

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

MAR 17 1995

CLERK, SUPREME COURT

By
Chief Deputy Clerk

FREDERICK CAVE,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 84,643

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 159089

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
ISSUE	6
WHEN THE TRIAL COURT EXPRESSLY RELIES UPON TEMPORAL PROXIMITY AND MAKES NO SPECIFIC FINDINGS WITH REGARD TO AN ESCALATING PATTERN OF CRIMINAL CONDUCT, MAY THE DEPARTURE SENTENCE NEVERTHELESS BE AFFIRMED IF THE DOCUMENTS OF RECORD PERTAINING TO DEFENDANT'S CRIMINAL HISTORY, ON THEIR FACE, DEMONSTRATE AN ESCALATING PATTERN OF CRIMINAL CONDUCT? (Certified Question)	6
A. The prosecutor and the trial court notified Cave that they believed that a departure sentence was appropriate in order to protect the public from his escalating criminality and Cave, through counsel, invited the terseness of the trial court's written reason for departure	6
B. The First District Court of Appeal was correct: <u>Barfield v. State</u> , 594 So. 2d 259 (Fla. 1992), controls	11
C. Cave's position exalts form over substance, seeks the wrong remedy for his purported grievance, and ignores the controlling holdings of <u>Barfield</u> and <u>Taylor</u>	17
D. The trial court should be affirmed even if it used the wrong reason	21
E. The importance of this case to the public interest lies more in protecting society against Cave than in the certified question	22
CONCLUSION	23
CERTIFICATE OF SERVICE	25

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Ansin v. Thurston</u> , 101 So. 2d 808 (Fla. 1958)	20
<u>Applegate v. Barnett Bank of Tallahassee</u> , 377 So. 2d 1150 (Fla. 1979)	21-22
<u>Barfield v. State</u> , 594 So. 2d 259 (Fla. 1992) . 8, 11-17, 19, 20, 22	
<u>Brown v. State</u> , 632 So. 2d 1052 (Fla. 5th DCA 1994)	18
<u>Cave v. State</u> , 613 So. 2d 454 (Fla. 1993)	4, 11
<u>Hause v. State</u> , 643 So. 2d 679 (Fla. 4th DCA 1994)	18
<u>Ivey v. State</u> , 633 So. 2d 530 (Fla. 2d DCA 1994)	18
<u>Jenkins v. State</u> , 385 So. 2d 1356 (Fla. 1980)	20
<u>Lowry v. Parole and Probation Commission</u> , 473 So. 2d 1248 (Fla. 1985)	23
<u>Madraso v. State</u> , 634 So. 2d 749 (Fla. 3d DCA 1994)	18
<u>New York Largo, Inc. v. Monroe Co.</u> , 985 F.2d 1488 (11th Cir. 1993)	20
<u>Parker v. State</u> , 406 So. 2d 1089 (Fla. 1982)	23
<u>Pope v. State</u> , 441 So.2d 1073 (Fla. 1983)	10
<u>Ree v. State</u> , 565 So. 2d 1329 (Fla. 1990)	16
<u>Smith v. State</u> , 579 So. 2d 75 (Fla. 1991)	15, 16, 22
<u>Smith v. State</u> , 639 So. 2d 160 (Fla. 1st DCA 1994)	18
<u>State v. Betancourt</u> , 552 So. 2d 1107 (Fla. 1989)	18
<u>State v. Dodd</u> , 594 So. 2d 263 (Fla. 1992)	20, 21
<u>State v. Rinkins</u> , 19 Fla. Law Weekly S644, 646 So. 2d 727 (Fla. Dec. 8, 1994)	18, 19, 21
<u>State v. Smith</u> , 547 So. 2d 613 (Fla. 1989)	23
<u>Taylor v. State</u> , 601 So. 2d 540 (Fla. 1992) . . 14-17, 19, 20, 22	

<u>U.S. Fire Insurance Co. v. Roberts</u> , 541 So. 2d 1297 (Fla. 1st DCA 1989)	23
<u>White v. State</u> , 446 So. 2d 1031 (Fla. 1984)	10, 11
<u>Williams v. State</u> , 504 So. 2d 392 (Fla. 1987)	7, 8, 15, 16, 21

STATUTES

§775.012, Fla. Stat.	22
§775.082, Fla. Stat.	13
§921.001, Fla. Stat.	12, 15, 16, 19, 21, 22, 23
§921.0016, Fla. Stat. (1993)	21, 22
§921.187, Fla. Stat.	22

OTHER AUTHORITY

Fla. Const, Art. V, §3(b)(4)	22
Fla. Jur. 2d Appellate Review (1978)	10
Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L.J. 161 (1930)	20
Re, Brief Writing and Oral Argument (1965)	20

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Frederick Cave, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with Cave's statement of the case and facts, except Cave omits or de-emphasizes the following facts.

Cave totally omits his threat against the Gainesville community. At the sentencing hearing, Officer Michael Moreska testified that Cave had inquired into the probable length of any prison sentence he may receive in this case. Officer Moreska answered, "Probably fifteen to thirty years." Cave then replied,

"Shit, I'll do three years and get out and then I'll really fuck Gainesville up." (T 247-48)

Cave has abbreviated (IB 3) the prosecutor's comments at the sentencing hearing so that the following are omitted:

Your Honor, what do you say about somebody that commits crimes like this, armed robbery, armed burglary, and an ag battery nineteen days after he gets released from prison? And, in fact, regarding that earlier incarceration, I note that attached to the PSI that was prepared in connection with this case is a previous PSI done in the other case, and that would be Case Number 85-1404-CF, and in that case the records indicate that this defendant was accused of burglary of a dwelling and assaulting the occupant in that case as well, and according to the PSI ... he allegedly strangled the victim in that case for a full minute and-a-half before releasing him. The defendant received a very significant break in that case because as is indicated in the PSI, the victim moved and was not able to be located before the trial in that case, hence Mr. Cave was allowed the option to plead to a third degree felony, and, in fact, he pled to burglary of a structure in that case back in 1986, February of '86, placed on probation for a period of three years, adjudicated guilty. In ... 1987 he violated that probation, and on April 5th, 1988, he was sentenced to thirty months in the Department of Corrections. He actually stayed in the Department of Corrections five months, a little less than five months, was released on September 1st, exactly nineteen days before he committed these ... [crimes].

(T 243-44) It was at this point that the prosecutor continued with "Just so the record is clear, ...," as quoted by Cave (at IB 3).

Cave summarily states (IB 4) that the trial court rejected his trial counsel's argument that a life sentence would be overly harsh, but he omitted the trial court's reasoning leading up to the imposition of sentence:

Well, I listened to the trial of this case, as you may know, Mr. Fischer [defense counsel], and I listened

carefully. Mr. Cave broke into a house occupied by a much smaller than he is female who was working on a project for her art class. As luck would have it she had in her possession or around her possession a very sharp X-acto knife. Mr. Cave's action when he broke in the house was extraordinarily violent. He knocked her down, jumped on top of her, and reached for the knife which he held to her throat. Exactly what his intentions were are not clear to me, nor would they be clear to anyone else, but robbery was certainly not the only motivating factor in his mind because if it had simply been robbery he could have easily robbed her, she was much smaller than he was, without knocking her down, and certainly without getting on top of her. She was a very fortunate girl because when Mr. Cave reached around and pulled the knife he sliced his own arm, almost killing himself. As I recall, he took some inconsequential things and left the home in a panic running trying to find -- I suppose trying to find some way to get help for himself. He had a towel with him.

Mr. Cave was nineteen days out of State prison when he did this, which tells me, number one, that Mr. Cave cannot be rehabilitated, and, number two, that he is [sic] extraordinarily dangerous and only believes he can survive in this life by means of crime. So frankly I think that it is my -- it is certainly my feeling he should get the maximum that the law allows me to give him and let him work from there.

(T 248-50) Accordingly, the trial court then sentenced Cave to two life sentences and fifteen years, all concurrent with each other (T 250, R 62-67, 68). At the pretrial phase, the trial court had increased bond (R 8) and denied the Defendant's Motion to Reduce Bond (R 13).

Cave quotes (IB 4) from the sentencing guidelines scoresheet, but he neglects other aspects of that same document on which the trial court noted its "Reasons for departure":

- The incident in this case supported two first-degree felonies punishable by life and a second degree felony¹ (Also, see R 21-22, 58-59, 62-66);
- Cave's "Prior record" included one third degree felony and over four misdemeanors.

(R 68, copy attached as the Appendix)

Cave totally omits his trial-level defense counsel's concession at the sentencing hearing that

there are grounds that have been upheld for the court to deviate in this matter, and I can understand why the Court might choose to do so.

(T 242)

¹ The law of the case includes this Court upholding the sentences for both Armed Robbery and Aggravated Battery in Cave v. State, 613 So. 2d 454 (Fla. 1993).

SUMMARY OF ARGUMENT

Both logic and the law require approval of the First District Court of Appeals's decision affirming the trial court's departure sentence. At the time of sentencing, temporal proximity by itself was an adequate reason for departure. The trial court cited the leading case authorizing this departure reason, and defense counsel conceded that departure was lawful. They could not have reasonably expected that this departure reason would be subsequently qualified by this Court, and, indeed, the legislature promptly reacted to the qualification by removing it. In light of these facts, it is understandable that the trial court's written departure reasoning was terse. But as terse as it was, the trial court's reasoning cited pertinent case and statutory law, and the document and page on which the reasoning was written contained, on its face, facts that showed an escalating pattern of criminal activity. Moreover, the trial court was clearly disturbed by the violent nature of these crimes juxtaposed with Cave's release from prison only nineteen days earlier. Under these circumstances, the trial court's departure sentence should be affirmed.

ARGUMENT

ISSUE

WHEN THE TRIAL COURT EXPRESSLY RELIES UPON TEMPORAL PROXIMITY AND MAKES NO SPECIFIC FINDINGS WITH REGARD TO AN ESCALATING PATTERN OF CRIMINAL CONDUCT, MAY THE DEPARTURE SENTENCE NEVERTHELESS BE AFFIRMED IF THE DOCUMENTS OF RECORD PERTAINING TO DEFENDANT'S CRIMINAL HISTORY, ON THEIR FACE, DEMONSTRATE AN ESCALATING PATTERN OF CRIMINAL CONDUCT? (Certified Question)

A. The prosecutor and the trial court notified Cave that they believed that a departure sentence was appropriate in order to protect the public from his escalating criminality and Cave, through counsel, invited the terseness of the trial court's written reason for departure.

In contrast to Cave's request that form prevail over substance,² this case presents a set of facts where logic and law support approval of the trial court's departure from the sentencing guidelines.

Cave contends that he was "never put on notice that the state was seeking life departure sentences based on an escalating pattern of criminal conduct." (IB 10) The State, without conceding that Cave was entitled to any such reason-specific notice, will, arguendo, respond to this argument. This is consistent with the State's position that Cave's argument and requested remedy would treat the State and trial court unfairly. In contrast, Cave was not treated unfairly.

² This argument will be elaborated in a section infra.

Cave's allegation of no notice overlooks much of the sentencing hearing. The prosecutor's departure argument explicitly compared not only the timing of this offense with Cave's release from prison but also the nature of the offenses and their interrelationships:

- First, the prosecutor highlighted that in this case Cave was convicted of "armed robbery, armed burglary, and an ag battery," (T 243) which even he must agree represent violent and very serious threats to the public safety.
- Then, the prosecutor detailed how Cave received a "very significant break" in Case Number 85-1404-CF (T 243).
- The prosecutor pointed out that Cave was allowed to plead to the third degree felony of "burglary of a structure in that case back in 1986." (T 244)
- The prosecutor then argued that in "1987 he violated that probation" (T 244) of the burglary-of-a-structure case.
- The prosecutor pointed out that Cave received 30 months prison for his violation of probation but that he served only "a little less than five months." (T 244)
- Finally, at this point, the prosecutor concentrated his argument of temporal proximity, citing inter alia, Williams v. State at 504 So. 2d 392 (Fla. 1987).³ (See T 244-46)⁴

³ The transcript reflects the incorrect page number for the Williams case.

⁴ To argue for a greater departure, the prosecutor subsequently also used the recommendations of the victim and police and Cave's threat to come back to "fuck up

Therefore, simply because the prosecutor ultimately concentrated his argument on what was then an entirely viable and unqualified case from this Court⁵ does not eliminate the context in which the prosecutor clearly argued facts that constituted an escalating pattern of criminality representing a danger to the public: Cave received a "break" on third degree felony conviction; then, despite the "break," Cave violated his probation; then, Cave served only about five months of the sentence occasioned by the probation violation; then, Cave committed these crimes that included convictions for felonies carrying up to life in prison and that involved violence. Cave chooses to totally ignore these pertinent facts in his Initial Brief.

Similarly, Cave ignores the trial court's lengthy recitation of the facts of this case, in which the trial court emphasized its violent nature juxtaposed with his recent release from prison. The trial court used the juxtaposition of the two in reaching its conclusion that Cave is "extraordinarily dangerous" and incapable of rehabilitation:

... I listened to the trial of **this case**, ... and I listened carefully. Mr. Cave broke into a house occupied by a much smaller than he female who was working on a project for her art class. *** Mr. Cave's action when he broke in the house was **extraordinarily violent**. He knocked her down, jumped on top of her, and reached for the knife which he held to her throat. *** She was a very fortunate girl because when Mr. Cave reached around and pulled the knife he sliced his own arm, almost killing

Gainesville." (T 246)

⁵ At the time of sentencing, August 7, 1989, (T 241) Barfield v. State, 594 So. 2d 259 (Fla. 1992), had not qualified Williams.

himself. As I recall, he took some inconsequential things and left the house in a panic

Mr. Cave was nineteen days out of State prison when he did **this**, which tells me, number one, that Mr. Cave cannot be rehabilitated, and number two, that he is extraordinarily dangerous and only believes he can survive in this life by means of crime. ***

(T 248-49)

Cave, in fact, was on notice.

Cave also ignores the concession of his defense counsel that a guidelines departure here was lawful:

Although it will be Mr. Cave's request to have a sentence within the guidelines recommended in this case, counsel is aware that **there are grounds that have been upheld for the court to deviate in this matter, and I can understand why the court might choose to do so.**

(T 242) Thus, Cave is correct when he concludes that his defense counsel requested below that "the court not deviate from the sentencing guidelines" (IB 4, citing T 248), but it would be incorrect to assume that Cave's trial-level argument contested a guidelines departure as unlawful. To the contrary, he conceded the lawfulness of departure. Similarly, any suggestion that the thrust of his trial-level argument was for the trial court not to deviate would be incorrect. Instead, defense counsel argued against the State's request for a life sentence, essentially arguing against the degree of departure that the State requested:

I strongly suggest that the court not deviate as far as possible *** I reiterate my recommendation, if the court does determine to deviate in this case, the court deviate to a term of years and not the full extent of life

(T 248) Accordingly, Cave's defense counsel signed the guidelines scoresheet that indicated an escalation from misdemeanors and a

third-degree felony in the past to the violent "primary offense at conviction" of Robbery with a Deadly Weapon carrying a maximum sentence of life in prison. This same scoresheet contained the written reasons that Cave now targets on appeal. (See R 68, copy attached as Appendix)

In sum, the prosecutor presented the trial court with facts indicating escalating criminality and with departure cases that were then clearly sound, unqualified, and uncontested. To reach the sentence it imposed, the trial court juxtaposed the violent nature of this case with Cave's release and concluded that Cave "cannot be rehabilitated" and that he is "extraordinarily dangerous."

Cave's trial counsel even signed, without contesting any aspect of, the scoresheet and even admitted to the lawfulness of departing from the guidelines. Faced with clear reasons for departing and the concessions of Cave's counsel, the trial court's written reasons were terse. Cave should not be heard to complain that the trial court's written reasons were not as detailed or clear as **he** would like them **now**. As this Court held in White v. State, 446 So.2d 1031, 1036 (Fla. 1984), "appellant cannot at trial create the very situation of which he now complains and expect this Court to remand for resentencing on that basis". See Fla. Jur. 2d Appellate Review §294 at 347-48 (1978). Cf. Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983) (invited error; unavailability of witness). Cave invited the trial court's written reasons.

B. **The First District Court of Appeal was correct: Barfield v. State, 594 So. 2d 259 (Fla. 1992), controls.**

Even if Cave's arguments are considered without the benefit of White and kindred cases, Barfield controls.

This Court's remand to the First District Court of Appeal "in light of Barfield," 613 So. 2d at 455, portended Barfield's applicability here. In Barfield, the stated written reasons for the upward sentencing departure focused upon temporal proximity: "recently released from prison"; "committed another Trafficking in Cocaine offense within a very short time of his release from prison." The trial court in Barfield did not specify the earlier offense for which he had been imprisoned, nor did the trial court specify in any literal words approximating "escalating pattern of criminal conduct." However, based upon the trial court's temporal proximity written reasons, Barfield looked to the record to find that

- he had been previously convicted of a first-degree felony carrying "a mandatory minimum three years' imprisonment and a fine of \$50,000," 594 So. 2d 261; and,
- in the case under review, he was convicted of "a first-degree felony with a mandatory minimum fifteen years imprisonment and a \$250,000 fine," Id.

Based upon that review of the record, Barfield held that "[t]he increased penalty which applies to Barfield's instant offenses indicates an 'escalating pattern of criminal conduct' Thus,

departure from the sentencing guidelines was valid under section §921.001(8)."

Like here, in Barfield the trial court's written reason pertained to temporal proximity of the sentenced offense to a prior offense. Like here, the trial court did not explicitly state an "escalating pattern of criminal conduct." Accordingly, as in Barfield, the record should be examined to determine whether there was, in fact, an "escalating pattern of criminal conduct." Here, from three perspectives, the pattern is even more obvious than in Barfield.

First, the escalating pattern is obvious because of the location of the information showing it. Here, one need examine only the very document on which the trial court wrote its reason for departure to find the "escalating pattern of criminal conduct." The sentencing guidelines scoresheet **on its face and by itself** showed that

- The trial court intended to depart from the sentencing guidelines;
- AND**
- As a departure reason, the trial court's relied upon the relationship between this offense and Cave's prior release from prison;
- AND**
- The incident in this case rose to the level of first-degree felonies punishable by life;
- AND**

- The incident in this case constituted an act of violence, as shown by the "primary offense at conviction," Robbery with a Deadly weapon;

AND

- Cave's "Prior record" included one third degree felony and over four misdemeanors.

(R 68, copy attached as Appendix) Contrary to Cave's contention (IB 7-8), appellate courts need not "sift through the entire trial and sentence record for evidence supporting" the trial court's departure. Here, support is found within the departure document itself.

A second factor stronger than in Barfield pertains to the obvious degree of escalation between the felonies. Barfield's felonies increased from a mandatory minimum of three years to fifteen years imprisonment and from a maximum of a \$50,000 fine to a \$250,000 fine. Here, looking only at the departure document, Cave's crimes jumped from a third degree felony to Robbery with a Deadly Weapon, a first-degree felony punishable by life in prison. (R 68, copy attached as Appendix) Thus, the maximum prison exposure jumped from five years to life. See §775.082, Fla. Stat.

Third, again looking only at the departure document, it is obvious from the "primary offense at conviction" that the current charge(s) directly involved violence (R 68, copy attached), unlike Barfield, where the charge was Trafficking.

Barfield's examination of obvious features of the record where the trial court's written reason included temporal proximity reflected sound public policy. It was sound and reasonable to examine the record for two reasons. The first reason pertains to the distinctive nature and history of temporal proximity. The second reason focuses more upon the general purpose of written departure reasons.

Temporal proximity is distinctive in its nature as well as its appellate case history. Barfield did not eliminate temporal proximity as a valid reason for departure. Instead, it qualified the circumstances under which it could be applied. As this Court, through Justice Harding, unanimously reasoned in Barfield: "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." Accordingly, Taylor v. State, 601 So. 2d 540, 542 (Fla. 1992), explained that in Barfield "we clarified **when temporal proximity could be used as a reason** for a departure from the guidelines."

In other words, Barfield only qualified the circumstances under which temporal proximity could be used as a valid departure reason. The trial court's reference in Barfield to another offense "within a very short time of his release from prison," 594 So. 2d at 260, and the trial court's reference in Taylor to "persistent criminal conduct," 601 So. 2d at 542, were sufficient for an appellate review of obvious features of the record regarding whether the circumstances of those cases qualified as

valid temporal proximities. Here, the trial court's reasons not only mirrored the ones in Barfield and Taylor but also cited Section 921.001, Fla. Stat., and Williams v. State, 504 So. 2d 392 (Fla. 1987).

Section 921.001, Fla. Stat., explicitly included two reasons for departure: excessive victim injury, §921.001(7), Fla. Stat., and escalating pattern of criminal conduct, §921.001(8), Fla. Stat. Therefore, the trial court's written departure reason expressly incorporated by reference a statute that authorized departure due to escalation.

The trial court's written reason also included Williams v. State, 504 So. 2d 392 (Fla. 1987),⁶ which at the time of sentencing here, August 7, 1989, was unqualified by Smith v. State, 579 So. 2d 75 (Fla. 1991), or Barfield. In Williams, this Court expressly upheld as a valid reason for departure the "timing of each offense in relation to prior offenses," including "release from incarceration or supervision," 504 So. 2d at 393. Therefore, the trial court followed and cited a case, and, under that case, there is no doubt whatsoever regarding the adequacy of the departure reason at the time of sentencing.

In sum, given the continued validity of temporal proximity in a qualified form due to Barfield and Taylor, given the explicit inclusion of escalation in the statute that the trial court cited, and given the then-uncontestable and unqualified

⁶ The trial court's written reasons provided the full citation to Williams -- although it inverted the parties' names.

applicability of the case that the trial court cited, the trial court's ruling is entitled to at least the same benefit of appellate reference to the record as this Court afforded the trial courts in Barfield and Taylor. Here, the reference to the record extends only to the departure document itself, the scoresheet.

This court's willingness to examine the record in Barfield and Taylor is sound, not only because of the continued viability of temporal proximity in qualified form, its explicit statutory authorization, and trial courts' reasonable reliance upon it in pre-Smith sentencings, but also because a record-supported, written, temporal-proximity reason satisfies a primary purpose of the writing requirement. As Ree v. State, 565 So. 2d 1329, 1332 (Fla. 1990) enunciated: the writing requirement promotes "serious and thoughtful attention by the trial court" as a prerequisite for departure. Here, the trial court's written reasons clearly effectuated this purpose of the writing requirement by its reference to the two crimes and its citations to Williams and Section 921.001 on a scoresheet disclosing yet greater supportive detail. Indeed, even though the sentencing transcript need not be examined to affirm the trial court, it does provide corroborative details of the "serious and thoughtful attention by the trial court" manifested in the written reasons. As discussed supra, the trial court verbally emphasized the violent nature of this crime and juxtaposed it with Cave's recent release from prison.

To conclude this section of the State's argument, if we look only to the departure document itself, it is clear on its face that this case meets at least the third form of temporal proximity recognized as valid in Barfield: Cave progressed from a third degree felony and misdemeanors to the level of a felony punishable by life, that is, this case represents "increasingly serious criminal activity," 594 So. 2d at 261. Moreover, it is also apparent from the departure document by itself that this case included Robbery with a Deadly Weapon, an increased level of violence, thereby satisfying one or both of the other two alternative forms of valid temporal proximity: "a progression from non-violent to violent crimes" and a "progression of increasingly violent crimes," 594 So. 2d 261.

In contrast to Barfield's and Taylor's dispositive holdings and sound public policy, Cave offers only hypertechnicality and a case that does not control the facts of this case.

C. Cave's position exalts form over substance, seeks the wrong remedy for his purported grievance, and ignores the controlling holdings of Barfield and Taylor.

Cave's position is essentially one of "playing gotcha" with the trial court. He waits until an appeal to attack a departure that at the trial level he conceded was valid. He waits until an appeal to argue that the trial court should have reduced more of its reasoning to writing where it was apparently clear to him that a primary purpose of that writing requirement, "serious and

thoughtful attention by the trial court," was afforded to him by the trial court.

Contrary to Cave's position, the requirement of written reasons have not been intended as hypertechnical traps for the "serious and thoughtful" trial court here. This Court's rejection of hypertechnicalities in this area of the law is readily apparent where the trial court is unaware that it is departing from the guidelines. In such a situation, the remedy is to remand for the trial court to consider departure ab initio. See State v. Betancourt, 552 So. 2d 1107 (Fla. 1989), followed in Smith v. State, 639 So. 2d 160 (Fla. 1st DCA 1994); Ivey v. State, 633 So. 2d 530 (Fla. 2d DCA 1994); Madraso v. State, 634 So. 2d 749 (Fla. 3d DCA 1994); Hause v. State, 643 So. 2d 679 (Fla. 4th DCA 1994); Brown v. State, 632 So. 2d 1052 (Fla. 5th DCA 1994).

Accordingly, where the law is either unclear at the time of sentencing or subsequently moves in a new direction, the proper remedy is remand to afford the trial court an opportunity to provide written reasons that comply with subsequently clarified law. See State v. Rinkins, 19 Fla. Law Weekly S644, S645 (Fla. Dec. 8, 1994). Rinkins essentially recognizes that hypertechnical pitfalls should not be erected to snare the trial judge who cannot foresee future developments in the case law. It allows the trial court to rationally respond to developments in the case law. Here, the law at the time of sentencing explicitly and clearly authorized the trial court to use unqualified temporal proximity as a departure reason. A fortiori, Rinkins' wisdom

would apply in the instant case if the trial court's written reasoning was deficient.

Similarly, the legislature's clear intent is to avoid technicalities not bearing upon the appropriate substance of a sentence. In Section 921.001(5), Fla. Stat., the legislature indicated that "one circumstance or factor" is sufficient to justify a departure and that the "extent of departure" is non-appealable. Applying the intent of these statutory provisions, a written reason of temporal proximity where it obviously exhibits an "escalating pattern of criminal conduct," §921.001(8), Fla. Stat., constitutes a requisite "circumstance or factor." Applying the intent of these statutory provisions to avoid hypertechnicalities, a written reason that clearly comported with case law at the time of sentencing and, arguendo, the purported failure of a trial court to elaborate a reason so that it complied with case law that did not exist at the time of sentencing should not forever prohibit an otherwise appropriate departure.

The essence of Cave's position is that since the trial court relied upon a case that has been subsequently qualified, the trial court cannot use that reason at all now or ever. He, however, cannot avoid the dispositive nature of Barfield and Taylor, as discussed above and as relied upon by the First District Court of Appeal. He also cannot avoid the clear applicability of Rinkins even if he is correct that the trial court's reasoning was insufficient.

Instead, Cave argues that State v. Dodd, 594 So. 2d 263 (Fla. 1992), controls. He misinterprets Dodd, which should be construed to comport with public policy and legislative intent, with Barfield, which was decided contemporaneous with it, and with Taylor, which was decided six months after it. This interpretation relies upon the facts of Dodd, thereby emphasizing the actual holding of it and the nature of that holding as precedent and case law.⁷ Accordingly, the First District Court of Appeal correctly distinguished Dodd because there this Court "found that the record did not support the alternative ground for departure" The Fifth DCA had stated "that even if the [trial] judge had made such a finding [of an escalating pattern of criminal activity], the record would not have supported it.

⁷ The dependence of the case law upon the facts of each case has been discussed often. See New York Largo, Inc. v. Monroe Co., 985 F.2d 1488, 1500 n. 7 (11th Cir. 1993) (Judge Edmondson concurring; "no matter how often or how plainly a judicial panel may put in its opinion that 'we hold X,' 'X' is not law and is not binding on later panels unless 'X' was squarely presented by the **facts** of the case and was a proposition that absolutely must have been decided to decide the concrete case then before the court"); Re, Brief Writing and Oral Argument 74-75 (1965) ("if the advocate can demonstrate to the court a distinguishing feature, a different **factual** pattern, the prior decision is not binding authority"); Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L.J. 161, 179-81 (1930) (If a court bases the outcome of the case on **facts** A and B, in the future, a case with **facts** A and B must have the same outcome).

Accordingly, to determine conflict jurisdiction, this Court analyzes the case law, the precedents, of district courts of appeal rather than merely accepting on their face the words of their opinions. See Jenkins v. State, 385 So. 2d 1356, 1358-59 (Fla. 1980); Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958) ("such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of **facts** and announce antagonistic conclusions").

570 So. 2d at 1014. This was the result that the Supreme Court approved in *Dodd*" 642 So. 2d at 11. The First DCA relied upon *Dodd*'s facts to determine whether it was applicable as precedent here. Furthermore, if there could have possibly been any doubt of *Dodd*'s import, *Taylor*, decided six months later, resolved it against Cave's position.

In contrast to *Dodd*, the record in the instant case supports the departure. In contrast to *Dodd*, the trial court's departure reason, on a single page and on its face showing an escalating pattern, included the citation to *Williams* and Section 921.001, Fla. Stat. The trial court cited as a reason for departure a case that at the time stood for an unqualifiedly valid reason for departure.⁸

D. The trial court should be affirmed even if it used the wrong reason.

Rinkins' principle, in which the trial court is afforded an opportunity to be subsequently right for a right reason, should be extended to the situation in the instant case, resulting in rephrasing the certified question: Should a trial court be affirmed if its departure decision is correct regardless of the reasons articulated? The answer to this question has been well-settled by this Court, *See, e.g., Applegate v. Barnett Bank of*

⁸ It is also interesting to note that if Cave committed his offenses today, temporal proximity by itself would be a valid reason for departure in his case. *See* §921.0016(3)(e), Fla. Stat. (1993). This point will be amplified *infra*.

Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979), meriting the application of this principle here, where the essence of the trial court's reasoning also remains viable under Barfield and Taylor.

E. The importance of this case to the public interest lies more in protecting society against Cave than in the certified question.

Even the certified question, as rephrased in the preceding section, does not capture the most significant aspect of this case for the public interest.

At the time of its decision, the District Court applied the case law as it existed and certified the question as one of great public importance. In one respect, this case is of great importance to public safety because of Cave's escalating pattern of violent behavior culminating with his promise to "really fuck Gainesville up" (T 248) when he is released from prison. However, in the usual sense of great public importance, as used in Article V, §3(b)(4), Fla. Const., this case no longer has wide precedential value. The Florida legislature has amended the sentencing guidelines to unequivocally provide that criminals such as Cave, who commit crimes soon after their release from prison, are subject to departure sentence without qualification. See Ch. 93-406, §13, Laws of Fla., codified as §921.0016(3)(e), Fla. Stat. (1993). This statute not only reduces the precedential value of this case, it also suggests that Smith's, 579 So. 2d 75 (Fla. 1991), imposition of qualifications on temporal proximity

was contrary to legislative intent. See State v. Smith, 547 So. 2d 613, 617-19 (Fla. 1989) (Justice Shaw concurring in part and dissenting in part); Lowry v. Parole and Probation Commission, 473 So. 2d 1248, 1250 (Fla. 1985) (unanimous opinion; "the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute"); Parker v. State, 406 So. 2d 1089, 1092 (Fla. 1982) (unanimous opinion; subsequent amendment "relevant" to interpretation); U.S. Fire Insurance Co. v. Roberts, 541 So. 2d 1297, 1299 (Fla. 1st DCA 1989) ("statutory change of language ... may be to clarify what was doubtful and to safeguard against misapprehension as to existing law").

Here, temporal proximity is a particularly powerful aggravator, where it involves violent criminals like Cave, who, as a matter of public policy, deserve prison space. See §921.001(1), Fla. Stat. ("to make the best use of state prisons so that **violent criminal offenders** are appropriately incarcerated"; "to ensure incarceration of ... [v]iolent criminal offenders"). Most importantly, therefore, Cave does not deserve the unwarranted windfall of a guaranteed guidelines sentence. Instead, the public deserves protection from him.

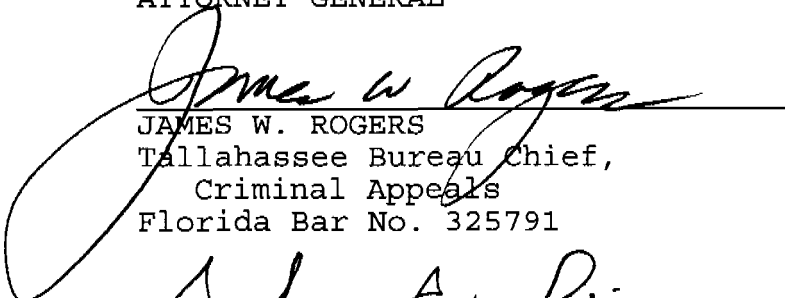
CONCLUSION

Based on the foregoing, this Honorable Court should answer the certified question in the affirmative, approve the decision of

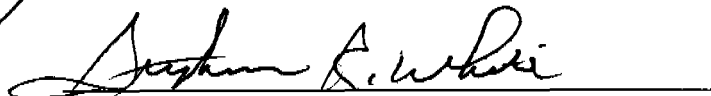
the First District Court of Appeal reported at 642 So. 2d 10, and direct that the trial court's sentencing departure be affirmed. Alternatively, if the Court determines that the trial court's reasoning was significantly deficient and refuses to apply to sentencing the well-settled principle affirming a correct trial court decision for the wrong reason, the case should be remanded for a new sentencing hearing.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 325791



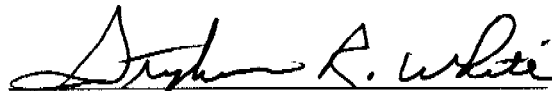
STEPHEN R. WHITE
Assistant Attorney General
Florida Bar No. 159089

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS and its Appendix, have been furnished by U.S. Mail to George F. Schaeffer, Attorney-at-Law, 1005 S.W. Second Avenue, Gainesville, Florida 32601-6116, this 17th day of March, 1995.



Stephen R. White
Assistant Attorney General