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**PRELIMINARY STATEMENT**

Petitioner, David Davis, the criminal defendant and appellant below in Davis v. State, 13 F.L.W. 2605 (Fla. 4th DCA Nov. 30, 1988), State's Appendix I, will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

References to the six-volume record on appeal will be designated "(R: )." References to the one-volume supplemental record will be designated "(SR: )."

All emphasis will be supplied by the State.

### STATEMENT OF THE CASE AND FACTS

The State accepts the bulk of petitioner's "statement of the case and facts" as a reasonably accurate narrative synopsis of the legal occurrences and the evidence adduced below. However, the State questions the pertinence of petitioner's paragraphs three and seven because the jury accepted Tina Carroll's unequivocal identifications of petitioner as her assailant (R 602; 726) by finding him guilty of the offenses charged (R 914), thus rejecting his defense of misidentification (R 562).

The State further finds that the factual assertions included in the argument portion of petitioner's brief are incomplete, and will integrate additional facts relevant to a resolution of the narrow legal issues presented on certiorari in the argument portion of this brief.

SUMMARY OF ARGUMENTS

The Fourth District correctly found that §921.001(5), Fla.Stat. (1987), which mandates the appellate affirmance of any sentencing guideline departure supported by at least one valid reason, was applicable to petitioner. The Florida Legislature had the power to enact this procedurally-oriented clarificatory statute, and such statutes may be employed "retroactively."

Under any standard, the instant departure was proper.

The trial judge did not violate State v. Neil, infra, by granting the prosecutor's peremptory challenge of prospective allegedly black juror Audrey Bowser.

### ISSUE I

WHETHER THAT PORTION OF CHAPTER 87-110, LAWS OF FLORIDA, WHICH AMENDS SECTION 921.001(5), FLORIDA STATUTES, IS APPLICABLE TO APPELLATE REVIEW OF SENTENCES IMPOSED FOR OFFENSES WHICH WERE COMMITTED PRIOR TO JULY 1, 1987?

### ARGUMENT

The State respectfully contends that this Honorable Court should answer the above-certified questions in the affirmative, for the reasons expressed in its "Answer Brief of Respondent on the Merits" filed in this Court in Abt v. State, 528 So.2d 112 (Fla. 4th DCA 1988), review granted, Case No. 73,312 (Fla. 1988), State's Appendix 11, pp. 4-12. The State acknowledges that this Court recently resolved this certified question adversely to it in State v. McGriff, 14 F.L.W. 32 (Fla. Jan. 19, 1989), and that the First District has reversed on rehearing en banc in Felts v. State, 14 F.L.W. 237 (Fla. 1st DCA Jan. 22, 1989), a decision upon which it prominently relied in its brief in Abt. The State notes that it conceded in McGriff a position it espoused in Abt, upon which it will stand here - with apologies - as a point of distinction:

That portion of §921.001(5) at issue here [is] not truly retrospective for ex post facto purposes because the legislature intended it to clarify previously existing statutory law concerning the standards for reviewing sentencing guideline

departures which this Court had misinterpreted in Albritton v. State, 476 So.2d 158 (Fla. 1985) and The Florida Bar re: Rules of Criminal Procedure (Sentencing Guidelines 3.701, 3.988), 482 So.2d 311, 312 note 1 (Fla. 1985), see also Griffis v. State, 509 So. 2d 1104 (Fla. 1987), rather than to change this law. In Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985) this Court held:

When an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. United States ex. rel. Guest v. Perkins, 17 F.Supp. 117 (D.D.C. 1936); Hambel v. Lowry, 264 Mo. 168, 174 S.W. 405 (1915). This Court has recognized the propriety of considering subsequent legislation in arising at the proper interpretation of the prior statute. Gay v. Canada Dry Bottling Co., 59 So. 2d 788 (Fla. 1952).

Under th{is} logic...petitioner's allegation that the application of §921.001(5) against him violates ex post facto concepts thus fails the first, "retrospective" prong of the Miller v. Florida, [482 U.S.\_\_\_\_, 96 L. Ed 2d 351, 360 (1987)] test.

(State's Appendix 11, pp. 7-8).

## ISSUE II

THE TRIAL JUDGE PROPERLY  
DEPARTED FROM THE SENTENCING  
GUIDELINES

### ARGUMENT

Petitioner secondly argues that regardless of whether the 1987 amendment to §921.001(5), Fla. Stat., is ordinarily applicable to those in his situation, this Court should nevertheless strike down the sentencing guideline departure he suffered because none of the reasons the trial judge expressed therefore were valid.

This Court should not review this claim since its is distinct from the claim over which its jurisdiction was invoked. See, e.g., Blackshear v. State, 522 So.2d 1083, 1084 (Fla. 1988).

Should this Court nonetheless elect to proceed, the State would rely on its "Answer Brief of Appellee" filed in the Fourth District, wherein it essentially argued that the instant redeparture was sustainable even under the old prodefense standard of Albritton v. State, 476 So.2d 158 (Fla. 1985), State's Appendix 111, pp. 9-12.

### ISSUE III

THE TRIAL JUDGE PROPERLY  
PERMITTED THE PROSECUTION TO  
PEREMPTORILY CHALLENGE  
PROSPECTIVE JUROR AUDREY  
BOWSER

### ARGUMENT

Petitioner lastly alleges that the trial judge reversibly violated State v. Neil, 457 So.2d 481 (Fla. 1984), see also Batson v. Kentucky, 476 U.S. 79 (1986), by permitting the prosecution to peremptorily challenge purportedly black prospective juror Audrey Bowser (R 441-442).

This Court should not review this claim since it is distinct from the claim over which its jurisdiction was invoked. See, e.g., Blackshear v. State, 522 So.2d 1083, 1084.

Should this Court nonetheless elect to proceed, the State would rely on its "Answer Brief of Appellee" filed in the Fourth District, wherein it essentially argued that this point was unpreserved and unmeritorious, State's Appendix 111, pp. 4-8.

CONCLUSION

WHEREFORE, the State urges that this Honorable Court APPROVE the decision of the Fourth District affirming the judgments and sentence imposed by the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing "Answer Brief of Respondent on the Merits" has been forwarded by United States Mail to: FRANK B. KESSLER, ESQUIRE, 2925 10th Avenue, North, Plaza Ten - Suite 202, Lake Worth, Florida 33461, this 15 day of February, 1989.

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