IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,493

THE STATE OF FLORIDA,

Petitioner,

vs.

WILLIAM HEAD,

Respondent.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

ON PETITION FOR DISCRETIONARY REVIEW

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# BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

HENRY R. BARKSDALE
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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## I

## PRELIMINARY STATEMENT

William Head, the criminal defendant and appellant in Head v. State, ___So.2d___, 10 FLW 1783 (Fla. 3d DCA July 23, 1985), will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below, will be referred to herein as Petitioner.

Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the supplemental record on appeal will be indicated parenthetically as "SR" with the appropriate page number(s). Citations to the transcript of proceedings will be indicated parenthetically as "T" with the appropriate page numbers(s). Citations to the Appendix attached hereto containing Petitioner's Notice to Invoke Discretionary Jurisdiction and a copy of the lower court's opinion rendered herein will be indicated parenthetically as "A" with the appropriate page number(s).

## II

## STATEMENT OF THE CASE AND FACTS

Respondent was charged by information filed in Dade County, Florida with attempted second degree murder and

shooting into an occupied dwelling. (R.1-2a). Subsequently, on December 28-29, 1983, the Respondent was tried by a jury. (T.1-218). It developed during the trial that the Respondent shot the victim through a door after the victim had retreated into his apartment. (T.26, 105-106). As a result, the victim was paralyzed. (T.108). On December 29, 1983, the jury found the Respondent guilty of aggravated battery with a firearm and shooting into an occupied dwelling. (R.31-32).

At sentencing, on February 3, 1984, the Respondent affirmatively elected to be sentenced under the sentencing guidelines. (T.231). The sentencing guidelines scoresheet recommended a 30-month to 3 1/2-year prison sentence. (R.44, 51). The trial court, having benefit of a Presentence Investigation Report (T.230), argument of counsel on aggravation and mitigation (T.228, 147), determined that departure from the guidelines was warranted for the following written reasons:

> 1. The defendant has exhibited no remorse throughout the case, an attitude consistent with the guilt found by the jury.
>
> 2. The victim's present and future fear of the defendant, as expressed throughout this proceeding.
>
> 3. There is no legal basis for any type of justification of the defendant's actions in this case.

The victim literally did everything possible to avoid this crime, including, but not limited to, fleeing into his home in an attempt to obviate the murderous barrage of bullets that followed.

4. The absolute senselessness of this crime; the violence of this crime.

5. The defendant's actions created a risk of harm to many peo-ple by shooting into an occupied home, knowing that in past times children were present, and at this time the victim was present.

6. There was no provocation whatever by the victim.

7. The defendant was completely the aggressor.

8. The sentence is necessary to deter other people from performing acts of a similar nature.

9. The crime involved great violence and multiple gunshot wounds, and the use of a deadly weapon, a firearm.

10. The victim, because of his actions, was particularly vulner-able; the Court considers the psy-chological impact to this victim. (e.g., think for just one moment the absolute horror of remainder of his natural life because of the actions of Mr. Head).

11. The defendant was convicted of crimes for which he could have been consecutively sentenced. The Court, however, will impose concurrent sentences.

> 12. The defendant committed perjury on the witness stand by the denying that he was even party to the actions or the firing of the gun.
>
> (R.52-53).

Thereafter, the trial court imposed concurrent sentences of the ten years with a minimum mandatory three year sentence for aggravated battery with a firearm and ten years imprisonment for shooting into an occupied dwelling. (R.40-42).

Respondent appealed the trial court's departure and the lower court, finding that the trial judge relied upon both permissible and impermissible reasons for departure, reversed and remanded the cause for resentencing while certifying the question before this Court for review as one of great public importance. Head v. State, supra. (A.2-3).

Petitioner timely filed its Notice to Invoke Discretionary Jurisdiciton (A.1) on the basis of the certified question. Petitioner's Brief on the Merits follows pursuant to the Court's Briefing Schedule issued on August 19, 1985.

## III

## SUMMARY OF THE ARGUMENT

The Third District Court of Appeal has certified a question as being of great public importance to this Court as to whether an appellate court should remand for resentencing, or examine valid reasons given by a trial court for a departure sentence under Fla.R.Crim.P. 3.701 to determine if the reasons justify departure where both permissible and impermissible reasons have been expressed by the trial court for departure. It is the position of the Petitioner that if the Appellate Court finds at least one clear and convincing reason relied upon by the trial court for departure and the sentence is within the statutory parameters for the offense, the sentence should be affirmed notwithstanding the presence of other impermissible reasons. Each reason found to be clear and convincing should be considered as having been given equal and separate importance by the trial judge. This precept is in accordance with cases where the death penalty has been imposed but the proof is lacking as to one or more aggravating circumstances listed by the trial judge as justifying that penalty, but the record as a whole is clear and convincing that death is the appropriate penalty. In the case sub judice, the lower court finding that the psychological impact upon the victim by having been shot three times through the closed door of his apartment

constituted a valid reason for a departure was eminently correct. This reason alone should have been sufficient to sustain the trial court sentence.

## IV
## ARGUMENT

### QUESTION CERTIFIED

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPER-MISSIBLE UNDER FLA.R.CRIM.P. 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SEN-TENCE COURT TO DETERMINE IF THOSE REASONS JUSTIFY DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR RESENTENCING.

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

> WHEN A TRIAL JUDGE'S DEPARTURE FROM THE SENTENCING GUIDELINES IS PREDI-CATED UPON AT LEAST ONE CLEAR AND CONVINCING REASON AND THE SENTENCE IMPOSED IS WITHIN THE STATUTORY PARAMETERS FOR THE CONVICTED OFFENSE, THE SENTENCE MUST BE AFFIRMED NOTWITHSTANDING THE PRE-
> SENCE OF ONE OR MORE IMPERMISSIBLE REASONS.

By adopting this position, this Court will leave intact the inherent sentencing discretion of the trial judge as narrow-ly modified by the sentencing guidelines while providing criminal defendants with the appellate review contemplated by Florida Statutes §921.005(5). Implicit in answering the

question certified by the lower tribunal is a determination by this Court of what constitutes clear and convincing reasons for departure and what standard of review should be applied to sentencing guidelines cases.

In Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), approved, Weems v. State, ___So.2d___, 10 FLW 268 (May 10, 1985), the court held that:

> The only limitation on reasons for deviating from the guidelines is found in subsection (d)(11) which reads:
>
> > Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not obtained.

Id. at 1028. Similarly, the lower tribunal, in rejecting the argument that the nature of the offense cannot be considered for purposes of departure held:

> However, both the grammatical language and the logical import of the quoted rule [3.701(d)(11)] would appear to preclude deviation only when predicated upon factors, related to either prior arrests or the instant offense, for which con-viction has not been obtained.

The foregoing decisions of the Second District is consistent with the views expressed by the United States Supreme

Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) where the Court recognized that in discharging his duty of imposing a proper sentence, the trial judge is authorized, if not required, to consider all of the mitigating circumstances involved in the crime, and that the trial judge's possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant, if not essential to the selection of an appropriate sentence where sentencing discretion is granted. (Emphasis added). Id. at 57 L.Ed.2d 988, 989. See also United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582, 591, 592 (1978).

Consequently, Petitioner maintains that for purposes of departure, the trial court may consider and rely upon any factor, concerning the nature and circumstances of the offense as well as the defendant's background, which is not precluded from consideration by Fla.R.Crim.P. 3.701(d)(11).

Florida Rule of Criminal Procedure 3.701(b)(6) provides:

> While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.

While the guidelines themselves do not define "clear and convincing reasons," the Fourth District reasoned in Mischler v. State, 485 So.2d 37, 40 (Fla. 4th DCA 1984), in dealing specifically with what constitutes clear and convincing reasons for departure from the guidelines that:

> Clear and convincing reasons for departure have been held in Florida to include violation of probation, repeated criminal convictions, crime "sprees" or binges," careers" of crime, extraordinary mental or physical distress inflicted on the victim and extreme risk to citizens and law enforcement officers. We ask ourselves: What do all these reasons have in common? The answer appears to be an excess in crime which either results in repetitive convictions, successive probation violations which decry the likelihood of rehabilitation or unusual physical or psychological trauma to the victim. To that, we now add crimes committed in a repugnant and odious manner.

Further, in view of the Sentencing Commission's stated intention that the guidelines are not meant to usurp judicial discretion, Fla.R.Crim.P. 3.701(b)(6), Petitioner submits that the proper standard of review in guidelines cases is whether the trial court's departure constitutes an abuse of discretion. Put simply, before a departure from the sentencing guidelines can be reversed on appeal, there must be a clear demonstration of an abuse of discretion by the trial judge.

Judicial discretion, in this sense, having been defined as the power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court, Hair v. Hair, 402 So.2d 1201, 1204 (Fla. 5th DCA 1981), pet. for rev. denied, 412 So.2d 465 (Fla. 1982), is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Hair v. Hair, supra at 1204, citing with approval Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).

Accordingly, where there is fair support in the record for one or more rational reasons advanced by the trial judge as a basis for imposition of a sentence outside of guidelines recommended range, it cannot be said that the trial judge, in departing, abused his discretion and the cause should therefore be affirmed. This proposition is nothing more than recognition of the well established principle that if a trial judge's order, judgment or decree is sustainable under any theory revealed by the record on appeal, notwithstanding that it may have been bottomed on an erroneous

theory, erroneous reason, or an erroneous ground, the order, judgment or decree will be affirmed. Savage v. State, 156 So.2d 566, 568 (Fla. 1st DCA 1963), cert. denied, 158 So.2d 518 (Fla. 1963). See, also, Martin v. State, 411 So.2d 987, 989 (Fla. 4th DCA 1982). While not specifically articulated, this principal has been employed by the lower court and other district courts to uphold departures where the trial court relied upon permissible as well as impermissible reasons for departure. See, Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984), clarified September 7, 1984; Swain v. State, ___So.2d___ (Fla. 1st DCA 1984)[9 FLW 1820]; Mitchell v. State, ___So.2d___ (Fla. 1st DCA 1984)[9 FLW 2107]; Webster v. State, ___So.2d___ (Fla. 2d DCA 1984)[9 FLW 2419].

Thus, when a trial judge's departure from the sentencing guidelines is predicated upon at least one clear and convincing reason and the sentence imposed is within the statutory parameters for the convicted offense, the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons. To hold otherwise would inhibit the listing of all reasons considered by the trial judge to constitute a bona fide basis for departure in the particular case and have the insalubrious effect of compelling the trial judge to search for and list only those reasons enjoying judicial approval in an effort to insure that his

sentencing decision will withstand appellate scrutiny. This result would make a mockery of the guidelines and assign the highest priority to form rather than substance.

The Petitioner is not unmindful of the recent decision by this Court in Albritton v. State, 10 FLW 426 (Fla. August 29, 1985), which is not yet final. In Albritton, supra, this court employed the standard in Chapman v. California, 386 U.S. 18 (1967) to hold that where both valid and invalid reasons are given for departure the reviewing court should remand for resentencing unless the state can demonstrate beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence. It is submitted that this decision places an unreasonable burden upon the trial court and upon the state in both the trial and appellate tribunal. If permitted to stand, Albritton, supra, will require the trial court to determine in each case beyond a reasonable doubt that if any of the various reasons which may be given for a departure sentence are later determined to be invalid, those reasons did not affect the departure sentence. Failing this, the higher standard imposed in Albritton will require a reversal for resentencing in almost every case for it will be virtually impossible for the state to meet the required standard of proof in the Appellate Court. It is respectfully submitted that it should be assumed by a reveiwing court that where a

trial judge delineates several reasons for a departure sentence he deems each of these reasons of equal importance and sufficient for the departure. If one or more reasons are determined invalid this should not infiltrate the valid departure reasons.

Moreover, Albritton, supra, imposes a higher standard than that required for determination of the propriety of a death penalty under Section 921.141, Fla.Stat. (1983). Funchess v. State, 399 So.2d 356 (1981), cert. den., 102 S.Ct. 493, 454 U.S. 957, 70 L.Ed.2d 261; Francois v. State, 407 So.2d 885 (1981), cert. den., 102 S.Ct. 3511, 458 U.S. 1122, 73 L.Ed.2d 1384, reh. den., 103 S.Ct. 319, 459 U.S. 983, 74 L.Ed.2d 295; Dobbert v. Strickland, 532 F.Supp 545 (D.C.M.D. Fla.)(1982), affirmed, 718 F.2d 1518, reh. den., 720 F.2d 1294, cert. den., 104 S.Ct. 3591, 82 L.Ed.2d 887; Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). Thus, if the facts and circumstances appearing in the record demonstrate clear and convincing reasons for the death penalty the sentence should be affirmed although the trial judge gave one or more circumstances which had not been sufficiently shown. Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979).

Therefore, it would seem this court should reject the standard of proof enunciated in Albritton, supra whereby the

burden is placed upon the state to prove beyond a reasonable doubt that an invalid reason for departure from the recommended guideline sentence did not effect the departure sentence. It is submitted that a more reasonable standard that should be adopted is one whereby if the record on appeal, considered as a whole reflects that the trial court was justified by clear and convincing reasons to impose a departure sentence, that sentence should be affirmed although the trial judge may have expressed one or more invalid reasons for departure.

In the case sub judice, it is evident from the record that the trial judge formed a firm judgment, as expressed in open court on February 3, 1984 (T.242-245) and by written order on February 22, 1984 that this was an unprovoked, senseless (controversy about $5.00) shooting of a defenseless victim, who fled into his home in an attempt to avoid a confrontation, was shot three times through the closed door and as a result was left confined to a wheelchair and paralyzed for life. Clearly, these were valid clear and convincing reasons for departure from the recommended guideline sentence, as the psychological impact upon the victim was enormous. Williams v. State, 454 So.2d 790 (Fla. 5th DCA 1984); Webster v. State, 461 So.2d 1043 (Fla. 2d DCA 1984); Moore v. State, 468 So.2d 1081 (Fla. 3d DCA 1985); Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985).

Petitioner submits that this one written reason which the lower court found to be a clear and convincing reason for departure was properly relied upon by the trial judge and found an adequate basis upon which to predicate a departure. Accordingly, the decision of the lower tribunal should be quashed and the judgment and sentence imposed by the trial court should be affirmed.

## CONCLUSION

Petitioner contends that for the purposes of departure from the sentencing guidelines, the trial court may consider and rely upon any factors concerning the nature and circumstances of the offense as well as the defendant's background, which is not precluded from consideration by Fla.R.Crim.P. 3.701(6)(11).

Since the sentencing function has been traditionally recognized as an area where the trial courts exercise discretion which, until the advent of the guidelines, was almost wholly unbridled, Petitioner maintains that the only proper standard of review is whether the trial court, in departing, abused its discretion.

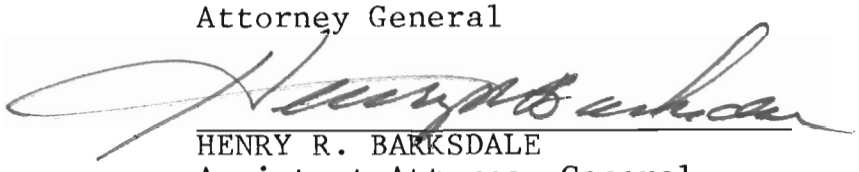
In applying this standard of review, where a trial judge's departure from the sentencing guidelines is predicated upon at least one clear and convincing reason and the sentence imposed is within the statutory parameters for the convicted offense, the sentence must be affirmed notwithstanding the presence of one or more impermissible reasons.

Therefore, Petitioner respectfully urges this Court to quash the decision of the lower court, affirm Respondent's judgments and sentences, and answer the certified question as follows:

WHEN A TRIAL JUDGE'S DEPARTURE FROM THE SENTENCING GUIDELINES IS PREDICATED UPON AT LEAST ONE CLEAR AND CONVINCING REASON AND THE SENTENCE IMPOSED IS WITHIN THE STATUTORY PARAMETERS FOR THE CONVICTED OFFENSE, THE SENTENCE MUST BE AFFIRMED NOTWITHSTANDING THE PRESENCE OF ONE OR MORE IMPERMISSIBLE REASONS.

RESPECTFULLY SUBMITTED, on this 17th day of September, 1985, at Miami, Dade County, Florida.

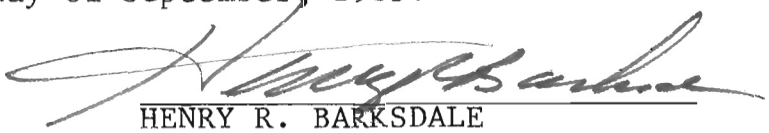
JIM SMITH
Attorney General



HENRY R. BARKSDALE
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was furnished by mail to ARTHUR CARTER and JOHN LIPINSKI, Special Assistant Public Defenders, 1441 N.W. North River Drive, Miami, Florida 33125, on this 17th day of September, 1985.



HENRY R. BARKSDALE
Assistant Attorney General

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