

IN THE SUPREME COURT OF FLORIDA

LLOYD E. ALBRITTON,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

FILED

S'D J. WHITE

MAY 14 1985

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CASE NO. 66,169

By _____
Chief Deputy Clerk

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PETITIONER'S REPLY BRIEF
ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR PETITIONER

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AUTHORITY CITED:

Rule 3.701(d) (11), Florida Rules of Criminal
Procedure

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 Petitioner,)
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 vs.) CASE NO. 66,169
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 STATE OF FLORIDA,)
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PETITIONER'S REPLY BRIEF
ON THE MERITS

POINT I

IN RESPONSE TO THE STATE'S CON-
TENTION THAT THE DISTRICT COURT
DID NOT ERR IN AFFIRMING THE
TRIAL COURT'S DECISION TO DEPART
FROM THE SENTENCING GUIDELINES
BASED ON ONLY ONE OF THE TRIAL
COURT'S STATED REASONS.

In its answer brief Respondent contends that an appellate court should always affirm a sentence where valid reasons for departure exist amongst invalid reasons for departure, except where the record clearly indicates that the judge would have altered his sentencing decision due to the elimination from consideration of one or more of the cited reasons for departure. Respondent contends that it would be prudent to require the trial court to make a finding on the record as to whether or not the elimination from consideration of one or more of the cited reasons for departure would alter

his sentencing decision.

Petitioner has several problems with this approach, not the least of which is the fact that the state seeks to have his sentence affirmed based on a standard of review which was not in effect at the time of his sentencing. Whatever the merits of the approach Respondent advocates, it clearly should not be applied retroactively to Petitioner's case. Nothing in the sentencing guidelines rule could be interpreted to require defense counsel to seek the trial judge's view on what he would do if some of his reasons for departure were disapproved on appeal. Petitioner should not be expected to have anticipated this approach.

Further, Petitioner does not believe this approach should be adopted in the future. If Respondent's position were accepted, trial judges would be encouraged to list as many reasons as possible in support of a departure sentence, whether those reasons were proper or improper. Petitioner believes the better approach is to encourage trial judges to consider only proper "clear and convincing" factors when deciding whether or not to depart.

If a judge lists five so called "reasons for departure" and then states on the record that the disapproval on appeal of two of such reasons would not effect his decision to depart (or the length of the departure), one must ask are those two factors "reasons for departure" at all? Rule 3.701(d)(11) requires a judge to state "the reasons for the departure." Trial judges should be encouraged to do just that.

If a factor has no bearing on the judge's decision there is no need to include it on the record. If a factor is included on the record as a "reason for departure" an appellate court should assume that it is a reason for departure, and that its absence from consideration would have some effect.

The state asks this Court to assume that in cases like Petitioner's that, "that the trial judge made a determination that the recommended guidelines sentence for a particular individual was inappropriate and that the judge would impose a departure sentence if legally permissible." Perhaps this is so in some cases, but Rule 3.701 states that departure should be avoided unless clear and convincing reasons can be articulated in writing. To allow departures based on the assumption that the trial court felt a guideline sentence was inappropriate regardless of the propriety of listed reasons would defeat the purpose of requiring written reasons and render appellate review meaningless. Petitioner maintains appellate courts should reverse a guidelines sentence that may have been based on reasons found improper and affirm only where it is clear that the trial court's decision would not be effected by the elimination of the improper reasons.

POINT II

IN RESPONSE TO THE STATE'S CON-
TENTION THAT THE DISTRICT COURT
DID NOT ERR IN REFUSING TO RE-
VIEW THE EXTENT OF THE DEPARTURE
FROM THE RECOMMENDED GUIDELINES
SENTENCE.

Respondent argues that any restriction on departure sentences which are within the statutory range should be established by the drafters of the sentencing guidelines, and that proportionality of sentences should be the drafters concern and not that of appellate courts.

Perhaps a better approach would have been for the guidelines rule itself to include some guidance for appellate courts on the issue of review of departure sentences. Perhaps in the future the rule may be changed to provide such guidance. However, in the mean time this court must deal with the guidelines as they are now. The fact is the legislature specifically provided for appellate review of departure sentences, but did not define the scope of such review. Respondent seems to contend that this means the drafters of the guidelines meant for appellate courts to ignore the length of a departure sentence and concern themselves strictly with whether any departure is proper. Petitioner contends this assumption is totally unwarranted. Nothing in the guidelines rule or the legislation establishing appellate review suggests such an assumption is correct. To the contrary, greater consistency of the length of sentences is what the guidelines are all about. It is hard to imagine how

this goal can be achieved if appellate review is as limited as Respondent suggests.

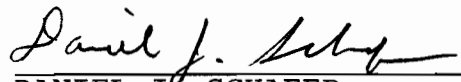
In his initial brief Petitioner suggested that this Court set a limit to the amount of departure from a recommended guidelines sentence that would apply in all but a few rare cases. Petitioner argued for this "cap" approach, not because anything in the guidelines rule suggests it, but because it seems a workable solution to a problem that must be addressed. It is an approach that the Minnesota Supreme Court adopted when faced with the same problem, and the same lack of guidance from their sentencing legislation. And above all else it is simply more just than the District Court's decision to treat all departure sentences alike, whether the length of departure is sixty months or sixty years.

CONCLUSION

Based on the arguments and authorities presented herein and in his initial brief, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal in this cause and remand the case for resentencing with appropriate instructions.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Jim Smith, Attorney General in his basket at the Fifth District Court of appeal and mailed to Mr. Lloyd E. Albritton, Inmate No. 092741, Lake Correctional Facility, P.O. Box 99, Clermont, Florida 32711 on this 13th day of May 1985.



DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER