

IN THE SUPREME COURT OF FLORIDA

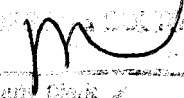
VAUGHN R. SIMPSON,  
Petitioner,

v.

STATE OF FLORIDA,  
Respondent.

---

JUN 25 1987

CLERK, SUPREME COURT  
BY  1987

CASE NO. 70,561

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

MARK C. MENSER  
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS  
THE CAPITOL  
TALLAHASSEE, FL 32399-1050  
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE (S)</u>
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
THE REGULARITY AND FRENQUENCY I.E., THE TEMPORAL PROXIMITY OF OFFENSES SCORED ON THE SENTENCING GUIDELINES IS A VALID BASIS FOR DEPARTURE FROM THE SENTENCING GUIDELINES	3,4
CONCLUSION	5
CERTIFICATE OF SERVICE	5

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE (S)</u>
<u>Miller v. Florida,</u> 1 F.L.W. Fed. S781 (1987)	4
<u>State v. Rousseau,</u> 12 F.L.W. 291 (Fla. June 11, 1987)	3,4
<u>Williams v. State,</u> 504 So.2d 392 (Fla. 1987)	3,4

OTHER AUTHORITIES

Ch. 775, Fla.Stat.	4
--------------------	---

STATEMENT OF THE CASE AND FACTS

The Petitioner's statement is accepted.

SUMMARY OF ARGUMENT

The "frequency" with which past offenses were committed, as opposed to the "existence" of prior offenses, is not a factor scored into the sentencing guidelines and therefore is a valid basis for departure.

ARGUMENT

THE REGULARITY AND FREQUENCY  
I.E., THE TEMPORAL PROXIMITY OF  
OFFENSES SCORED ON THE SENTENCING  
GUIDELINES IS A VALID BASIS FOR  
DEPARTURE FROM THE SENTENCING  
GUIDELINES

The certified question presented by the First District seems necessary now, more than ever, due to the inexplicable opinion rendered in State v. Rousseau, 12 F.L.W. 291 (Fla. June 11, 1987) which is in express and direct conflict with this Court's decision in Williams v. State, 504 So.2d 392 (Fla. 1987).

In Rousseau, this Court said:

"The district court evidently viewed the "temporal circumstances" of these crimes to justify departure. We disagree with this conclusion. Each of these three burglaries was scored as a primary offense in determining Rousseau's guidelines sentence. The record reveals no additional facts concerning the timing of these offenses which were not already factored into the guidelines scoresheet. Therefore, this reason cannot justify departure".

Id.

In Williams, this Court said:

"Neither the continuing and persistent pattern of criminal activity nor the timing of each offense in relation to prior offenses and release from incarceration or supervision are aspects of a defendant's prior

criminal history which are factored in to arrive at a presumptive guidelines sentence. Therefore, there is no prohibition against basing a departure sentence on such factors".

Id.

Williams was in March, Rousseau was decided in June. No one rewrote the guidelines in that period. What, then, explains the rendition of diametrically opposed decisions in two months time? Where is the continuity and predictability we were promised when sold the so-called sentencing "guidelines"?<sup>1</sup>

It is respectfully suggested that Rousseau overlooks Williams and is flatly wrong. While prior offenses are "scored", the timing of those prior offenses is not. That is why Williams, rather than Rousseau, correctly states the law and should be followed.

---


<sup>1</sup>Given the recent decision in Miller v. Florida, 1 F.L.W. Fed. S781 (1987), the "guidelines" may in fact be actual "sentences", repealing Ch. 775, Fla.Stat. If so, constitutional problems exist.

CONCLUSION

The "timing" of scored prior offenses may justify departure from the sentence compelled by the so-called sentencing "guidelines".

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL



MARK C. MENSER  
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS  
The Capitol  
Tallahassee, FL 32399-1050  
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Carl S. McGinnes, Assistant Public Defender, Counsel for Petitioner, this 25th day of June, 1987.



MARK C. MENSER  
Assistant Attorney General

OF COUNSEL