IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 88,719

RODGIE LAMAR WATKINS,

Respondent.

CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL FIRST DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Watkins v. State, 21 Fla. L. Weekly D1693 (Fla. 1st DCA July 25, 1996). The certified question is also before this Court from Simmons v. State, 668 So. 2d 654 (Fla. 1st DCA 1996), review pending, case no. 87,618; Perry v. State, 21 Fla. L. Weekly D1286 (Fla. 1st DCA May 20, 1996); review pending, case no. 88,192.

11 STATEMENT OF THE CASE AND FACTS

Respondent **accepts** petitioner's statement of the case and facts.

III SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that petitioner's request for relief should be denied. Respondent's sentence of 60-days in jail and community control under the 1994 sentencing guidelines was illegal, because it exceeded the recommended sanction of nonstate prison, and no reasons for departure were given.

While the law is not quite as clear under the 1994 guidelines as it was under the pre-1994 guidelines, a reading of the new rule shows the intent of the framers to preclude both county jail and community control when the scoresheet calls for nonstate prison sanctions.

The four pillars, which supported this Court's decision under the former sentencing guidelines in State v. Davis, 630 So. 2d 1059 (Fla. 1994), carry over to the new rule.

This Court should answer the certified question in the affirmative and approve the decision of the lower tribunal.

IV ARGUMENT

ISSUE I: THE RULE IN STATE v. DAVIS, 630 So. 2d 1059 (FLA. 1994), REQUIRING WRITTEN REASONS FOR DEPARTURE WHEN COMBINING NONSTATE PRISON SANCTIONS, **IS** APPLICABLE UNDER THE 1994 SENTENCING GUIDELINES.

Petitioner does not dispute that the law in effect prior to January 1, 1994, prohibited one in respondent's position from receiving community control and jail time when the scoresheet called for any nonstate prison sanction. In State v. VanKooten, 522 *So.* 2d 830 (Fla. 1988), this Court held that when the guidelines **cell** calls for community control or incarceration, either community control or incarceration may be imposed, but not both. Otherwise, the sentence constitutes a departure for which written reasons are absolutely required. Pope v. State, 561 So.2d 554 (Fla. 1990).

This Court reaffirmed the viability of VanKooten in State v. Davis, *supra,* and in Feltv v. State, 630 *So.* 2d 1092 (Fla. 1994). Respondent submits the four pillars supporting State v. Davis carry over to the new rule.

State v. Davis was founded upon four pillars. First, this Court in State w. VanKooten, *supra*, had **interpreted** "or" to mean "or," where **the** guidelines called for community control or 12-30 months, and this Court in State v. Davis reaffirmed that view. See *also* Feltv v. State, *supra.*

Second, **under** the one peculiar range in the former guidelines rule, which called for community control or 12-30 months, when a defendant **fell** into that recommended range, he could either **receive** 12-30 months incarceration or community control, but not both.

There is no similar "community control or 12-30 months" provision in the new rule. But according to the **new** guidelines rule, a point total of less than 40 calls for a nonstate prison sanction. Fla. R. Crim. P. 3.702(d)(16) provides:

> If the total sentence points are less than or equal to 40, the recommended sentence, absent a departure, shall not be state prison.

Thus, nonstate prison sanctions still mean nonstate prison sanctions.

Third, State v. Davis was also founded upon the committee note to the old guidelines rule, Fla. R. Crim. P. 3.701(d)(8), which defined "nonstate prison sanction" as:

> any lawful term of probation with or without a period of incarceration as a condition of probation, a county jail **term** alone, or any nonincarcerative disposition.

There is no definition of "nonstate prison sanction" in the new guidelines rule, so we may use the former definition in construing the new rule.

Fourth, State v. Davis was also founded upon the committee note to the old guidelines rule, Fla. R. Crim. P. 3.701(d)(13),

which cautioned that:

> Community control is not an alternative sanction from the recommended range of any nonstate prison sanction ... .

After examining the committee notes, this Court in State v. Davis concluded:

> Thus, nonstate prison sanctions, which include county jail time, community control, and incarceration are disjunctive sentences. Combining any or all of them creates a departure sentence for which written reasons must be given.

630 So. 2d at 1060.

There is no similar committee note regarding the definition of "community control" in the new rule, so we may use the former definition in construing the new rule.

The new rule provides that caselaw which existed at the time the new guidelines were adopted is superseded by the new rule if that caselaw is in conflict with the new rule. Fla. R. Crim. P. 3.702(b). The converse should also be true. Since there is no definition of "nonstate prison sanction" or "community control" in the new rule, to be in conflict with State v. Davis, then the existing caselaw should carry over to the new rule.

Since the existing caselaw carries over to and is not in conflict with the new rule, all four of the pillars supporting the court's holding in State v. Davis are still valid. First, we must continue to assume that "or" means "or," because the

new rule does not overrule State v. VanKooten.

Second, although there is no "community control or nonstate prison sanction" cell, Fla. R. Crim. P. 3.702(d)(16) calls for a nonstate prison sanction for one who has 40 points or less.

Third and fourth, there is no conflicting definition of "nonstate prison sanction" or "community control" in the new rule.

Thus, since the four pillars supporting State v. Davis carry over to the new rule, respondent should not have received community control in addition to his county jail sentence, since community control is still not a nonstate prison sanction.

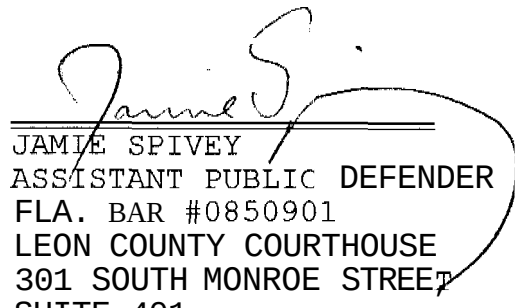
The lower tribunal decided the issue correctly, as did the court in Marotto v. State, 21 Fla. L. Weekly D1329 (Fla. 4th DCA June 5, 1996). This Court must agree.

V CONCLUSION

Based upon the foregoing, this Court should answer the certified question in the affirmative and approve the decision of the lower tribunal.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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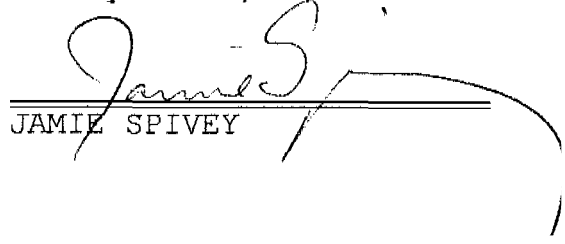
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to appellant, on this 30 day of **September**, 1996.



JAMIE SPIVEY

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 88,719

RODGIE LAMAR WATKINS,

Respondent.
_____/

CERTIFIED QUESTION FROM THE DISTRICT
COURT OF APPEAL FIRST DISTRICT

APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

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Criminal law—Sentencing—Guidelines—Question certified: Is the rule in *Davis v. State* requiring written reasons for departure when combining nonstate prison sanctions applicable under the Florida Rule of Criminal Procedure 3.702 Sentencing Guidelines (1994)?

RODGIE LAMAR WATKINS. Appellant. v. STATE OF FLORIDA, Appellee. 1st District. Case No. 95-3351. Opinion filed July 25, *1996.* An appeal from Circuit Court for Escambia County. Michael Jones. Judge. Counsel: Nancy A. Daniels, Public Defender, and Jamie Spivey. Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Altomey General. and William J. Bakstran, Assistant Attorney General, Tallahassee. for Appellee.

ORDER ON MOTION FOR CLARIFICATION
[Original Opinionat 21 Fla. L. Weekly D1438a]

BY ORDER OF THE COURT:

This court's opinion of June 19, 1996, is hereby withdrawn and replaced by the opinion which accompanies this order,

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(ALLEN, J.) The appellant challenges a sentence imposed under the Florida Rule of Criminal Procedure 3.702 sentencing guidelines. Relying on *State v.* Davis, 630 So. 2d 1059 (Fla. 1994), the appellant contends that the sentence of community control with a term of incarceration in the county jail is a guidelines departure requiring written reasons. Although Davis involved an earlier version of the guidelines which authorized these sanctions only in the disjunctive, the rule 3.702 guidelines have been construed in the same manner. See *Simmons v. State*, 668 So. 2d 654 (Fla. 1st DCA 1996); *see also Perry v. State*, 21 Fla. L. Weekly D1286 (Fla. 1st DCA May 20. 1996). As in *Simmons* and Perry, we certify the following question:

> IS THE RULE IN *DAVIS v. STATE*, 630 So. 2d *1059* (Fla. 1994), REQUIRING WRITTEN REASONS FOR DEPARTURE WHEN COMBINING NONSTATE PRISON SANCTIONS, APPLICABLE UNDER THE FLORIDA RULE OF CRIMINAL PROCEDURE 3.702 SENTENCING GUIDELINES (1994)?

In light of Simmons, the appealed order is reversed and the case is remanded. (MINER and MICKLE, JJ., CONCUR.)

* * *

Criminal law—Enhancement of sentence for attempted murder of law enforcement officer is permitted only where attempted murder is in the first degree—Conviction of attempted second degree murder of law enforcement officer reversed and remanded with instructions that conviction be reduced to attempted second degree murder—Error **to impose** mandatory **minimum sentence for use of firearm In absence of specific finding by jury that defendant used firearm**

BOBBY LAMAR STEVERSON, Appellant. v. STATE OF FLORIDA, Appellee. 2nd District. Cam No. 95-00713. Opinion filed July 26, *1996.* Appeal from the Circuit Court for Polk County; Dennis P. Maloney, Judge. Counsel: James Marion Moorman, Public Defender, and John T. Kilcrease, Jr., Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, *and* Wendy Buffington, Assistant Attorney General. Tampa, for Appellee.

(FRANK, Acting Chief Judge.) Bobby Lamar Steverson was convicted of the attempted murder of a law enforcement officer (Count I), the possession of a short-barrelled shotgun (Count II), and the carrying of a concealed firearm (Count 111). A fourth count was severed from the trial of Counts I, II, and III. Steverson ultimately pleaded guilty to Count IV, was adjudicated and sentenced to a concurrent 15 year term. Steverson claims error only in that aspect of the proceeding bottomed upon Count I, the attempted murder of a law enforcement officer, and the enhanced sentence.' The determinative issue he presents for review is "whether the statutes pertaining to attempted murder of a law enforcement officer violate equal protection."[2] Our answer results in a reversal and remand to the trial court, but we do not pass upon the constitutional question in light of *State v. Iacovone*, 660 So. 2d 1371 (Fla. 1995).

The setting from which the controlling question arises begins with Steverson's criminal drug problems. He was indebted to a drug dealer who in January of 1994 threatened his wife and him with physical harm. On two occasions, Steverson was subjected to physical abuse. He was hospitalized as a result of the last episode which occurred in February of 1994. The violent events inspired him to acquire firearms forself-protection, i.e., a pistol and a shotgun from which he removed a portion of the barrel. Some time later, in early March of 1994, in the course of a murder investigation unrelated to the instant proceeding, two detectives visited a drug house which coincidentally Steverson frequented. They had the house under surveillance. One of the detectives recognized Steverson and approached the car in which he was sitting. Steverson had his two weapons with him. On the heels of their encounter, Steverson and the detective exchanged gunshots. Steverson wounded the detective with the sawed-off shotgun. The testimonial evidence left to the jury the question of whether Steverson knew the identity of the wounded detective and his status as a law enforcement officer. In any event, Steverson's trial counsel adequately preserved for our consideration the issue of whether Steverson's conviction under Count I conforms to a permissible statutory scheme, the question to which we now turn.

The process we have followed in reversing and remanding this matter begins with the state's apparent concession that Steverson was convicted of an attempted murder of a law enforcement officer in the second degree. The absence of challenge to that view is grounded upon the jury instructions and the jury's subsequcnt question:

> Where do we check if we find the defendant guilty of attempted second-degree murder of a law enforcement officer? The verdict form does not offer that option.

In response, the jury was instructed to reread the first paragraph of the attempted homicide instruction. That instruction embodied the elements associated with an attempted first andsecond degree murder of a law enforcement officer. No further questions were presented to the court.

Based upon the record before us and the state's concession, we can only conclude that the jury verdict reflects a second degree conviction. At every stage of this proceeding. however, the trial court was without the benefit of the Supreme Court's conclusion in *Iacovone* that sections 775.0825 and 784.07(3) permit enhancement of the sentence only where the attempted murder of a law enforcement officer is in the first degree,' We must, therefore, reverse and remand with the direction that the trial court reduce Steverson'sconviction to the necessarily included offense of attempted second degree murder and impose an appropriate sentence. See $924.34. Fla. Stat. (1995); *Newbold v. Stale,* 667 So. 2d 996 (Fla. 3d DCA 1996). The lack of a specific finding by the jury that Steverson used a firearm in the commission of the crime precludes the imposition upon resentencing of an enhancement or minimum mandatory sentence contemplated in section 775.087, Florida Statutes (1993). See *State v. Tripp*, 642 So. 2d 728 (Fla. 1994).

Reversed and remanded for further proceedings consistent with thisopinion. (FULMER and QUINCE. JJ., Concur.)

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[1] A meritless issue within Steverson's challenge to Count I is the notion that knowledge of the victim's status as a law enforcement officer is an element in the crime of attempted murder of a law enforcement officer. See *Thompson v. State,* 667 So. 2d 470 (Fla. 3d DCA 1996), *review granted,* ___ So. 2d ___ (Fla. May 29, 1996).

[2] Section 775.0825. Florida Statutes (1993) (repealed 1995). provides as follows:

> Any person convicted of attempted murder of a law enforcement officer as provided in s. 784.07(3) shall be required to serve no less than 25 years before becoming eligible for parole. Such sentence shall not be subject lo the provisionsof s. 921.001.

Section 784.07(3), Florida Statutes (1993) (amended *1995).* provides as follows:

> Notwithstanding the provisions of any other section. any person who is convicted of attempted murder of a law enforcement officer engaged in the lawful performance of his duty or who is convicted ofatrcniptcd murder of a law enforcement officer when the motivation for such attempt was related, all or in part, to the lawful duties of the officer, shall be guilty of a life felony, punishable as provided in s. 775.0825.

[3] The record indicates some confusion regarding the nahire of sections 775.0825 and 784.07(3), Florida Statutes (1993), the statutes in effect at the