IN THE SUPREME COURT

STATE OF FLORIDA

WILLIE SCURRY, JR.,

Petitioner,

v.

CASE NO: 67,589

STATE OF FLORIDA,

Respondent.

/

INITIAL BRIEF ON THE MERITS

ON BEHALF OF PETITIONER

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PRELIMINARY STATEMENT

The Petitioner and the Respondent were the Defendant and the State respectively in the trial court below and the Appellant and the Appellee, respectively, in the District Court of Appeal. They will be referred to in this Brief as they were in the trial court. The only issue raised in these proceedings was the departure by the trial court from the recommended guidelines sentencing range. The Record on Appeal consists of the docket instruments and the transcripts of trial and sentencing proceedings. The docket instruments are contained in one separate volume and reference thereto will be designated by "R" followed by the appropriate page number. Volumes II and III contain the transcript of trial proceedings and reference thereto will be designated by "T" followed by the appropriate page number. Volume IV of the record contains the transcript of

sentencing proceedings and reference thereto will be designated by "S" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged by indictment with the first degree murder of John Wayne Scurry, by shooting the victim with a firearm on March 4, 1983. (R 1-2). Jury trial proceedings were conducted on October 13-14, 1983. (T 1, R 16-17). The following is a summary of the evidence presented at trial.

On the morning of March 4, 1983, the Defendant, his brother, John Wayne Scurry, also known as "Pokey", their father and sister, and several others, were in the vicinity of a Monticello, Florida, business known as "Ganzy's Store". Some or all of the family members had been drinking that morning and sometime close to the noon hour an argument ensued between the Defendant and his family members. (T 37-41, 63-65). The Defendant then left the area, walking easterly towards his home.

He returned approximately 10 to 15 minutes later. On his way he passed by a funeral home and made a comment to the proprietor, Willie Sloan, to the effect, "You'll have one in the funeral home in a few minutes." (T 103-106, 111-112). Gene Sanders had also seen the Defendant some two blocks east of Ganzy's Store "tussling" over a gun with a woman who was saying "Don't do it". Sanders then heard a gun shot 5 to 10 minutes later. (T 79-83, 95-96, 99-100, 111-112, 135-137).

There was a contradiction in testimony of the State's witnesses as to exactly how the shooting took place. One witness, Charles Hill, testified that as the Defendant came

back in the vicinity of Ganzy's Store, his brother, Pokey, came out of the door of a nearby apartment and told the Defendant to put the gun up before he got into trouble. The Defendant said something which was not discernible by Hill and then shot his brother. The victim grabbed his stomach and then fell, at which point the Defendant headed back in the direction in which he had come. The two men were approximately 20 feet apart at the time the shot was fired, according to Hill. (T 52).

On the other hand, Bessie Lee Conway, who had been standing outside the funeral home when the Defendant passed by, testified that the Defendant had pulled his brother out of the apartment, that they had tussled on the ground, and that as they stood back up the Defendant shot his brother. (T 118-120). There was also testimony from emergency medical technicians and from Deputy Sheriff Ricky Davis confirming that there were two knives found on the victim, inside his shirt pocket. (T 202-215). There was no testimony presented as to whether the victim had these knives or any other weapon in his hand at the time of the fatal shot.

As the Defendant was leaving the vicinity, the police arrived, stopped him, took away the gun, and arrested him. (T 153-155, 165-168).

The Defendant presented no testimony or other evidence and his Motions for Judgment of Acquittal were denied. (T 216-222). The defense theory was that the Defendant was intoxicated

to the point that he could not form the required specific intent for first degree murder. (T 23-25, 30).

The jury apparently agreed and returned a verdict of guilty of the lesser included charge of second degree murder with a firearm. (R 16). The Defendant was thereafter adjudicated guilty of that offense and sentenced to thirty years in the Department of Corrections. (R 40-44). This sentence was in excess of the recommended sentence under the sentencing guidelines, which the Defendant had chosen to have applied in his case. The guidelines recommended sentencing range was between 12 and 17 years, although the author of the Pre-Sentence Investigation Report recommended a departure and a sentence of 25 years incarceration. (S 6, 13). The Court, in sentencing the Defendant to 30 years incarceration entered a separate written Order setting forth the reasons for the departure from the guidelines range. (R 45-47). The Court's reasons for departure were as follows:

> "1. The offenses was carried out with particular cruelty in that the offense was committed in the presence of family members and close friends.
>
> 2. The defendant fired the fatal shot from a public street while the victim was in the doorway of his own home evincing a flagrant disregard for the safety of others.
>
> 3. The offense was planned by the defendant as evidenced by the fact that after he argued with the victim he walked approximately three tenths of a mile to get his rifle and returned the same distance to the scene and said to an undertaker along the route 'wait here I'm gonna bring you one in a few minutes' or words to that effect. The defendant then sat down on a bench across from the victim's home for several minutes before he shot the victim.

'4. The offense for which the defendant was sentenced was committed in a calculated manner without pretense of moral or legal justification or provocation.

5. The victim suffered great personal pain and injury as a result of the shooting, dying more than thirty hours after he was initially shot, during which time heroic medical and surgical procedures were performed in an effort to sustain his life.

6. The defendant showed no remorse for having committed the offense for which he was sentenced as evidenced by his courtroom demeanor and non-caring attitude throughout the proceedings.

7. The defendant committed the offense by using a rifle firearm.

8. The defendant, prior to committing the murder had been drinking. The defendant had begun drinking at approximately 8:00 a.m. on the Friday morning of the murder. The defendant has an established pattern of drinking as he did the morning of the murder.

9. The defendant has twice before been given periods of probation after convictions. Apparently the defendant learned nothing from these past periods of probation, in that he has not been able to conform his behavior to societal norms and standards.

10. A lesser sentence is not commensurate with the seriousness of the defendant's crime.

11. The sentence imposed in this case is necessary to deter others. The portion of Monticello in which the victim was killed is an area with small grocery stores that sell alcoholic beverages. Some of the people who hang around this portion of Monticello frequently drink to excess and cause trouble and problems. Frequently firearms and other deadly weapons are involved in the commission of crimes in this area. The crime was committed in front of one of these groceries where the defendant has been drinking prior to his murdering the victim in front of a number of these people.

12. The Parole and Probation Officer who prepared the presentence investigation recommended the defendant be sentenced outside the sentencing guidelines and receive not less than a 25 year commitment to the Deparmtent of Corrections.

'13. In the court's opinion the evidence as presented could have easily sustained a conviction of murder in the first degree."

(R 45-47; Appendix, p.2-3).

The Defendant appealed the case challenging only the sentencing departure. In its Opinion filed June 27, 1985, the District Court of Appeal found reasons number 4, 6 and 13 to be improper as grounds for departure. The Court concluded, however, that because a majority of the trial judge's reasons for departure were valid, clear and convincing, his reliance on the three impermissible reasons constituted only harmless error. However, the Court certified the following question as one of great public importance:

"WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.CR.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 A RESENTENCING."

(Appendix, p.4-5).

The Defendant's Petition for Rehearing was denied by Order of the District Court of Appeal dated August 5, 1985, and these proceedings ensued.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in this case in departing to the extent that it did from the guidelines sentence. There are several common threads that run through the thirteen different reasons set forth by the trial court justifying the departure.

A review of all of these reasons suggests very strongly that the underlying premise or basis upon which the trial court departed was a fundamental disagreement with the jury verdict. This is abundantly clear through the many references by the trial court to certain evidence, leading to certain conclusions, all of which were impliedly rejected by the jury in their verdict.

Some of the reasons set forth by the trial court are based upon very common and ordinary factual elements of the offense itself, and are in some cases, merely a recitation of the allegations in the charge. Also, some of the reasons cited by the trial court pertain to factors which are already considered and utilized in arriving at the presumptive sentence under the guidelines.

In short, the trial court failed to give clear and convincing reasons why the presumptive sentence of the guidelines was not appropriate in this case. Even assuming, however, that there was some permissible reason for departure, there is no factual support in the record for the extent of the departure, i.e., doubling the recommended sentence. Accordingly, the

judgment and sentence should be reversed and remanded with directions that the Defendant be sentenced within the guidelines range, or alternatively, the Defendant be sentenced by a new judge.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT IMPROPERLY DEPARTED FROM THE SENTENCING GUIDELINES.

The Defendant in this case was sentenced to 30 years in the Department of Corrections. (R 40-44). The recommended guidelines sentencing range was between 12 and 17 years. (R 6, 13). The District Court of Appeal found three of the thirteen reasons used by the trial court as grounds for departure from the recommended guidelines sentence to be improper and impermissible. The Defendant would contend that the District Court of Appeals did not go far enough. None of the reasons set forth by the trial court are clear and convincing reasons to depart from the recommended guidelines sentence.

The stated purpose of the sentencing guidelines is to "eliminate unwarranted variation in the sentencing process by reducing the subjectivity and intepreting specific offense - and offender-related criteria and in defining their relative importance in the sentencing decision." Rule 3.701(b), Florida Rules of criminal procedure. This court recently reaffirmed that this provision means just what it says in Albritton v. State, 10 F.L.W. 426, (Fla. 1985). This Court concluded in Albritton:

> "Departure from the guidelines are permitted, but judges must explain departures in writing and may depart only for reasons that are 'clear and convincing'. Fla.R.Cr.P. 3.701(b)(6), (d)(11) Moreover, the guidelines direct that departures 'should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence.' Fla.R.Cr.P. 3.701(d)(11). Therefore, while the rule does not eliminate judicial discretion in sentencing, as respondent argues, it does seek to discourage departures from the guidelines."
>
> 10 F.L.W. at 425.

This Court also held that the extent of the departure, as well as the departure itself, was reviewable by the appellate court. The Court concluded:

> "In our view, and we so hold, the proper standard of review is whether the judge abused his judicial discretion. An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and the record to determine if the departure is reasonable."
>
> 10 F.L.W. at 426.

An examination of the reasons set forth by the trial court justifying its departure in this case, considered in light of the stated purpose of the guideline rules and this Court's opinion in Albritton, supra, reveals a very thinly disguised disagreement by the trial court with the severity of the sentence determined to be appropriate under the guidelines by considering the appropriate factors. Common threads run through many of the reasons, but each one will be considered separately.

> "1. The offense was carried out with particular cruelty in that the offense was committed in the presence of family members and close friends."

This conclusion by the trial court is not supported by the evidence at trial or otherwise in the record. The only persons to testify as eye witnesses in the trial were neither family nor identified as close friends. Although the Defendant and other family members had been together drinking and arguing earlier, by the time the Defendant had returned with a rifle, the victim had already gone inside an apartment and there is no indication in the evidence that any of the other family members were immediately present. One of the witnesses, Charles Hill, testified when asked where the Defendant went when he came back with the gun:

> "When he came across the road, he came walking straight toward where we were standing, and after he didn't see nobody, he walked over by the store, and I didn't see him then after he walked over by the store."
>
> (R 49).

Proof supporting a departure must be clear and convincing and "implication is not enough". Ryder v. State, ____ So.2d ____, 10 F.L.W. 648 (Fla. 5th DCA 1985); Wyman v. State, 495 So.2d 118 (Fla. 1st DCA 1984); Brooks v. State, 456 So.2d 1305 (Fla. 1st DCA 1984); Lindsey v. State, 452 So.2d 485 (Fla. 2nd DCA 1984).

Even if the trial court's conclusion was correct, the fact that the victim was shot in front of family members or

close friends would not be a clear and convincing reason to aggravate the Defendant's sentence. Unfortunately, homicides and aggravated batteries very frequently occur within families and family members are often the witnesses of these crimes, as well as the victim. Routine facts which are common and have no real relevance to sentencing have been held not to be valid reasons for departure. Thomas v. State, 461 So.2d 234 (Fla. 1st DCA 1984); Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984).

Finally, it should be noted that cruelty generally implies some sort of specific intent and anticipated result. The jury impliedly rejected any imputed cruelty on the part of the Defendant in this case by its refusal to convict of the crime charged, i.e., first degree murder.

> "2. The Defendant fired the fatal shot from a public street while the victim was in the doorway of his home evicing a flagrant disregard for the safety of others."

This conclusion is likewise not supported by the record. There is a dispute in the evidence as to either exactly how, when, and under what circumstances the fatal shot was fired. One of the State's witnesses, Gene Sanders, testified that the victim was shot in the doorway from 6 to 8 feet away. (R 84-88). Another State witness, Bessie Lee Conway, testified that the Defendant had pulled the victim out of his house and that they were "tussling" on the ground when the gun went off. (R 118-120).

Obviously, a conviction for second degree murder, by its very nature, evidences a disregard for the safety of others; so does driving under the influence of alcohol, or reckless driving, or an armed robbery of a bank or other place in which the public is likely to be. This is not a sufficient reason to aggravate the sentence.

> "The offense was planned by the defendant as evidenced by the fact that after he arged with the victim he walked approximately three tenths of a mile to get his rifle and returned the sme distance to the scene and said to an undertaker along the route 'wait here I'm gonna bring you one in a few minutes' or words to that effect. The defendant then sat down on a bench across from the victim's home for several minutes before he shot the victim."

The conclusion that the crime was "planned" implies a deliberateness or premeditation which was impliedly rejected by the jury in its refusal to find the Defendant guilty for first degree murder as charged. It is interesting that the District Court of Appeal rejected both reason number 4 and reason number 13,[1] for essentially the same reason. As the Court stated:

---

[1] 4. The offense for which the defendant was sentenced was committed in a calculated manner without pretense of moral or legal justification or provocation.

13. In the Court's opinion the evidence as presented could have easily sustained a conviction of murder in the first degree.

> "Reason number four is an impermissible reason for a departure from the guidelines sentence. By convicting Scurry of the lesser included offense of second degree murder, the jury obviously did not feel the crime was committed with the necessary premeditation or calculation to sustain a conviction for first degree murder. Therefore, the trial judge included a factor relating to the instant offense for which a conviction was not obtained, which violates Florida Rule of Criminal Procedure 3.701(d)(11). The trial judge, in doing so, 'improperly usurped the jury's function when, in fact, the jury rejected the allegations that appellant commited the crime' with the necessary premeditation. Carter. v. State, 10 F.L.W. 664, 665 (Fla. 1st DCA March 13, 1985). Cf. Burch v. State, 462 So.2d 548 (Fla. 1st DCA 1985); Brooks v. State, 456 So.2d 1305 (Fla. 1st DCA 1984). Under the same rationale, reason number thirteen is an impermissible reason for departure."
>
> (Appendix, p.3-4).

It is difficult to imagine a murder that is planned but is yet at the same time not calculated or premeditated. It is suggested that reasons 3, 4 and 10 are essentially elaborations of reason number 13. That is, the trial court simply did not agree with the jury's verdict, thought it was a mistake, and was determined to "correct" that mistake.

> "The offense for which the defendant was sentenced was committed in a calculated manner without pretense of moral or legal justification or provocation."

The District Court of Appeal properly rejected this reason.

"5. The victim suffered great personal pain and injury as a result of the shooting, dying more than thirty hours after he was initially shot, during which time heroic medical and surgical procedures were performed in an effort to sustain his life."

This conclusion is supported by the record. Again, however, as vile and detestable as it may be, the shooting in this case is not so unusual or uncommon, or any different from any other second degree murders, regardless of how the homicide is accomplished. There is no evidence that the Defendant purposely tortured his victim or intended the great personal pain and injury the court refers to. The jury found that the Defendant acted in a manner evidincing a depraved mind regardless of human life and the facts and circumstances are consistent with that. That does not mean the sentence should be aggravated. Otherwise, all second degree murders would be so aggravated.

"6. The defendant showed no remorse for having committed the offense for which he was sentenced as evidence by his courtroom demeanor and non-caring attitude throughout the proceedings."

The District Court of Appeal properly rejected this reason.

"7. The defendant committed the offense by using a rifle firearm."

This factor is inherent in the charge which alleged that the Defendant killed the victim by "shooting him with a firearm". (R 1). Callaghan v. State, 462 So.2d 832 (Fla. 4th DCA 1984);

Bowdoin v. State, 464 So.2d 596 (Fla. 4th DCA 1985). This reason could just as easily have read "the defendant committed the offense by using a butcher knife, a baseball bat, [insert weapon of your choice]." It is submitted that this is not the type of reason or justification that it anticipated in the sentencing guidelines as being justification for departure.

> "8. The defendant, prior to committing the murder had been drinking. The defendant had begun drinking at approximately 8:00 a.m. on the Friday morning of the murder. The defendant has an established pattern of drinking as he did the norming of the murder."

In Owen v. State, 441 So.2d 1111 (Fla. 3rd DCA 1983), the defendant was charged with first degree murder and the jury returned a verdict of second degree murder. In justifying retention of jurisdiction, the court stated that "defendant consumed enough alcohol over a period of time to bolster courage to commit the murder". The appellate court reversed the trial court's retention of jurisdiction holding thatthis conclusion was contrary to the jury verdict. 441 So.2d at 1113.

Intoxication is an absolute defense to any crime requiring a specific intent. Edwards v. State, 428 So.2d 357 (Fla. 3rd DCA 1983); Russell v. State, 373 So.2d 97 (Fla. 2nd DCA 1979). This was the defense urged in this case. (R 23-25, 30). As the court noted in Owen v. State, supra, to enhance a defendant's sentence because he raised this defense successfully at trial, has a chilling effect on defendant's assertion of his right to trial.

This Court had held that it is error to utilize a mitigating circumstance, or its absence, as an aggravating factor. Miller v. State, 373 So.2d 882 (Fla. 1979). (trial judge's use of defendant's mental illness as aggravating factor.) It would be ironic indeed if the defense of intoxication which was apparently favorably received by the jury and resulted in a conviction of a lesser included offense, was to be considered appropriate in disregarding the jury's verdict and aggravating the sentence.

> "9. The defendant has twice before been given periods of probation after convictions. Apparently the defendant learned nothing from these past periods of probation, in that he has not been able to conform his behavior to societal norms and standards."

The fact that the Defendant had twice been on probation is a factor already included in reaching the recommended guidelines sentence and is not a proper reason for departure. Albritton v. State, 10 F.L.W. 426 (Fla. 1985); Hendrix v. State, 10 F.L.W. 425 (Fla. 1985); Napoles v. State, 10 F.L.W. 337 (Fla. 1st DCA 1985); Burch v. State, 462 So.2d 549 (Fla. 1st DCA 1985). It should be noted that this is not a case in which the Defendant violated probation, Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984). Nor is this a case where there is an allegation or evidence that the Defendant was not amenable to rehabilitation. Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984).

"10. A lesser sentence is not commensurate with the seriousness of the defendant's crime."

Again, this statement merely reflects a disagreement by the trial court with the guidelines sentence recommended. It is suggested that this statement, in conjunction with the reasons set forth by the trial court in number 12, 13, 3, 4, 7, all underline the basic reason for departure, i.e., the trial court disagreed with the jury's verdict. A departure for this reason, with others annexed largely as rationalizations, contradicts the entire purpose and philosophy of the guidelines. As the dissenting opinion of Justice Sharp in Hendrix v. State, 455 So.2d 449 (Fla. 2nd DCA 1984), correctly points out:

> "The trial judge in this case thought the presumptive sentence was too light of punishment for this crime and this defendant with his prior record. I agree. However, the degree of punishment afforded by the guidelines, or lack thereof, should not be grounds for enhancement. The basic problem is that generally light punishments programmed as presumptively correct in the guidelines.
>
> The legislature can remedy this problem. However, if in the meantime the courts render the guidelines meaningless by allowing departures in violation of guideline rules and mandates, there will be nothing left to remedy. Sentencing guidelines in Florida will become an interesting but failed social experiment."
>
> 455 So.2d at 451.

"11. The sentence imposed in this case is necessary to deter others. The portion of Monticello in which the victim was killed in an area with small grocery stores that sell alcoholic beverages. Some of the people who hang around this portion of Monticello frequently drink to excess and cause trouble and problems. Frequently firearms and other

'deadly weapons are involved in the commission of crimes in this area. The crime was committed in front of one of these groceries where the defendant has been drinking prior to his murdering the victim in front of a number of these people."

While deterence of others is a legitimate reason for punishment, it should not be used as a basis for aggravation of a sentence. Were it otherwise, "all punishments would automatically be aggravated, the very antithesis of what the guidelines were designed to accomplish." Williams v. State, 462 So.2d 23 (Fla. 4th DCA 1984).

"12. The Parole and Probation Officer who prepared the presentence investigation recommended the defendant be sentenced outside the sentencing guidelines and receive not less than a 25 year commitment to the Department of Corrections."

This reason is essentially "passing the buck". The recommendation of the author of the presentence investigation report is not a justification for departure. The court should independently exercise its function in determining the proper sentence. At best, it is only a culmination of those factors which are presented in the presentence investigation report.

"13. In the court's opinion the evidence as presented could have easily sustained a conviction of murder in the first degree."

The District Court of Appeal properly rejected this reason as a grounds for departure.

Thus, none of the reasons cited by the trial court are clear and convincing under the facts and circumstances of this case to justify a departure from the recommended guidelines sentence.

ISSUE II

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.CR.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 A RESENTENCING.

In the recent case of Albritton v. State, 10 F.L.W. 426 (Fla. 1985), this Court addressed this same issue. The Fifth District Court of Appeal had held in Albritton that "a departure sentence can be upheld on appeal if it is supported by any valid ("clear and convincing") reason without the necessity of a remand in every case." Albritton v. State, 458 320, 321 (Fla. 5th DCA 1984). The District Court of Appeal in Albritton also held that the extent of a departure from the guidelines is not subject to appellate review provided it does not exceed the maximum statutory sentence authorized by the legislature for the offense in question. This Court disagreed:

> "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 and the case remanded for resentencing unless the state is able to show beyond a reasonable doubt that the absence of the invalid reasons would not have effected the departure sentence."
>
> Albritton, supra, at 426.

As to the extent of departure this Court held:

> "In our view, and we so hold, the proper standard of review is whether the judge abused his judicial discretion. An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and the record to determine if departure is reasonable."

Albritton v. State, supra, at 526.

The question then in this case is whether the State is able to show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence. If one takes a very cynical view of sentencing one could very easily argue that a trial court generaly makes up his mind to depart based upon a fundamental disagreement with the severity of the sentence, and then "rationalizes" the departure by formulating reasons that the rules or case law support may justify that departure. Under this reasoning almost every departure that was based in part at least on a permissible reason would be upheld.

It is also suggested that it is not proper, as the District Court of Appeal apparently did in this case, to count the number of reasons given by a trial court and affirm or reverse depending on whether the majority of those reasons are permissible or impermissible.

The better reasoned approach, that suggested by the decision in Albritton, is that the trial court should be given the benefit of the doubt. If an appellate court determines that certain reasons are impermissible and should not be considered, it should be presumed that the trial court will again review his decision and consciously disregard those reasons which he relied upon in reaching his determination of an appropriate sentence before.

If the extent of the departure is also reviewable by the appellate court, it would seem to be extremely difficult to make a determination that the absence of one or more impermissible reasons would not have affected the decision to depart, or at least the decision as to the extent of departure.

There is nothing in the record of the present case to suggest or support the implied finding that the Defendant's recommended guideline sentence should be doubled in order for the sentence to be appropriate. It is suggested that, in accord with Albritton, the greater the extent of departure, the greater the scrutiny that should be applied in the justification for that departure. In the present case, even if there is deemed to be one or more permissible reasons, those reasons cannot justify the extent of departure.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Defendant prays this Court will quash the decision of the District Court of Appeal and remand this case with directions that the Defendant be sentenced within the recommended guidelines range, or alternatively, that the Defendant be resentenced by a different judge with appropriate instructions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to WALLACE E. ALLBRITTON, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, and to MR. WILLIE SCURRY, JR., #098397, Cross City Correctional Institution, Post Office Box 1500, Cross City, Florida 32628, by United States Mail, this 26 day of September, 1985.

ATTORNEY FOR APPELLANT