IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

RODGIE LAMAR WATKINS,

Respondent.

CASE NO. 88,719

CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, 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 "Petitioner" or "the State." Respondent, Rodgie Lamar Watkins, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as "Respondent" or by his proper name.

A one-volume record on appeal was prepared for the violation of probation in trial court case no. 94-1668-A, and will be referred to as "R" followed by the appropriate page number in parentheses. The district court's decision is attached hereto as an appendix and references to it will be by the letter "A" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

By information filed April 20, 1994, under lower court Case No. 94-1668-A, the Respondent was charged with burglary of a dwelling with person assaulted in violation of section 810.02(1) and (2)(a), Florida Statutes. (R 1). Pursuant to written plea agreement the Respondent entered a no contest plea to burglary of a dwelling, a lesser-included offense. (R 5). He was sentenced to 2 years' probation with a special condition that he serve 9 months in jail. (R 11). After completing his jail sentence, Respondent was still on probation when he pled no contest to a misdemeanor battery charge in case no. **95-15330-MM**. (R 19). **As** a result of this new offense, Respondent was arrested for violation of probation in the instant case. (R 15-16). At the violation of probation proceeding, the State filed a certified copy of Respondent's conviction on the new charge and the trial court found him to be in substantial violation of his probation. (R 19, *37*). The trial court revoked the Respondent's probation and sentenced him to 2 years' community control, a special condition of which was that he serve 60 days in jail. (R *37*). Respondent's total sentence points amounted to 49.4. (R 45).

The defendant appealed the sentence and the district court reversed, holding that the sentence of community control with a

special condition of incarceration was a departure sentence which was improper because the trial court did not provide written reasons for the departure. (A 1-2). The district court certified the following question:

> IS THE RULE IN STATE v. DAVIS, 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)?

(A 2). Petitioner timely invoked the jurisdiction of this Court to review the certified question.

SUMMARY OF ARGUMENT

The certified question should be answered in the negative and the trial court's sentence approved because a sentence of 2 years' community control (with the condition that the defendant serve 60 days in the county jail) is statutorily authorized by the revised 1994 sentencing guidelines. This sentence is within the statutory guidelines because it is a nonstate sanction.

ARGUMENT

ISSUE

IS THE RULE IN STATE v. **DAVIS,** 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)? [CERTIFIED QUESTION]

The Respondent challenged his sentence on the basis **of** State v. Davis, 630 **So.** 2d **1059 (1994),** arguing in the district court that his sentence **of** community control with a **term** *of* incarceration in the county jail was a guidelines departure requiring written reasons. **(A 1).** Although the district court recognized that Davis involved an earlier version **of** the sentencing guidelines, it nevertheless reversed the Respondent's sentence and remanded the case on the basis *of* its decision in Simmons v. State, 669 So. 2d 654 (Fla. 1st DCA 1996). (A 2). In reaching its decision, the district court certified virtually the same question as it **did** in Simmons, which is presently pending before this Court in Case No. **88,719.** Because the Respondent was sentenced under the **1994** sentencing guidelines, Davis **should** not apply.

In Davis, **the** defendant's scoresheet yielded **a** recommended range of 'any nonstate prison sanction or community control or twelve to thirty months of incarceration" and a permitted range *of* 'any

nonstate prison sanctions to three and one-half years' incarceration." Id., at 1059 (emphasis added). This Court, relying on State v. Van Kooten, 522 So. 2d 8930 (Fla. 1988), held that because the guidelines called for a sentence of community control or incarceration, Davis' sentence of one year in the county jail, one year of community control, and four years of probation, constituted a departure sentence. In reaching this decision, this Court explained that "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." Davis, 630 So. 2d at 1060. In contrast to the old sentencing guidelines that were applicable at the time of Davis,[1] the new (1994) sentencing guidelines "apply to sentencing . . . for felonies . . . committed on or after January 1, 1994." §921.001(4)(b)2, Fla. Stat. (Supp. 1994). Moreover, if existing caselaw construing the old guidelines conflicts with the new guidelines, the new will prevail. Fla. R. Crim. P. 3.702(b). As Davis held that sentencing a defendant to a split sentence of

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[1] Davis committed his crime in 1991. Davis v. State, 617 So. 2d 1139 (Fla. 1993). Thus, the old guidelines were applicable at his sentencing. §921.001(4)(a), Fla. Stat. (1991). See, also, section 921.001(4)(b), Fla. Stat. (1995).

incarceration and community control constituted a departure sentence, it is in direct conflict with the new guidelines because:

> [t]he imposition of a split sentence of incarceration followed by community control or probation does not by itself constitute a departure from the sentencing guidelines.

§921.00016(1)(d), Fla. Stat. (1993)(emphasis supplied). Furthermore, in Gilvard v. State, 636 So. 2d 134 (Fla. 2d DCA 1994), aff'd, Gilvard v. State, 653 So. 2d 1024 (Fla. 1995), the holdings of Davis and Van Kooten were limited to cases where the defendant scored in the permitted or recommended sentencing range cell of any nonstate prison sanction or community control or a term of incarceration. As that sentencing cell no longer exists, **Davis** does not apply to the new sentencing guidelines. Because the Respondent's original offense occurred on April 6, 1994 (R 1), he had to be (and properly was) sentenced under the new guidelines. Consequently, Davis does not apply to the instant case, the decision of the district court should be quashed, and the sentence imposed by the trial court should be affirmed.

State v. Davis Should he Reexamined

As it did in the pending Simmons case (No. 88,719), the State respectfully urges this Court to reexamine and clarify **State v.**

Davis, 630 So. 2d 1059 (Fla. 1994), because the seminal case upon which it was based, Van Kooten, supra, was decided without the benefit of this Court's subsequent decision in Smith v. State, 537 So. 2d 982, 985 (Fla. 1989) (holding only the Legislature may enact substantive law).

This Court held in Van Kooten that when a guidelines sentence disjunctively directs alternative penalties of either incarceration or community control, the trial court is limited to imposing one or the other. In Gilyard, this Court clarified Van Kooten as grounded on statutory interpretation and held that the combination of community control and incarceration was a permissible sentence within the guidelines when the statute was not disjunctive. Gilyard simply recognizes that when the Legislature only authorizes a single sentence, then only a single sentence may be imposed.

In Tillman v. State, 555 So. 2d 940 (Fla. 5th DCA 1990), disapproved, State v. Davis, 630 So. 2d **1059**, 1060 (Fla. 1994), the Fifth District Court of Appeal had been called upon to decide whether the trial court erred by requiring Tillman to serve 180 days in the county jail as a condition of community control when Tillman's scoresheet specified "incarceration 'or' community control." Tillman, 555 So. 2d at **941**. Relying, inter alia, on Van Kooten, Tillman had argued that the trial court violated Florida

Rule of Criminal Procedure 3.701(d)(11) by imposing a departure sentence without providing written reasons justifying the departure. Rejecting this argument, the court said Tillman's reliance on Van Kooten was misplaced because it "[did] not address the discretion of the sentencing judge to impose jail time as a condition of community control. See § 948.03(7), Fla. Stat. (1987),[2] and **Reese v. State**, 535 So. 2d 676 (Fla. 5th DCA 1988)." Tilman, 555 So. 2d at 941. (emphasis in original). In **Reese**, the

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[2] At the time of Respondent's crime, subsection (7) of this statute was located at subsection (5), which read as follows:

> (5) The enumeration of specific kinds of terms and conditions shall not srevent this court from adding thereto such other or others as it considers proper. The court may rescind or modify at any time the terms and conditions theretofore imposed by it upon the probationer or offender in community control. However, if the court withholds adjudication or guilt or imposes a period of incarceration as a condition of srobation or community contro1, the period shall not exceed 364 days, and incarceration shall be restricted to either a county facility, a probation and restriction center under the jurisdiction of the Department of Corrections, a probation program drug punishment phase I secure residential treatment institution, or a community residential facility owned or operated by any entity providing such services.

§948.03(5), Fla. Stat. (1993) (emphasis added).

court had said:

> Section 948.03(7), Florida Statutes (1987) specifically recognizes the power of the trial court to impose a period of incarceration in the county jail not to exceed 364 days as a condition of community control, and we find nothing in the guidelines to the contrary.

Reese v. State, 535 So. 2d 676, 677 (Fla. 5th DCA 1988).

In Davis, this Court was asked whether combining county jail incarceration with community control constituted a departure sentence. Not only did this Court answer the certified question in the affirmative, it specifically disapproved Tillman. Davis, 630 So. 2d at 1060. In its rationale, this Court relied on the commission notes to the rule as authority for concluding that a presumptive guidelines sentence directing community control or incarceration was disjunctive and, therefore, the imposition of both constituted a departure sentence. Id. However, the commission notes were not adopted by this Court as part of the rules nor have they been subsequently enacted by the Legislature as substantive law. See, In Re: Rules of Crim. Proc. (Sentencing Guidelines), 439 SO. 2d 848, 849 (Fla. 1983); Ch. 84-328, § 1, Laws of Florida. Further, and this was not addressed in Davis, these notes conflict with the provisions of section 948.03(5). By

relying on the commission notes, Davis inadvertently nullifies substantive statutory law enacted by the Florida Legislature, thus violating the Separation of Powers Doctrine under which only the Legislature may change substantive law. Smith, 537 So. 2d at 985. See also, Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 576 So. 2d 1307, 1308 (Fla. 1991) (concluding doctrine of separation of powers requires legislative approval of proposed changes to sentencing guidelines). For these reasons, the State urges this Court to revisit and clarify Davis, thereby implementing section 948.03(5) and removing the violation of the Separation of Powers Doctrine, which this Court has maintained "repeatedly and without exception," is absolutely required by Florida's constitution (Art.II, § 3, Fla. Const.). B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994).

Factually and pragmatically, the State points out that there is a significant difference in kind between imposing separate sentences of community control, incarceration, and probation and imposing a single sentence of community control or probation with a period of incarceration as a special condition. The essence of probation and community control as created by the Legislature in Ch. 948, Florida Statutes, is to impose local punitive and rehabilitative measures without imposing the more serious sanction

of state prison incarceration. The conditions of community control are part of the community control sentence itself, are not separate sentences, and are limited to the maximum period authorized for community control.

Because the imposition of community control with a special condition of incarceration is authorized by the Legislature in § 948.03(5), Fla. Stat. (1993), Respondent's sentence does not even violate the disjunctive sentencing provisions of the 1993 guidelines.

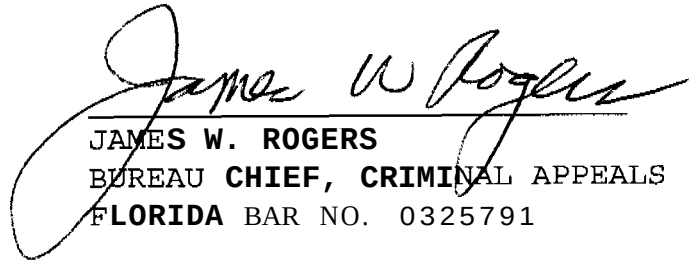
Therefore, this Court should clarify Davis and quash the decision of the district court below, thereby reinstating the legal sentence imposed by the trial court in the exercise of its discretion.

CONCLUSION

Based on the foregoing, the State respectfully submits that the certified question should be answered in the negative, the decision of the First District Court of Appeal quashed, and the sentence entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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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 the Honorable Nancy Daniels, the Public Defender of the Second Judicial Circuit, and to Mr. Jamie Spivey, Assistant Public Defender, 301 South Monroe Street, Leon County Courthouse, Suite 401, North, Tallahassee, Florida 32301, this 10th day of September, 1996.

William J. Bakstran
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

RODGIE LAMAR **WATKINS,**

Respondent.

CASE NO. 88,719

APPENDIX FOR
PETITIONER'S INITIAL BRIEF ON THE MERITS

Rodgie Lamar Watkins v. State Of **Florida,**
Case No. 95-03351 (July 25, 1996).

[A:\WATKINS.BI --- 9/10/96,8:09 **am**]

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

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

RODGIE LAMAR WATKINS,

Appellant,

v.

CASE NO. 95-3351

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed July 25, 1996.

An appeal from Circuit Court for Escambia County. Michael Jones, Judge.

Nancy A. Daniels, Public Defender, and Jamie Spivey, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and William J. Bakstr..., Assistant Attorney General, Tallahassee, for Appellee.

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, 2996). 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.