

IN THE  
SUPREME COURT OF THE STATE OF FLORIDA

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DEC 8 1980  
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TOBIAS BARFIELD, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
STATE OF FLORIDA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

CASE NO. 76,524

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the trial court. The Respondent was the Appellee and the Prosecution, respectively, in the lower courts. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"SR"	Supplemental Record
"A"	Appendix

### STATEMENT OF THE CASE AND FACTS

Petitioner relies on his brief on the merits for the Statement of the Case and Facts. However, Petitioner would note that Respondent has chosen to recite the facts which led to Petitioner's convictions. These facts are not relevant to the resolution of the instant review. Without further reciting the complete detailed facts of the case, it should also be noted that Petitioner's involvement was not as extensive as it is painted to be. Petitioner's primary argument in this district court was the insufficiency of the evidence.

Petitioner would additionally point out that he was found guilty of attempted trafficking in cocaine (R458), rather than trafficking in cocaine as noted in Respondent's brief.

## ARGUMENT

### THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE.

In its brief Respondent claims that timing alone is a valid reason for departure. However, this court has specifically indicated that timing alone is not a valid reason.<sup>1</sup> Mere reliance on temporal proximity would result in arbitrary and disparate sentences.<sup>2</sup> Respondent relies on Jordan v. State, 15 F.L.W. D1535 (Fla. 4th DCA, June 6, 1990) for the claim that any temporal proximity of less than one year justifies a departure sentence. However, the reasoning in Jordan, supra, illustrates the very problem with using temporal proximity to depart from the guidelines.<sup>3</sup> The trial court erred in departing from the recommended guideline sentence based on the temporal proximity of his release from prison.

In Petitioner's brief on the merits it was explained why the evidence did not establish an escalating pattern of criminal activity. Respondent has not disputed the fact that the evidence failed to establish an escalating pattern of criminal activity. Instead, Respondent claims that the evidence established a continuing or persistent pattern of criminal activity. This claim is without merit.

The primary purpose of the guidelines is to prevent arbitrary

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<sup>1</sup> State v. Simpson, 554 So.2d 506 (Fla. 1989); State v. Jones, 530 So.2d 53 (Fla. 1988).

<sup>2</sup> See pages 8 through 9 of Petitioner's brief on the merits.

<sup>3</sup> See pages 7 through 8 of Petitioner's brief on the merits.

and disparate sentences. Thus, reasons for departure may not be based on unfettered subjectivity. The terms "continuing" and "persistent" pattern of criminal activity are totally subjective. Unlike an "escalating" pattern, a "continuing" and "persistent" pattern has not been defined by the legislature or the courts.<sup>4</sup> Nor has Respondent offered any workable definition for these terms. Instead, the highly subjective terms result in one finding a "continuing" or "persistent" because "I know a continuing or persistent pattern of criminal activity when I see it." See Liscomb v. State, 15 F.L.W. D2227, 2229 (Fla. 5th DCA Sept. 6, 1990) (Coward, J., dissenting).

Respondent claims that Petitioner's lack of rehabilitation, shown by committing the instant offense after his release from prison, is offered not as a reason for departure but merely to demonstrate a "continuing and persistent pattern of criminality." Assuming this is true, the fact that one has not been rehabilitated and does not live a life free of criminal activity after his release from prison does not warrant a departure sentence. This would be true of anyone with a prior criminal record. By scoring the prior criminal record, the guidelines take this into account.<sup>5</sup>

If "continuing" and "persistent" pattern of criminal activity

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<sup>4</sup> Escalating pattern has been defined in § 921.001(8), Florida Statutes (1987) and by caselaw. See Keys v. State, 500 So.2d 134 (Fla. 1986) (commission of four crimes escalating from property to persons).

<sup>5</sup> In its brief Respondent makes a policy argument that studies show that the "typical" inmate in DOC commits numerous crimes per year. In other words, Respondent is saying that the "typical" person being sentenced is a "continuing" and "persistent" criminal.

has any identifiable meaning, it probably refers to the situation where a person is continuously committing a specific type of crime time after time. For example, where a person continuously commits burglaries or robberies. This type of "continuing" and "persistent" pattern is specifically factored into the guidelines through multiplier factors. In a robbery case, the prior number of convictions for robbery are multiplied by 25 so as to increase the point total for the recommended sentence. Rule 3.988(c), Fla.R.Crim.P.. The same multiplier applies to the burglary category. Rule 3.988(e), Fla.R.Crim.P.. The purpose and effect of these multipliers is to punish more severely those who continuously and persistently commit these type of category offenses. While it is very simple to incorporate these type of multipliers into the scoresheets, it should be noted that most other guideline categories do not include such multipliers. The fact that these category scoresheets do not include multipliers which account for specific persistent criminal activity indicates that such activity is considered to be adequately factored into the guideline through the normal computation of points for prior record and does not need to be additionally emphasized through a multiplier.<sup>6</sup> A reason which is either factored into the guidelines, or which could easily be factored into the guidelines, cannot logically be used to depart

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<sup>6</sup> Petitioner is not advocating the wisdom of inclusion, or exclusion, of a multiplier for these other categories. However, if persistent patterns of specific criminal activity need to be emphasized to the degree that Respondent suggests, multipliers should be added for these other categories.

from the guidelines.<sup>7</sup>

Additionally, there is a field of relationships between the offenses constituting a defendant's prior record. Specifically, escalating pattern of criminal conduct has been defined and codified as an authorized reason for departure. § 921.001(8) Fla. Stat. (1987). The codification represents the portion of the field of prior record relationships which has been deemed sufficient for departing from the guidelines. Due to the consideration of the field of prior record relationships, and the failure to codify that relationships other than escalating patterns warrant departure, the codification constitutes a legislative pre-emption of the field of prior record relationships justifying departure. See Liscomb, supra at 2229 (Coward, J., dissenting).

Respondent's primary analysis consists of the public policy of increasing sentences of "typical" inmates due to the cost of criminal activity to society. Respondent's brief at 10-12. The analysis alleges that "typical" inmates are "persistent" in their criminal activity. The public policy Respondent speaks of would be advanced by increasing the guideline recommendations rather than by departing in specific cases.

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<sup>7</sup> To use a reason that could be factored into the guidelines, but purposely was not, to depart from the guidelines would be illogical. Obviously, such a reason was not deemed significant enough to score compared with other factors that were scored. To permit departure for such a reason would be to exalt it over other aspects of offenses such as the nature of the offense, degree and quantity of offenses, legal constraint, victim injury, etc. which were deemed more important. Such a departure would not be logical as it allows a factor deemed not important enough to be scored to override a factor which was deemed important enough to be scored.

In the present case the trial court departed because Petitioner was sentenced as a youthful offender on January 27, 1987, and that on April 5, 1988, he was convicted of the offenses for which he is now being sentenced (R 479). Clearly, this is not "persistent" and is not a "pattern".

Finally, Respondent alludes to the fact that Petitioner did not object at sentencing to the underlying factual predicate in the trial court's written order stating reasons for departure. However, as previously pointed out, the sentencing occurred on November 3, 1988, but the reasons were not filed until December 3, 1988.<sup>8</sup> Thus, Petitioner never had an opportunity to object to the trial court's non-existent written order at sentencing.<sup>9</sup> Since there was no written order at sentencing, the sentences must be reversed and Petitioner resentenced within the recommended guideline range. Ree v. State, 15 F.L.W. S395 (Fla. July 19, 1990).

To avoid a reversal pursuant to Ree, Respondent has claimed that the written reasons provided on the scoresheet constitute the reasons for departure. The pertinent portion of the scoresheet yields the following reasons for departure:

Defendant was recently convicted of trafficking in cocaine and was in community on S.C.R.A.P. program when offenses committed.

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<sup>8</sup> The reasons were not entered until November 29, 1988.

<sup>9</sup> It should be noted that the factual predicate has not been disputed, however the legal conclusion, regarding pattern of criminality, is disputed. Guideline departures may be reviewed on appeal even in absence of objection below. State v. Whitfield, 487 So.2d 1045 (Fla. 1986); Knight v. State, 501 So.2d 150 (Fla. 1st DCA 1987).

(R 476). The fact that Petitioner was convicted of trafficking in cocaine is scored on the scoresheet and therefore does not constitute a valid reason for departure. The fact that Petitioner was on legal constraint (i.e. the S.C.R.A.P. program)<sup>10</sup> at the time of the instant offense is not a valid reason for departure because fourteen (14) points for legal constraint were already scored. Lindsay v. State, 15 F.L.W. D2768 (Fla. 4th DCA Nov. 14, 1990) (error to depart on ground that defendant in a supervised release program at time of offense where he scored 17 points for legal constraint). Thus, since the reasons written on the scoresheet were invalid, it would be error to depart from the guideline sentence based on these reasons.

Petitioner relies on his brief on the merits for further argument on this point.

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<sup>10</sup> In the lower court the prosecutor represented that this was a program for those released from prison but "still in custody" and "still under legal constraints" (SR192-193).

**CONCLUSION**

Based on the foregoing argument and authorities cited therein, Petitioner would request this Honorable Court to reverse the decision of the district court with directions that Petitioner be sentenced within the recommended guideline range.

Respectfully submitted,

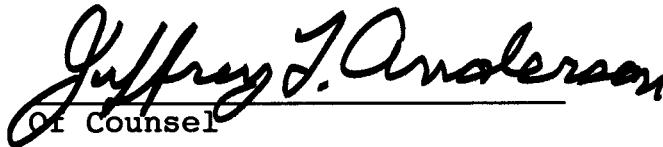
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy hereof has been furnished to CAROL ASBURY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 29th day of November, 1990.

  
Of Counsel