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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,576

WILLIE GORDON,

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S ANSWER 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
"AB"	Petitioner's Brief
"SR"	Supplemental Record
"A"	Appendix

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and facts is acceptable to Respondent for purposes of a proper disposition of this case on appeal, with the following additions:

The State filed a notice to declare Petitioner an habitual offender and a notice of its intent to seek enhanced penalties on August 15, 1989 (R 652). The State filed its motion for Aggravation of Sentence on September 11, 1989 (R 663-664).

At sentencing the trial court noted the Williams rule evidence adduced during trial (R 639) (that Petitioner victimized another person through the same scam, within two months of committing the instant offense (R 308 - 423) and that Petitioner victimized elderly people (R 641).

### SUMMARY OF ARGUMENT

This Court has held that the temporal proximity of crimes can be a valid reason for departure when the timing of an offense relates to prior offenses and the release from incarceration or other supervision, as those aspects of prior criminal history are not factored in to arrive at the presumptive guidelines sentence. Williams v. State, 504 So.2d 392 (Fla. 1987); State v. Jones, 530 So.2d 53, 55 (Fla. 1988). Here the Petitioner committed this crime was within 6 months of being released from supervision, and which was nearly the identical crime of which he was previously convicted. Thus, there was a showing of both a temporal proximity of crimes as well as a persistent pattern of criminal activity relating to the same type of crime, grand theft by tricking people out of their money.

ARGUMENT

**THE TRIAL COURT DID NOT ERR IN DEPARTING FROM  
THE RECOMMENDED GUIDELINE SENTENCE**

This Court in Williams v. State, 504 So.2d 392 (Fla. 1987) held that the timing of an offense in relation to prior offenses and release from incarceration or supervision are not 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. The following year this Court held that timing of offenses could be a valid reason for departure if it is shown that "...the crimes committed demonstrate a defendant's persistent pattern of criminal activity as evidenced by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision. State v. Jones, 530 So.2d 53, 55 (Fla. 1988). Again this Court pointed out in Simpson v. State, 554 So.2d 506 (Fla. 1989) a departure sentence can be upheld based on an escalating pattern of criminal activity or a continuing and persistent pattern of criminality. Id. at 510.

The Fourth District Court noted in Jordan v. State, 562 So.2d 820 (Fla. 4th DCA 1990) that this Court has not set an arbitrary number of days or months which would demonstrate, or not demonstrate, a continuing and persistent pattern of criminal activity. However, the Fourth District Court of Appeal surmised, based on the case law, that any period less than a year is sufficient. Finally, based on Justice Barkett's specially

concurring opinion in Gibson v. State, 533 So.2d 701, 702 (Fla. 1989) it appears that timing alone is an appropriate reason for departure.

The facts in this case show that Petitioner was convicted of 3 counts of grand theft on November 6, 1985 and sentenced to 2½ years; he was released from prison on a supervised release program on September 9, 1986 and released from that program on October 6, 1986. Petitioner was charged with committing the same offense of grand theft on March 24, 1987, less than 6 months from his release from supervision. Furthermore, the evidence at trial showed Petitioner victimized another person in precisely the same fashion, not two months after committing the acts charged in the instant case (308 - 423); this fact was noted by the trial court at sentencing (R 639 - 641). These acts, in conjunction with Petitioner's numerous prior offenses shows a continuing and persistent pattern of criminality which Williams, Jones, and Simpson address. Section 893.135, Florida Statute (1989). A lack of rehabilitation was not given as a reason for departure but rather to show the persistent nature of the Petitioner's criminal activity in bilking or conning victims out of money.

There is a strong public policy in protecting the public for allowing a trial judge to depart from the recommended sentence when it is shown that the defendant is recently released from prison and immediately commits a similar or identical crime as his prior conviction. As Judge Gkickstein points out in his concurring opinion in Jordan v. State, 562 So.2d 820 (Fla. 4th DCA, 1990), the prisons in Florida are full because of the

explosion of drug-related crimes and the public's growing demands for protection from offenders coupled with the legislative response to those public demands in the form of permitting more flexibility for judges in the State's sentencing guidelines and more severe penalties for habitual and violent offenders. Judge Glickstein questions the effectiveness of warehousing defendants at a cost to the taxpayers of \$28,000 per year. The value of imprisonment decision depends primarily on the accuracy of how much public safety is purchased for \$28,000.

Calculating the cost of crime remains an inexact science. In one study by the Office of Justice Program's National Institute of Justice which calculated the total expenditures on crime for 1983, including victim losses, criminal justice, commercial security costs, etc. the cost of crime that was arrived at was \$99.8 Billion. By dividing the number of victimizations for that year, 42.5 million, into the expenditures, the researchers arrived at an average cost per crime of \$2, 300. Applying this figure to the information on offense rates gleaned from the Rand research, which concluded that inmates averaged between 187 and 287 crimes per year, exclusive of drug deals, they concluded that a "typical inmate" is responsible for \$430,000 in crimes costs per year, or 17 times the \$28,000 cost of incarceration. (See, the Compelling Economics of Prison Construction by Richard B. Abell, Human Events, March 4, 1989).

Recently, the Florida Department of Law Enforcement published its 1989 Annual Report on Crime in Florida. In a

letter to the Governor and the Members of the Cabinet the Commissioner pointed out that "Statewide, for all serious crimes there were 1, 395,902 victims of crime reported with an overall property loss of over \$1.2 Billion." There was another \$51 Million in property loss to 115, 828 individuals/business in miscellaneous crimes such as forcible sodomy, forcible fondling, kidnap/abduction, drugs, bribery, embezzelment and fraud. This report does not calculate the cost of processing these criminals through the criminal justice system. Nor does it calculate other losses to the victim such as doctors, psychological care, the impact on losing one's live savings. How much higher would the cost to the taxpayers be when those figures are calculated into the figure of \$1.25 Billion? And how much of this cost is attributed to defendants who commit crimes while on probation or other supervising program?

The first goal of our criminal justice system must be to protect the innocent; the second, to punish the guilty. The public recognized that a growing percentage of crimes are committed by defendants such as the Petitioner. Had the Petitioner not been released on an early release program he would not have committed this particular crime. Petitioner's involvement in conning people out of money as he was previously convicted shows a continuing and persistent pattern of criminal activity. Petitioner is exactly the type of criminal that the Williams/Jones/Simpson line of cases seeks to address. The temporal proximity of crimes alone does, and should provide, a valid reason for departing from the sentencing guidelines even if

this Court determines that a persistent pattern of criminal conduct was not shown below.

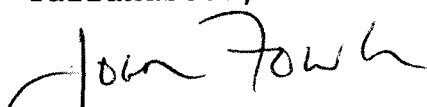
In conclusion, the temporal proximity of crimes, standing alone, constitutes a sufficient basis for departure. Accordingly, the Petitioner's conviction and sentence must be affirmed.

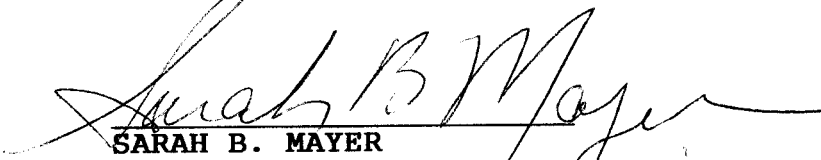
CONCLUSION

Respondent, based on the foregoing arguments and authorities cited herein, requests this Honorable Court to affirm the conviction and sentence of the Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been forwarded, by courier, to: MARCY ALLEN, Assistant Public Defender, The Governmental Center/9th Floor, 301 N. Olive Avenue, West Palm Beach, Florida 34401, this 19th day of April, 1991.

  
of Counsel

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