

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,493

THE STATE OF FLORIDA,

Petitioner,

vs.

WILLIAM HEAD,

Respondent.

FILED

SID J. WHITE

OCT 28 1985

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

* * * * *

ON PETITION FOR DISCRETIONARY REVIEW

* * * * *

REPLY 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

TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT.....	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT.....	3
CONCLUSION.....	6
CERTIFICATE OF SERVICE.....	7

TABLE OF CITATIONS

CITES

PAGE

Albritton v. State
10 FLW 426 (Fla. August 29, 1985).....4

Dobbert v. State
375 So.2d 1069 (Fla. 1979).....4

Head v. State
So.____, 10 FLW 1783 (Fla. 3d DCA July 23,
1985).....1

Hurt v. State
468 So.2d 1100 (Fla. 1st DCA 1985).....4

Moore v. State
468 So.2d 1081 (Fla. 3rd DCA 1985).....4

Webster v. State
461 S.2md 1043 (Fla. 2d DCA 1984).....4

William v. State
454 So.2d 790 (Fla. 5th DCA 1984).....4

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 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).

SUMMARY OF THE ARGUMENT

The Petitioner argues that the standard which should be employed in this case is that if the record, considered as a whole reflects justification for a departure sentence, unless the reasons for such departure are precluded by Fla.R. Crim.P.3.701(6)(11), the sentence should be affirmed, although one or more impermissible reasons are present. In the instant case the psychological impact upon the victim was alone sufficient to justify the sentence imposed by the trial court.

ARGUMENT

QUESTION CERTIFIED

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.RCRIM.P.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 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 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.

The basic thrust of the argument advanced by the Respondent in their brief is that this courts decisions in Albritton v. State, 10 FLW 426 (Fla. August 29, 1985), and its progeny mandate that the instant case be affirmed and remanded to the trial court for resentencing.

The Petitioner contends that a more reasonable standard that should be applied to the case sub judice is one whereby if the record considered as a whole evidences the trial court in its discretion was justified by clear and convincing reasons to depart from the recommended guide line sentence, even through one or more of these reasons may prove invalid, the sentence should be affirmed. Dobbert v. State, 375 So.2d 1069 (Fla. 1979)

In the present case it appears abundantly clear that the reasons for the departure sentence which permeates the entire sentencing proceedings (T: 242-245) was the senseless shooting by Respondent of a completly innocent victim who suffered an overriding psychological impact by being left paralyzed for life. This alone was sufficient clear and convincing reason for departure. Williams v. State, 454 So.2d 790 (Fla. 5th DCA 1984); Webster v. State, 461 So.2nd 1043 (Fla. 2d DCA 1984); Moore v. State, 468 So.2d 1081 (Fla. 3rd DCA 1985); Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985).

Therefore Petitioner submits that the decision of the lower tribunal should be quashed and the judgment and sentence of the lower court 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 PRE-DECATED 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 24 day of October 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 24 day of October 1985.



HENRY R. BARKSDALE
Assistant Attorney General