from the sentencing guidelines "when credible facts demonstrate that the defendant's prior record . . . and the current criminal offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct."

Applying basic logic to the statute's words, a "pattern" of criminal conduct defines one thing, and "escalating" criminal conduct defines another. Unquestionably, what they define overlaps, but still they define different things. Some criminal conduct falls within one definition, some falls within the other, and some falls within both.

Logically, if you combine the two definitions as the statute does, thereby limiting yourself to an "escalating pattern" of criminal conduct, you are delineating only that conduct that falls into the overlapping category. You are delineating criminal conduct that satisfies both definitions rather than just one or the other.

Examples of conduct falling within one definition and not the other are easy to think of, as are examples of conduct that satisfies both definitions. Assume conviction for each offense mentioned in the following examples, to bring the statute's provision for departure sentencing into play.

First example: A woman litters the highway one day as she drives to visit a friend, six months later in the business she owns she evades payment of one month's worth of sales taxes, and two years after that an incident occurs at home in which she excessively spanks her child causing a permanent injury (*i.e.*, physically abuses her child), She has engaged in criminal conduct that clearly "escalated" from less serious to more serious, from non-violent to violent, from misdemeanor to felony, but there is no "pattern" to her crimes, nor to the escalation. Her crimes are totally unrelated and dissimilar incidents.

Second example: Her husband goes out on the same day in December of every year, for ten years, and cuts down just one Christmas tree in a state forest without a permit. He is engaging in a clear, long-term, well-established "pattern" of criminal conduct, but neither his criminal conduct nor the pattern or

frequency of it are in any way "escalating." So the statute authorizing an upward departure sentence for "an escalating pattern of criminal conduct" simply does not apply. Instead, as noted in **Barfield v. State**, 594 So.2d 259, 261 (Fla. 1992), Florida's habitual offender statute provides a statutory means of dealing with persistent criminal conduct. **§775.084(1)(a), Florida Statutes (1989).**

And third example: The couple in the above examples have a neighbor whose crimes meet both definitions. He also takes Christmas trees from the forest without permits, on the same day in December each year, but each year he takes a larger number of trees than the year before, until now he is taking them by the truckload and selling them at the roadside. This person is engaging in criminal conduct that has a distinct "pattern" to it over time, and is also clearly "escalating" in seriousness or scale.

From the case authorities cited in the Attorney General's brief and discussed in **Barfield**, one thing is completely clear. The departure provision of the Sentencing Guidelines is not worded to automatically and always apply to every person who is convicted of a crime today who in the past has been convicted of a less serious crime. Nor is it worded to apply automatically to one, two, three, or any specific number of prior crimes of less serious nature than the current one on which sentence is to be imposed. The statute easily enough could have been worded to automatically apply in either of those situations, but it was not. Instead, it

addresses a combination of present and prior crimes that, together, reflect an "increasing pattern" of criminal conduct.

The Attorney General bluntly says that the Fourth District has merely "invented" a "similarity of offenses" factor that the Supreme Court and the legislature never recognized or suggested as a part of **§ 921.001(8), Florida Statutes.** But the Attorney General is wrong. The District Court "invented" nothing. The Supreme Court merely has to look to the words of the statute itself to find ample authority for the Fourth District's decision. That authority is found in the logical application of the statute's words as outlined above, and in the plain meaning of those words as discussed below.

When interpreting statutes, the plain meaning of words counts, and it counts for a lot. In interpreting statutes, Florida courts are constitutionally required to start there. *Cf.*, **Reino v. State,** 352 So.2d 853 (Fla. 1977).

The dictionary says "escalate" means "to increase in scale or intensity." The dictionary says "pattern" means "a recurrent set of features or characteristics." See: **Webster's Illustrated Encyclopedic Dictionary**, Tormont Publications, Inc., 1990 edition. So, putting the words "escalate" and "pattern" together and applying them to criminal conduct, they refer to crimes increasing in seriousness or scale or intensity, and having a recurring set of features or characteristics.

In the examples given earlier, the woman in the first example who at different times littered the highway, evaded taxes, and

abused her child, committed crimes that lacked any recurring set of features or characteristics, though her crimes clearly increased in seriousness or scale. Nor was there any pattern to the increase itself.

Her husband, who illegally took just one Christmas tree in December of each year for ten years, did a series of criminal acts which had an unquestionably consistent and recurrent set of features or characteristics over a period of years, yet his crimes in no manner increased in scale or intensity or seriousness.

But their neighbor who also took Christmas trees in December of each year, taking a larger number each year until he was stealing them by the truckload, committed crimes involving a consistent or recurring set of features or characteristics, and also increasing in seriousness and scale.

Perhaps it all boils down to this. Whatever an "escalating pattern of criminal conduct" means, it means something more than simply that the defendant once was in trouble before, for a less serious crime then the present one. Any time someone is being sentenced for a second or third or fourth crime more serious than the earlier crime, the most recent crime is by definition an "escalation" from less serious to more serious. Every time that happens though, it does not necessarily reflect an "increasing pattern" of criminal conduct. Something more still has to be present for there to be a "pattern" to the crimes, or to the escalation. In other words, something more has to be present before the statutory provision in issue authorizes an upward

departure sentence. What that something more is, is the question.

How to distinguish between, on the one hand, criminal conduct that satisfies the definition of both "escalating" and "a pattern," and, on the other hand, criminal conduct that does not, is the problem. If that distinction cannot be readily made -- if the statute's wording and the cases interpreting it leave that distinction vague in its application to real sentencings in real cases -- then the statute is void for vagueness, and unconstitutional. *Cf.*, **Leeman v. State,** 357 So.2d 540 (Fla. 1978); **Schultz v. State,** 361 So.2d 416 (Fla. 1978); **Fla. Jur 2d,** CRIMINAL LAW, § 9.

Of course, the Attorney General maintains the statute is not vague. So perhaps the Attorney General can demonstrate that the distinction is easy to make. Respondent challenges the Attorney General to give, in the state's reply brief, at least four examples of multiple crimes, in which the current one is more serious than the previous ones, yet that clearly fail to meet the test for an "escalating pattern" of criminal conduct, explaining why the examples clearly fail to do so, and, more importantly, explaining why this defendant's case is distinguishable from each of those examples. The Attorney General's ability to do so may assist the Court significantly in drawing the distinctions. Conversely, the Attorney General's inability to do so may nicely demonstrate why the statute must be strictly construed, or perhaps even why it is void for vagueness.

The Attorney General maintains, in the state's brief, that the

definition of an "escalating pattern" applied by the Fourth District construes the wording of the Sentencing Guidelines too strictly. The Attorney General advocates a much broader construction. But it is axiomatic that criminal statutes and rules must be strictly construed. **State v. Smith**, 547 So.2d 613, 615 (Fla. 1989). If there is any doubt as to their application or intent, that doubt must be resolved in favor of the accused citizen. **Ferguson v. State**, 377 So.2d 709, 711 (Fla. 1979).

The Attorney General maintains the District Court wrongly found the record here fails to support a finding of an "escalating pattern" of criminal conduct, because the court incorrectly found a "pattern" is required.

As already pointed out, though, one prior criminal incident resulting in two misdemeanor convictions, four years earlier, without something more, does not make a "pattern" of any nature. There must be a "pattern" to the prior and present crimes, or to the nature of the escalation itself.

Here, the misdemeanor offenses were committed four years before the present offense. (1312C) Offenses committed four years apart were held not to constitute a "pattern" in **Bogan v. State**, 528 So.2d 1341 (Fla. 2d DCA 1988). Something more is required.

Here, the judge relied on two prior misdemeanor convictions. Two prior marijuana misdemeanor convictions were held insufficient to establish a "pattern" of escalation when the defendant was later convicted of two automobile burglaries and a household burglary in **Cox v. State**, 508 So.2d 1318 (Fla. 1st DCA 1987). Also see:

Douglas v. State, 605 So.2d 1346 (Fla. 2d DCA 1992). Something more is required.

The Attorney General maintains that the decisions in **Barfield v. State**, 594 So.2d 259 (Fla. 1992), and **Taylor v. State**, 601 So.2d 540 (Fla. 1992), contravene the Fourth District's view that "escalating pattern" means the trial court must find both escalation and some nature of pattern before imposing an upward departure sentence. The Attorney General says **Barfield** and **Taylor** contravene the District Court deciding this case based on any absence of facts to support the "pattern" element.

Yet, the Attorney General also seems to recognize that the issue of whether there is a "pattern" element required by the statute's wording was not even an issue presented to the court by the facts in **Barfield** or **Taylor**. The Attorney General correctly acknowledges that the particular facts in **Barfield** and **Taylor** were that the prior offenses were less serious than, but similar to, the current offenses for which Barfield and Taylor were sentenced.

In **Barfield** the Supreme Court specifically recognized it was addressing only the issue of "temporal proximity of crimes" and not the "pattern" element.

> We address this issue again in an effort to clarify when the temporal proximity of crimes can be a valid reason for departure from the sentencing guidelines.

Barfield v. State, *id.*, at 261.

In truth, **Barfield** supports the Fourth District's decision here. Barfield was previously convicted of trafficking in cocaine, in an amount of 28 grams or more but less than 200 grams. His new

conviction was for conspiracy to traffick and attempt to traffick in cocaine, in an amount of 400 grams or more. He was clearly a cocaine dealer seeking, over time, to deal in increasingly larger amounts of cocaine. His crimes were increasing in scale or intensity or seriousness, and also had a recurring set of features or characteristics. Absolutely nothing in **Barfield** is inconsistent with the decision of the Fourth District Court of Appeal in the present case.

According to the Rules of Criminal Procedure, "the purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge," and the guidelines "are intended to eliminate unwarranted variation in the sentencing process." ***Rule 3.701(b), Florida Rules of Criminal Procedure.*** When all else is said and done, the sentence imposed by the trial judge in this case defeats that intent.

Though the Attorney General objects to requiring a showing both of an "escalation" and of a "pattern" before the court will uphold an upward departure sentence, nonetheless that is what is required by the plain meaning of the words used in the Sentencing Guidelines, just as it is also how the appellate courts of Florida are constitutionally required to read the statute.

In conclusion, if the Supreme Court decides to take jurisdiction of this case, then here is what the Court's finding should be. An "increasing pattern of criminal conduct" means either that the nature of the crimes themselves shows a pattern of increase in seriousness or scale, or that the crimes, even though

not increasing in seriousness or scale, are occurring with increasing frequency. One or the other of these "patterns" of increase must exist to authorize a departure from the sentencing guidelines. The plain meaning of the words of the statute requires it.

The certified question therefore must be answered in the negative.

CONCLUSION

An "increasing pattern of criminal conduct" means either that the nature of the crimes themselves shows a pattern of increase in seriousness or in scale, or that the crimes, though not increasing in seriousness or scale, are occurring with increasing frequency. One way or the other, a "pattern" of increase must be present to authorize a departure from the sentencing guidelines. The plain meaning of the words of the statute requires this. The certified question therefore must be answered in the negative.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this pleading was served by Mail delivery upon **Robert A. Butterworth, Attorney General,** ATTENTION: **WILLIAM A. SPILLIAS, Assistant Attorney General,** Department of Legal Affairs, Suite 300, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401, on this date, the 8th day of November, 1994.

Respectfully submitted,

NELSON E. BAILEY, LAWYER
Commerce Center, Suite 300
324 Datura Street
West Palm Beach, Florida 33401
Telephone (407) 832-7941

By Nelson E. Bailey
NELSON E. BAILEY
Counsel for Appellant
Florida Bar Board Certified
Criminal Trial Lawyer
Florida Bar No. 117216