

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
A SIX-CELL DEPARTURE IS NOT REASONABLE AND HENCE NOT JUSTIFIED WHERE THE ONLY REASON FOR DEPARTURE IS THAT THE DEFENDANT HAD VIOLATED HER PROBATION.	4
CONCLUSION	6
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

CASES CITED:

PAGE NO.

<u>Albritton v. State</u> 476 So.2d 158 (Fla. 1985)	3,4,5
<u>Albritton v. State</u> 458 So.2d 320 (Fla. 5th DCA 1984)	2,3,4
<u>Boldes v. State</u> 475 So.2d 1356 (Fla. 5th DCA 1985)	5
<u>Sutton v. State</u> 11 FLW 337 (Fla. 1st DCA February 6, 1986)	4,5

OTHER AUTHORITIES:

Rule 3.701(d)(11), Florida Rules of Crim. Procedure	5
Rule 3.701(d)(14), Florida Rules of Crim. Procedure	4

IN THE SUPREME COURT OF FLORIDA

DEBORAH ANN ADAMS,)
)
 Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
 Respondent.)
)
_____)

CASE NO . 67,705

PETITIONER'S INITIAL BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

By information filed February 19, 1979, the defendant was charged with the offenses of forgery and uttering a forgery. (R67,68) She pleaded guilty to both offenses and was placed on supervised probation. (R70) Following a probation revocation, on December 12, 1983, the defendant was placed on twenty-four months of community control. (R70)

On October 26, 1984, the defendant's supervisor filed an affidavit alleging violations of community control conditions 1, 5, 8, 10, and 13, by failing to submit truthful monthly reports, by violating laws, by failing to telephone her supervisor on a daily basis as instructed, by failing to perform fifty hours of public service work, and by failing to maintain accurate daily accounting of her activities. (R72-73)

Following a hearing, the court revoked the defendant's community control and departed from the recommended guideline sentence of any nonstate prison sanction by imposing consecutive sentences of four years imprisonment on each count. (R83-85, 95-96) The court's stated reason for the six-cell departure sentence was that the defendant had previously violated her probation. (R95)

On appeal to the District Court of Appeal, Fifth District, the defendant argued that the length of departure was unreasonable. The district court refused to address this issue, rendering the following opinion:

PER CURIAM.

AFFIRMED on the authority of Whitlock v. State, 458 So.2d 888 (Fla. 5th DCA 1984); Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984).

(Appendix)

A notice to invoke discretionary jurisdiction, based on express and direct conflict (the decision cited by the district court was pending before this Court) was filed on September 24, 1985. This Court accepted jurisdiction on February 4, 1986. This brief follows.

SUMMARY OF ARGUMENT

The instant opinion of the district court affirms the defendant's sentences on the basis of Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1985). Since this case has been reversed by this Court, Albritton v. State, 476 So.2d 158 (Fla. 1985), the case should be remanded to the district court with instructions to apply this Court's holding and rationale in Albritton. Under this Court's ruling in Albritton, only a one-cell departure can be justified on the basis of the reason given by the trial court.

ARGUMENT

A SIX-CELL DEPARTURE IS NOT
REASONABLE AND HENCE NOT
JUSTIFIED WHERE THE ONLY REASON
FOR DEPARTURE IS THAT THE
DEFENDANT HAD VIOLATED HER
PROBATION.

The trial court's departure from any nonstate prison sanction to two consecutive four-year sentences was based solely on the reason that the defendant had previously violated her probation. (R83-85,95-96) The district court of appeal affirmed the length of the departure relying on its decision in Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984), which case held that once there existed a valid reason for departure, the appellate court was precluded from considering the validity of the length of the departure.

This Court has reversed the fifth district's Albritton decision and has held that the extent of departure is subject to appellate review. Albritton v. State, 476 So.2d 158, 160 (Fla. 1985). An appellate court reviewing a departure sentence, this Court ruled, should look to the guidelines sentence, the extent of the departure, and the reasons given for the departure to determine if the departure is reasonable. Id. The case should, at least, be remanded to the district court for consideration in light of this Court's Albritton holding.

Here, the sole reason for the departure is that the defendant had violated her probation. This reason has been held by the rules of procedure and case law to justify merely a one-cell departure, and not a departure such as was given here. Fla.R.Crim.P. 3.701(d)(14); Sutton v. State, 11 FLW 337

(Fla. 1st DCA February 6, 1986); Boldes v. State, 475 So.2d 1356

(Fla. 5th DCA 1985). In Boldes, supra at 1357, the court stated:

It appears to us that if violation of community control or probation is the sole reason for departing from a guidelines sentence, that the amended rule has mandated the result that the sentence may be increased one bracket. However, if the increase is beyond one bracket, then other clear and convincing reasons must be given for the departure. Fla. R.Crim. 3.701(d)(11). An interpretation of the guidelines allowing unrestricted "departure" sentences solely for a violation of probation would, in effect, make the amended rule meaningless.
(footnote omitted)

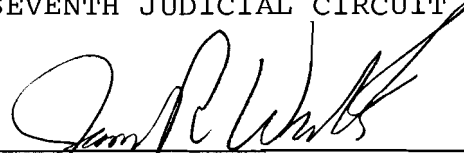
Therefore, the extent of departure was unreasonable and an abuse of discretion since the only reasonable departure based upon the reason given is a one-cell departure. This Court should vacate the petitioner's sentence and remand to the district court with instructions to apply Albritton and to approve only a one-cell departure.

CONCLUSION

BASED UPON the foregoing cases, authorities, policies, and facts, the petitioner requests that this Honorable Court vacate her sentences and remand with instructions to approve only a one-cell departure.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, FL 32014
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, FL 32014 and Ms. Deborah A. Adams, Inmate No. 321853, P. O. Box 147, Lowell, FL 32663 on this 24th day of February, 1986.



JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER