IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,411

STATE OF FLORIDA,

Petitioner,

vs.

MARTY DARRISAW,

Respondent.

**********

ON PETITION FOR DISCRETIONARY REVIEW

**********

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, was the Appellee in the Fourth District Court of Appeal. The Respondent, **MARTY DARRISAW**, was the Appellant in the Fourth District Court of Appeal. The parties will be referred to as they stand before this Court.

## STATEMENT OF THE CASE AND FACTS

The relevant facts of this case were succinctly set forth in the Fourth District Court of Appeal's opinion in Darrisaw v. State, 19 Fla. L. Weekly D1870 (Fla. Sept. 9, 1994) (on motion for rehearing), as follows:

> Appellant was convicted of robbery with a firearm, grand theft auto, and aggravated assault. The guidelines scoresheet revealed that appellant's recommended range was 3 1/2 - 4 1/2 years, and the permitted range was 2 1/2 to 5 1/2 years imprisonment. The trial court elected to depart from the guidelines and impose a 40 year sentence in the DOC on the following grounds: (1) that appellant was employed at the time of the offense as a correctional officer and that the commission of the offense was a breach of the public trust; and (2) appellant's escalating pattern of criminal activity.
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> * * * * *
>
> The second reason was based on appellant's prior record of two misdemeanor convictions of trespassing and resisting arrest without violence which occurred four years prior to the instant offense. The trial court concluded that departure was appropriate because the record reflected an escalating pattern of criminal conduct from nonviolent to violent crimes, from misdemeanors to felonies, and from non-personal to personal crimes.

(See Appendix A).

On rehearing the Fourth District Court of Appeal held that the trial court's first reason was not a valid reason for departure because there was no evidence that appellant's position was in any way used to facilitate the crime. Id.[1] However, the Fourth District changed course on rehearing from its original opinion with respect to the trial court's "escalating pattern of criminal conduct" ground for departure. The Fourth District suggested, based upon its interpretation of Barfield v. State, 594 So. 2d 259 (Fla. 1992), and Taylor v. State, 601 So. 2d 540 (Fla. 1992), that the three categories set forth in Barfield as necessary to establish an escalating pattern of criminal activity under section 921.001(8), Florida Statutes (1987), actually only "establish what will be considered 'escalating' criminal conduct, but... do not address what constitutes a 'pattern' of criminal conduct." Id. at D1871. The Fourth District proceeded to hold that because Respondent's previous misdemeanors were "dissimilar and remote to the instant armed robbery," they did not satisfy a pattern of criminal activity; Respondent's sentence was thus reversed and remanded for resentencing within the guidelines. Id.[2]

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[1] The Fourth District held the same way in its original opinion in this cause, Darrisaw v. State, 19 Fla. L. Weekly D1344 (Fla. 4th DCA July 1, 1994) (See Appendix B).

[2] The Fourth District noted that its holding was in line with Smith v. State, 507 So. 2d 788 (Fla. 1st DCA 1987), and Davis v. State, 534 So. 2d 821 (Fla. 4th DCA 1988), quashed on other grounds, 549 So. 2d 187 (Fla. 1989).

The Fourth District certified the following question to this Court:

> IS A PATTERN OF CRIMINAL CONDUCT PROVED BY THE COMMISSION OF TWO OFFENSES NOT IN TEMPORAL PROXIMITY TO EACH OTHER OR OF A RELATED NATURE BUT OF INCREASING SERIOUSNESS AS DEFINED IN BARFIELD V. STATE?

Id.

## SUMMARY OF ARGUMENT

An escalating pattern of criminal conduct is proven under section 921.001(8), Florida Statutes, by the commission of two offenses, the current offense and the prior offense, of increasing seriousness, as construed and defined in Barfield v. State, 594 So. 2d 259 (Fla. 1992). This Court should answer the certified question in the affirmative, and reverse the Fourth District's decision, based upon the clear language of section 921.001(8), Florida Statutes, and this Court's decision and reasoning in Barfield v. State, 594 So. 2d 259 (Fla. 1992), which clearly defined, interpreted, and/or construed the "escalating pattern of criminal conduct" provision of section 921.001(8).

In its opinion below, see Darrisaw v. State, 19 Fla. L. Weekly D1870 (Fla. 4th DCA Sept. 9, 1994) (on motion for rehearing), the Fourth District basically "split" the "escalating pattern of criminal conduct" provision of section 921.001(8) in half, and held that there is a separate "pattern of criminal conduct" factor in said provision which can only be satisfied where there is (1) temporal proximity of offenses; and (2) similarity of offenses. The Fourth District's holding, however, has no foundation in the law and is in fact contrary to the clear language of both Barfield and section 921.001(8).

The Fourth District has "invented" the "similarity of offenses" factor even though this Court and the legislature, through section 921.001(8), have never recognized or suggested the existence of such a factor. The only authority apparently relied upon by the Fourth District was the existence of the

particular facts in Barfield and Taylor v. State, 601 So. 2d 540 (Fla. 1992), where the prior offenses were less serious than, but similar to, the current offenses for which the respective defendants had been sentenced. However, this Court's definition, interpretation, and/or construction of section 921.001(8) in Barfield, and reaffirmed in Taylor, contravenes the Fourth District's splitting of the "escalating pattern of criminal conduct" provision and its "invention" of the heretofore non-existent factor of similarity of offenses. Barfield and Taylor, as well as section 921.001(8) itself, make clear that the existence of a "similarity of offenses" factor within the "escalating pattern of criminal conduct" provision of section 921.001(8) was never contemplated by this Court or the legislature.

## ISSUE

**AN ESCALATING PATTERN OF CRIMINAL CONDUCT IS PROVEN UNDER SECTION 921.001(8), FLORIDA STATUTES, BY THE COMMISSION OF TWO OFFENSES, THE CURRENT OFFENSE AND THE PRIOR OFFENSE, OF INCREASING SERIOUSNESS, AS CONSTRUED AND DEFINED IN BARFIELD V. STATE, 594 SO. 2D 259 (FLA. 1992).**

In the instant case, Respondent was convicted of robbery with a firearm, grand theft auto, and aggravated assault. The guidelines scoresheet revealed that appellant's recommended range was 3 1/2 to 4 1/2 years' imprisonment, and the permitted range was 2 1/2 to 5 1/2 years' imprisonment. The trial court elected to depart from the guidelines and impose a 40 year sentence in the DOC on the following grounds: (1) that appellant was employed at the time of the offense as a correctional officer and that the commission of the offense was a breach of the public trust; and (2) appellant's escalating pattern of criminal activity. The second reason was based on appellant's prior record of two misdemeanor convictions of trespassing and resisting arrest without violence which occurred four years prior to the instant offense. The trial court concluded that departure was appropriate because the record reflected an escalating pattern of criminal conduct from nonviolent to violent crimes, from misdemeanors to felonies, and from non-personal to personal crimes. See Darrisaw v. State, 19 Fla. L. Weekly D1870 (Fla. 4th DCA Sept. 9, 1994) (on motion for rehearing) (See Appendix A).

On rehearing the Fourth District Court of Appeal held that the trial court's first reason was not a valid reason for departure because there was no evidence that appellant's position was in any way used to facilitate the crime. Id.[3] However, the Fourth District changed course on rehearing from its original opinion with respect to the trial court's "escalating pattern of criminal conduct" ground for departure. The Fourth District suggested, based upon its interpretation of Barfield v. State, 594 So. 2d 259 (Fla. 1992), and Taylor v. State, 601 So. 2d 540 (Fla. 1992), that the three categories set forth in Barfield as necessary to establish an escalating pattern of criminal activity under section 921.001(8), Florida Statutes (1987), actually only "establish what will be considered 'escalating' criminal conduct, but... do not address what constitutes a 'pattern' of criminal conduct." Id. at D1871. The Fourth District proceeded to hold that because Respondent's previous misdemeanors were "dissimilar and remote to the instant armed robbery," they did not satisfy a pattern of criminal activity; Respondent's sentence was thus reversed and remanded for resentencing within the guidelines. Id.[4]

The Fourth District certified the following question to this Court:

> IS A PATTERN OF CRIMINAL CONDUCT PROVED BY THE COMMISSION OF TWO OFFENSES NOT IN TEMPORAL

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[3] Note footnote 1, p.3.

[4] Note footnote 2, p.3.

> PROXIMITY TO EACH OTHER OR OF A RELATED NATURE BUT OF INCREASING SERIOUSNESS AS DEFINED IN BARFIELD V. STATE?

Id.

The State submits that this Court must answer the certified question in the affirmative, and reverse the Fourth District's decision, based upon the clear language of section 921.001(8), Florida Statutes, and this Court's decision and reasoning in Barfield v. State, 594 So. 2d 259 (Fla. 1992), which clearly defined, interpreted, and/or construed the "escalating pattern of criminal conduct" provision of section 921.001(8).

Section 921.001(8) provides as follows:

> A trial court may impose a sentence outside the guidelines when credible facts proven by a preponderance of the evidence demonstrate that the defendant's prior record, including offenses for which adjudication was withheld, and the current criminal offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct. The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent crimes to violent crimes or a progression of increasingly violent crimes.

(emphasis added).

In Barfield, 594 So. 2d at 259, this Court answered in the negative the following certified question from the Fourth District:

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

(emphasis added). The State notes that the specific issue in Barfield, as framed by the certified question, involved only the factor of the temporal proximity alone of a prior crime in relation to the present subject crime(s) in the absence of a persistent pattern of criminal conduct.[5] This Court's explanation, reasoning, and eventual holding in Barfield clearly indicate that the narrow and limited issue it was addressing was whether temporal proximity alone is a valid reason to justify an upward departure sentence:

> 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. We are guided by the goal of the sentencing guidelines "to eliminate unwarranted variation in the sentencing process," Florida Rule of Criminal Procedure 3.701(b), and to permit departures from the presumptive sentences only for

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[5] In Barfield the defendant was convicted of attempted trafficking in cocaine and conspiracy to traffic in cocaine; the defendant had committed these offenses ninety days after his release from prison for trafficking in cocaine. Barfield, 594 So. 2d at 259, 260. On appeal, the Fourth District concluded that the defendant's commission of "'another Trafficking in Cocaine offense within a very short time of his release from prison'" was a valid basis for the upward departure sentence. Id. at 260.

> clear and convincing reasons. While an offense committed soon after release from incarceration or supervision may show a disregard for the law and justify a judge's displeasure and desire for a departure sentence, such a persistent but nonescalating pattern of criminal activity is not a sufficient reason to depart from the guidelines... Moreover, Florida's habitual offender statute provides a statutory means of dealing with persistent criminal conduct. Section 775.084(1)(a), Florida Statutes (1989), authorizes the court, upon compliance with the statutory procedures, to "impose an extended term of imprisonment" for persistent criminal conduct. Therefore, we find that temporal proximity alone does not constitute a clear and convincing reason to depart from the guidelines...

(emphasis added) (citation omitted). Id. at 261. However, this Court proceeded to define, in detail, the factor at issue in the instant case; namely, "What constitutes an escalating pattern of criminal conduct?" This Court explained as follows:

> We recognize that section 921.001(8), Florida Statutes (1987), 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." Section 921.001(8) also provides that this escalating pattern may be evidenced by a "progression from nonviolent to violent crimes or

> a progression of increasingly violent crimes." However, this Court has construed this provision as not necessarily requiring a violent progression. Departure is permissible when "the defendant has shown a pattern of engaging in serious criminal activity." Williams v. State, 581 So. 2d 144, 146 (Fla. 1991). Consequently, the "escalating pattern" recognized by section 921.001(8) as a valid basis for departure can be demonstrated in three ways: 1) a progression from nonviolent to violent crimes; 2) a progression of increasingly violent crimes; or 3) a pattern of increasingly serious criminal activity. Under this third category, "increasingly serious criminal activity" is indicated when the current charge involves an increase in either the degree of crime or the sentence which may be imposed, when compared with the defendant's previous offenses.

(emphasis added). Id.

This Court also proceeded to hold that the trial court's departure from the sentencing guidelines was valid under section 921.001(8) because his present offenses carried an increased penalty from his prior offenses, thus indicating "'an escalating pattern of criminal conduct'" under the third category (emphasis added). Id. at 261-262.

Likewise, in Taylor v. State, 601 So. 2d 540 (Fla. 1992), this Court found an escalating pattern of crimes in which a trial judge could properly impose a departure sentence where the defendant's first conviction in 1987 involved third-degree

felonies and his subsequent offenses in 1988 and 1989 contained two second-degree felony convictions within a short period of time. This Court noted that in Barfield it had clarified when temporal proximity could be used as a reason for departure from the guidelines, and it explained as follows:

> Prior offenses no matter how close or remote in time alone are not enough to show an escalating pattern of criminal activity. These prior offenses are already scored on the sentencing guidelines scoresheet, and the scored points may increase the defendant's sentence. As we held in Hendrix v. State, 475 So. 2d 1218, 1220 (Fla. 1985), factors already taken into consideration on the scoresheet may not be used as a reason for departure. Thus, the timing of the prior offenses alone may not be used as a reason for departure. However, prior offenses committed within a close temporal proximity may be a basis for departure when found in conjunction with any one of the three factors outlined in Barfield.

(emphasis added). Id. at 542.

Clearly, both Barfield and Taylor addressed only the issue of temporal proximity alone as a basis for departure from the sentencing guidelines, but this Court in both cases defined, or interpreted and construed, the factors under section 921.001(8) which constitute, or establish, an escalating pattern of criminal conduct.

In the instant case, the Fourth District reasoned as follows:

> What we glean from Barfield and Taylor is that the three categories set forth in Barfield establish what will be considered "escalating" criminal conduct, but that they do not address what constitutes a "pattern" of criminal conduct. In both Barfield and Taylor the temporal proximity and similarity of the escalating criminal conduct established a "pattern." Here, on the other hand, the previous misdemeanors are dissimilar and remote to the instant armed robbery. In line with Smith [v. State, 507 So. 2d 788 (Fla. 1st DCA 1987)] and Davis [v. State, 534 So. 2d 821 (Fla. 4th DCA 1988), quashed on other grounds, 549 So. 2d 187 (Fla. 1989)] we hold that these two do not satisfy a pattern of criminal activity.

(emphasis added). Darrisaw, 19 Fla. L. Weekly at D1870, 1871 (See Appendix A). The Fourth District has thus basically "split" the "escalating pattern of criminal conduct" provision of section 921.001(8) in half, and held that there is a separate "pattern of criminal conduct" factor in said provision which can only be satisfied where there is (1) temporal proximity of offenses (the Fourth District, however, failed to specify or define what would constitute sufficient temporal proximity, other than holding that four years is insufficient); and (2) similarity of offenses. The State contends that the Fourth District's holding has no foundation in the law, and is in fact contrary to the clear language of both Barfield and section 921.001(8).

Regarding the "similarity of offenses" factor, the State contends that the Fourth District has "invented" this factor even though this Court and the legislature, through section 921.001(8), have never recognized or suggested the existence of such a factor. The only authority the Fourth District appears to rely upon is the existence of the particular facts in Barfield and Taylor, where the prior offenses were less serious, but similar, to the current offenses for which the respective defendants had been sentenced. The State asserts, however, that this Court's definition, interpretation and/or construction of section 921.001(8) in Barfield, and reaffirmed in Taylor, contravenes the Fourth District's splitting of the "escalating pattern of criminal conduct" provision of said statutory section and its "invention" of the heretofore non-existent factor of "similarity of offenses." As stated by this Court in Barfield:

> [T]he "escalating pattern" recognized by section 921.001(8) as a valid basis for departure can be demonstrated in three ways: 1) a progression from nonviolent to violent crimes; 2) a progression of increasingly violent crimes; and 3) a pattern of increasingly serious criminal activity. Under this third category, "increasingly serious criminal activity" is indicated when the current charge involves an increase in either the degree of of crime or the sentence which may be imposed, when compared with the defendant's previous offenses.

(emphasis added). Barfield, 594 So. 2d at 259, 261. The State notes that this Court's definition, interpretation, and/or construction of section 921.001(8) did not include a "similarity of offenses" factor, and this Court never referred to, mentioned suggested, or included such a factor. Therefore, despite the Fourth District's suggestion to the contrary, it is clear that the existence of a "similarity of offenses" factor within the "escalating pattern of criminal conduct" provision of section 921.001(8) was never contemplated by this Court in Barfield or Taylor.[6] [7]

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[6] The State further notes decisions from the First, Second, and Fourth District Courts of Appeal that have addressed the issue of an escalating pattern of criminal conduct as a basis for departure, and have relied upon Barfield as controlling authority; however, none of these districts (save for the Fourth District in the instant case) have referred to, suggested, mentioned, or included a "similarity of offenses" factor or have even suggested that the Florida Supreme Court contemplated such a factor in Barfield. See Mills v. State, 19 Fla. L. Weekly D1591 (Fla. 4th DCA July 27, 1994) (en banc); Cave v. State, 19 Fla. L. Weekly D1606 (Fla. 1st DCA July 25, 1994); Moore v. State, 634 So. 2d 214 (Fla. 4th DCA 1994); Lippman v. State, 602 So. 2d 647 (Fla. 2d DCA 1992); Williams v. State, 602 So. 2d 562 (Fla. 2d DCA 1992). In fact, in many of these cases, the facts clearly indicate that the offenses were not similar. See Mills; Cave; Williams.

[7] As noted above, the Fourth District failed to delineate a sufficient time period that would satisfy the "temporal proximity" factor. Note Williams, 602 So. 2d at 562, however, where the Second District affirmed the trial court's upward departure sentence based upon an escalating pattern of criminal conduct; all of the defendant's prior offenses were 3-16 years prior to his current offenses, save for one prior offense which was one year prior to his current offenses.

## CONCLUSION

WHEREFORE, based upon the foregoing points and authorities, Petitioner respectfully requests that this Court answer the certified question in the affirmative, reverse the Fourth District's ruling, and remand for the reinstatement of Respondent's original departure sentence.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S INITIAL BRIEF ON THE MERITS** has been furnished by U.S. Mail to: **NELSON E. BAILEY, ESQUIRE,** Counsel for Respondent, Commerce Center, Suite 300, 324 Datura Street, West Palm Beach, Florida, 33401, this 21st day of October, 1994.

William A. Spillias
Assistant Attorney General

# APPENDIX A

BERND, J., Concur.)

[1]The radio was "a little longer than a pen."

[2]Section 443.036(26), Florida Statutes (1993), provides as follows:

(26) MISCONDUCT.—"Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:

(a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or

(b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

[3]Now renumbered at § 443.036(26), Florida Statutes (1993).

* * *

**Criminal law—Post conviction relief**

STURGAL CHRISTOPHER RUSSELL, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 94-02884. Opinion filed September 9, 1994. Appeal pursuant to Fla. R. App. P. 9.140(g) from the Circuit Court for Manatee County; Thomas M. Gallen, Judge.

(PER CURIAM.) We affirm the summary denial of this motion filed pursuant to Florida Rule of Criminal Procedure 3.850. We note that the trial court mistakenly believed the issues described in grounds 2 and 3 of the motion had been raised on direct appeal. Nonetheless, as pleaded, those grounds are facially insufficient. Accordingly, this affirmance is without prejudice to the prisoner filing another motion that raises these grounds with greater specificity.

Affirmed. (PARKER, A.C.J., and ALTENBERND, and LAZZARA, JJ., Concur.)

* * *

**Criminal law—Sentencing—Correction—Appeal from denial of rule 3.800 motion dismissed—Remanded to trial court for "rendition" of order**

ERIC ANTHIONY DREW, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 94-01651. Opinion filed September 9, 1994. Appeal pursuant to Fla. R. App. P. 9.140(g) from the Circuit Court for Hillsborough County; Robert J. Simms, Judge.

(PER CURIAM.) Eric Anthony Drew appeals the summary denial of his motion filed pursuant to Florida Rule of Criminal Procedure 3.800(a). We dismiss this appeal on the authority of *Davenport v. State*, Case No. 94-02484 (Fla. 2d DCA Aug. 10, 1994) [19 Fla. L. Weekly D1735a], and *Parnell v. State*, 19 Fla. L. Weekly D1624 (Fla. 2d DCA July 27, 1994), and remand with directions that the trial court "render" an order on Drew's motion in accordance with Florida Rule of Appellate Procedure 9.020(g).

Dismissed and remanded with directions. (ALTENBERND, A.C.J., and LAZZARA and QUINCE, JJ., Concur.)

* * *

**Criminal law—Sentencing—Concurrent twenty-seven-year terms of imprisonment followed by life probation exceeded statutory maximum for life felonies**

STATE OF FLORIDA, Appellant, v. GERALD GEORGE MARSH, Appellee. 2nd District. Case Nos. 93-01560, 93-01561, 93-01562, 93-01800. Opinion filed September 9, 1994. Appeal from the Circuit Court for Hillsborough County; Donald C. Evans, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Helene S. Parnes, Assistant Attorney General, Tampa, for Appellant. James Marion Moorman, Public Defender, and Timothy J. Ferreri, Assistant Public Defender, Bartow, for Appellee.

(CAMPBELL, Acting Chief Judge.) Gerald George Marsh pled nolo contendere to two counts of sexual battery and one count of armed kidnapping. On each offense, he received a concurrent sentence of twenty-seven years incarceration followed by life probation. We find no merit in the issues raised by the state on direct appeal and affirm Marsh's conviction. On cross-appeal, Marsh argues that his sentence exceeds the statutory maximum. We agree.

The sexual batteries and armed kidnapping for which Marsh was sentenced are life felonies, punishable by life imprisonment or a term of imprisonment not exceeding forty years. § 775.082(3)(a), Fla. Stat. (1987). When the trial court opts for a term of years instead of a life sentence, it may not impose a sentence longer than forty years. *Stephens v. State*, 627 So. 2d 543 (Fla. 2d DCA 1993); *Sterling v. State*, 584 So. 2d 626 (Fla. 2d DCA 1991), *rev. denied*, 592 So. 2d 682 (Fla. 1991); *Greenhalgh v. State*, 582 So. 2d 107 (Fla. 2d DCA 1991). Moreover, the total duration of a split sentence must fall within the statutory maximum. *Wilson v. State*, 622 So. 2d 529 (Fla. 2d DCA 1993).

The concurrent twenty-seven-year terms of imprisonment followed by life probation in this case exceeds the statutory maximum. Accordingly, we vacate the sentences for sexual battery and armed kidnapping and remand for resentencing.

Affirmed in part; reversed in part. (SCHOONOVER and BLUE, JJ., Concur.)

* * *

**Criminal law—Sentencing—Guidelines—Departure—Finding that defendant was correctional officer at time of offense and that commission of offense was breach of public trust not valid basis for departure where there was no evidence that defendant's position was in any way used to facilitate crime—Escalating pattern of criminal activity not valid basis for departure under circumstances of instant case in which defendant had two misdemeanor convictions of trespassing and resisting arrest without violence which occurred four years prior to armed robbery conviction—Pattern of criminal conduct is not proved by the commission of two offenses not in temporal proximity to each other or of a related nature, but of increasing seriousness as defined in *Barfield v. State*—Question certified**

MARTY B. DARRISAW, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-1708. L.T. Case No. 92-364 CFA. Opinion filed September 9, 1994. Appeal from the Circuit Court for Martin County; Larry S. Schack, Judge. Counsel: Nelson E. Bailey, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and William A. Spillias, Assistant Attorney General, West Palm Beach, for appellee.

ON MOTION FOR REHEARING

[Original Opinion at 19 Fla. Law Weekly D1344b]

[Editor's note: Substituted opinion replaces one-paragraph opinion in which court ruled differently on "pattern of criminal activity" issue.]

(WARNER, J.) We withdraw our previous opinion and substitute the following in its place.

We affirm the conviction of appellant. However, we reverse the departure sentence as neither reason given by the trial judge is a valid ground for departure.

Appellant was convicted of robbery with a firearm, grand theft auto, and aggravated assault. The guidelines scoresheet revealed that appellant's recommended range was 3½ - 4½ years, and the permitted range was 2½ to 5½ years imprisonment. The trial court elected to depart from the guidelines and impose a 40 year sentence in the DOC on the following grounds: (1) that appellant was employed at the time of the offense as a correctional officer and that the commission of the offense was a breach of the public trust; and (2) appellant's escalating pattern of criminal activity.

The first reason is not a valid reason for departure because there was no evidence that appellant's position was in any way used to facilitate the crime. *See Jefferson v. State*, 549 So. 2d 222 (Fla. 1st DCA 1989).

The second reason was based on appellant's prior record of two misdemeanor convictions of trespassing and resisting arrest without violence which occurred four years prior to the instant offense. The trial court concluded that departure was appropriate because the record reflected an escalating pattern of criminal conduct from nonviolent to violent crimes, from misdemeanors to felonies, and from non-personal to personal crimes.

In *Barfield v. State*, 594 So. 2d 259 (Fla. 1992), the supreme court answered a certified question from this court as to whether the temporal proximity of crimes alone provides a valid reason for departure without a finding of a persistent pattern of criminal activity. The court held that the temporal proximity of crimes

alone could not serve as a basis for departure absent an escalating pattern of criminal behavior. It stated:

> Consequently, the "escalating pattern" recognized by section 921.001(8) as a valid basis for departure can be demonstrated in three ways: 1) a progression from nonviolent to violent crimes; 2) a progression of increasingly violent crimes; or 3) a pattern of increasingly serious criminal activity. Under this third category, "increasingly serious criminal activity" is indicated when the current charge involves an increase in either the degree of crime or the sentence which may be imposed, when compared with the defendant's previous offenses.

*Id.* at 261.

The defendant Barfield had been convicted in 1987 of trafficking in cocaine in an amount of 28 grams or more but less than 200 grams. He served time in prison and committed the offense which resulted in the departure sentence ninety days after being released from prison. Noting that the second offense of trafficking in cocaine and conspiracy to traffic in an amount in excess of 400 grams was a crime of increased seriousness because of its increased penalty, the court said that this indicated an "escalating pattern of criminal conduct" under the third category. The court therefore affirmed the departure sentence.

*Barfield* is further explained in *Taylor v. State,* 601 So. 2d 540 (Fla. 1992), wherein the court noted:

> This Court noted in *Barfield* that section 921.001(8), Florida Statutes (1987), allows a trial court to give a defendant a departure sentence for an escalating pattern of criminal activity which can be demonstrated in one of three ways: [citing three categories listed above] . . . . Prior offenses no matter how close or remote in time alone are not enough to show an escalating pattern of criminal activity. These prior offenses are already scored on the sentencing guidelines scoresheet, and the scored points may increase the defendant's sentence. As we held in *Hendrix v. State,* 475 So. 2d 1218, 1220 (Fla. 1985), factors already taken into consideration on the scoresheet may not be used as a reason for departure. Thus, the timing of the prior offenses alone may not be used as a reason for departure. However, prior offenses committed within a close temporal proximity may be a basis for departure when found in conjunction with any one of the three factors outlined in *Barfield.*

*Id.* at 542.

This restatement of *Barfield* indicates that the conclusion that there was an escalating pattern of criminal activity in *Barfield* was based in part on the temporal proximity of the crimes. We therefore question whether the *Barfield* court would have determined that there was a "pattern" so as to permit departure if the two crimes had been five years apart, as opposed to the second one being a few months after the defendant was released from prison on the first conviction. Or, would an escalating pattern be shown by any combination of two crimes no matter how remote in time from each other, so long as the first carried with it a lesser penalty than the second?

In *Smith v. State,* 507 So. 2d 788 (Fla. 1st DCA 1987), the court held that a prior conviction as a juvenile of shooting into a motor vehicle together with the current charge of armed robbery did not constitute an escalating pattern of criminal conduct. Writing for the court, Judge Zehmer noted:

> The necessary implication of our holding to the contrary would be to authorize departure in every case where a defendant has a prior conviction, a result clearly in conflict with the purposes of the sentencing guidelines.

*Id.* at 791. Our court followed *Smith* in *Davis v. State,* 534 So. 2d 821 (Fla. 4th DCA 1988), *quashed on other grounds,* 549 So. 2d 187 (Fla. 1989), where this court disapproved the escalating pattern of criminal activity as a reason for departure where defendant's prior conviction was a "not included" strong arm robbery and the present convictions were robbery with a deadly weapon and attempted first degree murder with a deadly weapon. Judge Downey wrote, "However, as one swallow does not a summer make, neither does one prior 'not included' strong arm robbery establish a sufficient pattern of escalating criminal conduct to support a departure." *Id.* at 822. While both *Smith* and *Davis* were decided prior to *Barfield,* we are not convinced that the result would be any different.

What we glean from *Barfield* and *Taylor* is that the three categories set forth in *Barfield* establish what will be considered "escalating" criminal conduct, but that they do not address what constitutes a "pattern" of criminal conduct. In both *Barfield* and *Taylor* the temporal proximity and similarity of the escalating criminal conduct established a "pattern." Here, on the other hand, the previous misdemeanors are dissimilar and remote to the instant armed robbery. In line with *Smith* and *Davis* we hold that these two do not satisfy a pattern of criminal activity. We therefore reverse the sentence of appellant and direct that on remand, the trial court sentence appellant within the guidelines.

We also certify the following question to the Supreme Court.

> IS A PATTERN OF CRIMINAL CONDUCT PROVED BY THE COMMISSION OF TWO OFFENSES NOT IN TEMPORAL PROXIMITY TO EACH OTHER OR OF A RELATED NATURE BUT OF INCREASING SERIOUSNESS AS DEFINED IN *BARFIELD V. STATE*?

(POLEN and PARIENTE, JJ., concur.)

* * *

**Insurance—Liability—Determination that insurer was liable to insured property owners' association under general liability policy for attorney's fees that insured was required to pay to homeowner reversed—Policy provided that insurer would pay for all sums that insured became obligated to pay as damages because of property damage—Fees to which homeowner was entitled under terms of declaration of restrictions pertained solely to homeowner's securing injunction to abate violation of declaration, not recovery of damages for property damage—Insurer not estopped, by reason of its failure to comply with notice requirements of claims administration statute, from asserting that there was no coverage for attorney's fees under the policy—Lack of coverage for contractual obligation to pay attorney's fees is not "coverage defense" to coverage which would exist but for some breach of condition—No error in award of costs that insured became obligated to pay homeowner—No apportionment to be made between costs homeowner incurred in defense of insured's petition against homeowner and those incurred in prosecuting counterclaim against insured where insurer conceded that costs were so intertwined that it would be impossible to separate them—No apportionment between costs incurred prior to insured's notifying insurer of counterclaim against it and those incurred after insurer became involved**

SCOTTSDALE INSURANCE COMPANY, Appellant, v. DEER RUN PROPERTY OWNER'S ASSOCIATION, INC., a Florida not-for-profit corporation, Appellee. 4th District. Case No. 93-0277. L.T. Case No. CL 89-13375 AF. Opinion filed September 9, 1994. Appeal from the Circuit Court for Palm Beach County; Richard L. Oftedal, Judge. Counsel: John S. Freud and Allan S. Reiss of John S. Freud, P.A., Miami, for appellant. Anne E. Zimet of Becker & Poliakoff, P.A., West Palm Beach, for appellee.

ON MOTION FOR REHEARING

[Original Opinion at 19 Fla. L. Weekly D1165b]

[Editor's note: The last sentence in the second paragraph was reworded.]

(PER CURIAM.) Appellee's motion for rehearing is denied. However, for the purpose of making a correction, we withdraw our opinion of May 25, 1994 and republish the opinion as follows:

We reverse the trial court's determination that Appellant, Scottsdale Insurance Company, is liable to Deer Run Property Owner's Association, its insured under a general liability insurance policy, for attorney's fees that Deer Run was required to pay to a homeowner. The homeowner had prevailed in litigation against Deer Run, which Scottsdale defended on Deer Run's behalf.

# APPENDIX B

gi[illegible]egal right'' of a birth parent ''to enjoy the custody, fellowship and companionship of his offspring.'' *State ex rel Sparks v. Reeves*, 97 So. 2d 18 (Fla. 1957). We do so in light of abundant precedent stressing the sanctity of biological parenthood. But, we do so here without any assurance that she will be returned to the loving arms of a parent. We more likely send her back to await a custody battle which may cause her to be placed in temporary foster care for another period of time, and ultimately, perhaps, to be offered for adoption again.

This is not mere speculation. The mother believes to this day that adoption is in the best interests of baby girl E.A.W. She consented to the adoption. She supported the position of the adoptive parents throughout the trial court proceedings and she continues to do so on appeal. Only if the adoption is reversed with custody reverting to the father does she seek to resume her parental role.

What of the father, then, and his quest for custody of baby girl E.A.W. As I interpret the majority opinion, his fitness as a parent is not an appropriate issue in the adoption proceedings, either at the trial court level or on appeal. That issue awaits consideration in subsequent custody proceedings. Whether appropriate or not, the record gives us a glimpse of testimony that has been and would presumably again be introduced on the issue of his fitness for custody. In due course, assuming it surfaces again in the custody hearing, that evidence will be tested for credibility and materiality. It is too late for this case, but there should be a mechanism to resolve the issue of parental fitness within the context of adoption proceedings when that issue is raised. And it should be raised. Otherwise we have, as here, a vicious circle.

One final observation. The proceedings below and activities ancillary to those proceedings were far from ideal. Nevertheless, I fo[illegible] nothing appalling in anything done by counsel except that they collectively, and I am sure unwittingly, allowed the proceedings to drag out for a year or more. I agree with the majority opinion that we should not criticize the trial judge for the excessive delays. There is nothing in this record that supports attributing those delays to him. Had he the wisdom of Solomon he might have correctly decided this case at the first hearing and ended it. But who is to say which result is correct. The future of a baby girl was at stake. There were areas of doubt. There were protagonists. He did his best in the face of all that. My dissent concludes that the final result was correct, which would mean that the delays did not unduly and adversely impact upon the life and future of baby girl E.A.W. As it turns out, the majority opinion goes the other way in this close case. For that reason, the delays loom ominously upon the relationships of the parties.

I respectfully dissent.

* * *

**Criminal law—Costs—Assessment of costs of prosecution affirmed—Amount of costs imposed in restitution order reversed and remanded for correction of amount**

LAWRENCE D. MILLS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-2306. L.T. Case Nos. 93-2470CF A02 & 93-2469CF A02. Opinion filed June 22, 1994. Appeal from the Circuit Court for Palm Beach County; Edward Rodgers, Judge. Counsel: Richard L. Jorandby, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We affirm the trial court's assessment of $200.00 for costs of prosecution against appellant since he failed to o[illegible] to imposition of restitution during the sentencing hearing. *Thomas v. State*, 633 So. 2d 1122 (Fla. 5th DCA 1994). We reverse, however, the amount of court costs imposed in the restitution order and remand with instructions to correct that amount to reflect an assessment of $295.00 in court costs.

AFFIRMED IN PART; REVERSED IN PART and REMANDED. (DELL, C.J., HERSEY, J., and DAUKSCH, JAMES C., JR., Associate Judge, concur.)

* * *

**Criminal law—Sentencing—Guidelines—Departure—Defendant's status as correctional officer was not valid ground for departure because there was no evidence that his position was in any way used to facilitate crime—Sentence affirmed where pattern of escalating criminal conduct was established**

MARTY B. DARRISAW, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-1708. L.T. Case No. 92-364 CFA. Opinion filed June 22, 1994. Appeal from the Circuit Court for Martin County; Larry S. Schack, Judge. Counsel: Nelson E. Bailey, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and William A. Spillias, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We affirm the conviction of appellant. As to the sentence we also affirm, although we note that appellant's status as a correctional officer was not a valid ground for departure because there was no evidence that his position was in any way used to facilitate the crime. *See Jefferson v. State*, 549 So. 2d 222 (Fla. 1st DCA 1989). However, a pattern of escalating criminal conduct was established. *See Barfield v. State*, 594 So. 2d 259 (Fla. 1992). As at least one ground justifies departure, we affirm. § 921.001(5), Fla. Stat. (1993). (WARNER, POLEN and PARIENTE, JJ., concur.)

* * *

**Criminal law—Sentencing—Fine—Record did not support state's contention that defendant had bargained away court's discretion to reduce fine based on substantial assistance, and therefore court erred in concluding that it had no discretion to reduce fine**

WILLIAM RAHUBA, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-2452. L.T. Case No. 90-135111 CFC. Opinion filed June 22, 1994. Appeal from the Circuit Court for Broward County; Paul L. Backman, Judge. Counsel: J. David Bogenschutz of Bogenschutz & Dutko, P.A., Ft. Lauderdale, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Defendant was charged with trafficking in cocaine and agreed to plead guilty in return for the state moving for a reduction in sentence for substantial assistance. The court was advised that the state would recommend a three-year mandatory minimum and that it might waive the mandatory fine depending on the quality of the defendant's assistance.

At the sentencing hearing the parties were in agreement on the three-year prison term; however, things were not as clear in regard to the fine, which is the subject of this appeal. Defendant maintained that the parties could not agree on a reduction or waiver of the fine, while the state maintained that the fine was to be at the discretion of the state. The court concluded that it had no discretion to reduce the fine.

Defendant appeals, arguing that the court erroneously concluded that it did not have discretion to reduce the fine, citing the substantial assistance statute, section 893.135(4), Florida Statutes (1991), which says that the court ''may'' reduce the sentence for substantial assistance. The state acknowledges the court's discretion under the statute, but argues that under the terms of the plea agreement here the matter of the fine was to ultimately be determined by the state.

We cannot agree with the state, on the basis of this record, that the defendant had bargained away the court's discretion in regard to the fine. We thus agree with defendant that the court erred in concluding that it had no discretion to reduce the fine. *State v. Agerton*, 523 So. 2d 1241 (Fla. 5th DCA), *rev. denied*, 531 So. 2d 1352 (1988); *Cherry v. State*, 439 So. 2d 998 (Fla. 4th DCA 1983). We therefore reverse and remand for the trial court to reconsider the fine.

Reversed. (GUNTHER, KLEIN and STEVENSON, JJ., concur.)

* * *