

FILED

IN THE SUPREME COURT
STATE OF FLORIDA

SID J. WHITE
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WILLIE SCURRY, JR.,
Petitioner,

vs.

CASE NO: 67,589

STATE OF FLORIDA,
Respondent.

_____ /

PETITIONER'S REPLY BRIEF

OFFICE OF THE PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

TERRY P. LEWIS
SPECIAL ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 10508
TALLAHASSEE, FLORIDA 32302
(904) 222-2216

SUMMARY OF THE ARGUMENT

The facts and the issues raised in this appeal present a very classic example of a fundamental difference of opinion among the bench and bar as to the proper philosophical approach to guidelines issues. It is submitted that this court in Albritton v. State, 10 FLW 426 (Fla. 1985) has correctly taken a stance which requires that the stated purposes and goals of the guidelines be adhered to at sentencing. That is, departure from the guidelines is discouraged and a trial court will have to show "clear and convincing" reasons why a particular case is unique or unusual so as to justify a departure. If the guidelines are to be effective, it is essential that all concerned understand that the sentencing guidelines, by necessity, have eliminated some of the discretion traditionally exercised by sentencing courts.

Applying the Albritton rational and criteria to this case, it is apparent that a resentencing should be held. There are not clear and convincing reasons that distinguish this case sufficiently from others with similar charges and a similar situated defendant. Even more so, there certainly is not clear and convincing reasons in the record to justify the extent of departure.

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ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT IMPROPERLY DEPARTED FROM THE SENTENCING GUIDELINES.

The State argues that the thrust of the Petitioner's argument is that the trial judge erred in considering circumstances surrounding the offense. (Respondent's Brief, page 4). The Respondent has misunderstood the point of Petitioner's argument. It is not that the trial court erred in considering circumstances surrounding the offense. Rather, it is the fact that the trial court considered facts and circumstances that were in dispute and were impliedly rejected by the jury's verdict, and relied upon facts and circumstances that were very common and ordinary factual elements of the offense itself in departing from the guidelines recommended sentence.

The State argues that the sentencing guidelines are just that, guidelines, and that Petitioner's argument usurps the judicial discretion in the sentencing process which those guidelines intended. (Respondent's Brief, page 6).

The Petitioner would submit, however, that this apparent conflict in basic philosophy as to the nature of the guidelines and how they should be applied was resolved by this Court in Albritton v. State, 10 FLW 426 (Fla. 1985). As this Court stated:

"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 FLW at 425.

The Petitioner would submit that the above quoted language places a much stricter standard on the sentencing court than the State suggests. In order to depart from a recommended guidelines sentence, a sentencing court must answer, with clear and convincing reasons: "Why is this case different from other cases with similar charges or defendants with similar criminal histories and other similar factors?" A mere recitation of the facts which constitute the elements of the offense, or facts which are disputed or impliedly rejected by a jury's verdict, is not sufficient.

The State argues that the Petitioner was sentenced to thirty years and "should be grateful for it." (Respondent's Brief, page 3-4). All of the cases cited by the State, however, on this point, were decided prior to this Court's decision in Albritton v. State, supra, which provides that the extent of departure is reviewable. It is suggested that there is nothing in the record in this 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 if the sentencing guidelines are

to be effective trial courts will have to do more than pay "lip service" to the guidelines' requirements that there be clear and convincing reasons before there is a departure from the guideline range. A mere philosophical difference with the recommended sentence should not be a basis for 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.

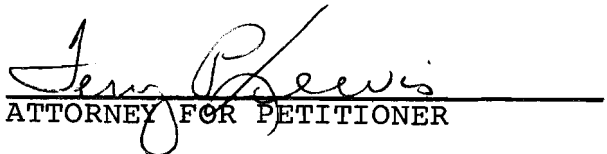
Respectfully submitted,



TERRY P. LEWIS
SPECIAL ASSISTANT PUBLIC DEFENDER
Post Office Box 10508
Tallahassee, Florida 32302
(904) 222-2216

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief has been furnished to WALLACE E. ALLBRITTON, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, and to MR. WILLIE SCURRY, JR., #098397, Post Office Box 1500, Cross City, Florida 32628, by United States Mail, this 6th day of November, 1985.



ATTORNEY FOR PETITIONER