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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,493

THE STATE OF FLORIDA,

Petitioner,

-vs-

WILLIAM HEAD,

Respondent.

**FILED**  
 SID J. WHITE  
 OCT 11 1985  
 CLERK, SUPREME COURT  
 By: *m*  
 Clerk of the Court

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ON APPLICATION FOR DISCRETIONARY REVIEW

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RESPONDENT'S BRIEF ON THE MERITS

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## INTRODUCTION

The petitioner was the prosecution in the trial court and the appellee in the District Court. The respondent was the defendant in the trial court and the appellant in the District Court. The parties will be referred to as they stand before this Court. References to the record on appeal will be by the letter "R". References to the trial transcripts will be by the letter "T". References to petitioner's appendix will be by the letter "A". All emphasis is added unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

The respondent respectfully accepts petitioner's statement of the case and facts as substantially true and correct.

QUESTION CERTIFIED

WHETHER WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFY A DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR A RESENTENCING?

SUMMARY OF THE ARGUMENT

Pursuant to this Court's opinion in Albritton v. State, 10 F.L.W. 426 (Fla. August 29, 1985), this cause must be remanded to the trial court for resentencing. Eleven of the twelve reasons given for aggravating the respondent's guidelines sentence were found to be invalid. (A. 3). The petitioner is unable to show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence.

ARGUMENT

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFY A DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR A RESENTENCING.

Petitioner submits that the foregoing question should be answered as followed:

When an appellate court finds that a sentencing court relied upon a reason or reasons that are impermissible under Fla.R.Crim.P. 3.701 in making its decision to depart from the sentencing guidelines, the case should be remanded for resentencing.

The question posed has already been answered by this Court in Albritton v. State, 10 F.L.W. 426 (Fla. August 29, 1985), wherein this Court held:

The standard recommended by petitioner is essentially that of Chapman v. California, 386 U.S. 18 (1967), which places the burden on the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the verdict. We adopt this standard and hold that when a departure sentence is grounded on both valid and invalid reasons that the sentence should be reversed for resentencing unless the state is able to show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence.

10 F.L.W. 426.

This Court has since affirmed its decision in Albritton, supra, in the cases of State v. Carney, 10 F.L.W. 479 (Fla. August 29, 1985); Brinson v. State, 10 F.L.W. 480 (Fla. August

30, 1985) and State v. Young, 10 F.L.W. 463 (Fla. August 29, 1985).

In the instant case, the District Court of Appeal found only one (1) out of twelve (12) reasons for aggravation to be valid. (A. 3). The petitioner has not disputed in its brief that 11/12 (92%) of the reasons given by the trial court for aggravating the respondent's guidelines sentence were invalid! Additionally, the petitioner does not argue that it is able to "show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence."

The respondent submits that this Court's decision in Albritton, supra, was correct. To aggravate a sentence, a trial court should be required to state valid reasons which are shown by clear and convincing evidence. By taking the time to formulate valid reasons supported by clear and convincing evidence, a trial court now will reach a thoughtful and deliberate decision as to whether to aggravate a guidelines sentence, knowing that the use of invalid reasons unsupported by clear and convincing evidence will require a resentencing, instead of throwing out a "washing list" of aggravating reasons hoping that at least one will be valid. This Court's Albritton decision has the benefit of requiring thoughtful trial court sentencing. That, in turn, will ease the appellate court's burden by reducing the volume of "sentencing appeals."

Pursuant to this Court's decision in Albritton, supra, this cause must be remanded to the trial court for resentencing.

CONCLUSION

Based upon this Court's decision in Albritton, supra, this cause must be remanded to the trial court for resentencing.

Respectfully submitted,

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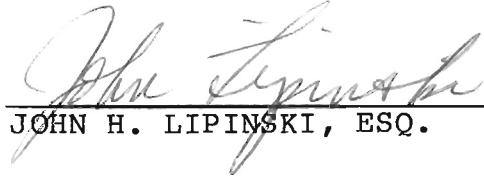
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BY:   
\_\_\_\_\_  
JOHN H. LIPINSKI, ESQ.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 9 day of October, 1985.

  
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JOHN H. LIPINSKI, ESQ.