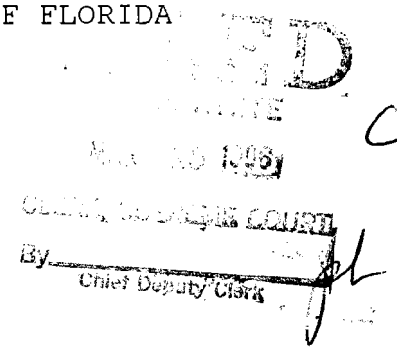
IN THE SUPREME COURT OF FLORIDA



JOHN ANTHONY CASTEEL, )

Petitioner, )

vs. ) CASE NO.: 68,260

STATE OF FLORIDA, )

Respondent, )

RESPONDENT'S BRIEF ON THE MERIT

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## PRELIMINARY STATEMENT

The State accepts the Preliminary Statement set forth in the initial brief and will use the designations set out therein. References to the initial brief will be by the symbol "IB" followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

The State accepts the statement of fact and of the case as set forth in the initial brief as a substantially accurate recitation of the events of this case.

## QUESTION CERTIFIED

The District Court of Appeal, First District has certified the following as a question of great public importance pursuant to Rule 9.030(a)(2)(v), F.R.App.P.:

> When an appellate court finds that a sentencing court relied both valid and invalid reasons for departure, what factors should the court weigh in determining whether it is convinced beyond a reasonable doubt that the absence of the invalid reason or reasons would not have affected the trial court's exercise of its discretion in departing from the guidelines.

Casteel v. State, No. BC-480, (Fla. 1st DCA January 3, 1986) [11 FLW 128].

## SUMMARY OF ARGUMENT

This cause has been certified by the district court as a question of great public importance. The district court has concluded, upon review, that three of the five grounds set forth as a basis for departing from the guidelines recommendation are convincing "beyond a reasonable doubt and that the trial court would have exceeded the guidelines sentence regardless of the improper reasons stated because of the particular circumstances of the offenses, the heinous, repugnant manner [the precise facts were set forth in a footnote] of commission, and the emotional trauma to the minor child present." Casteel v. State at p.128, see also n.3.

In certifying the question, the district court seeks guidance in determining what factors should be weighed, in cases where both valid and invalid grounds are set forth, in determine whether the trial court's exercise of discretion would be affected. The State submits that when such specific and articulable grounds as those set forth in the instant cause can be discerned from the record, and the factors declared invalid are essentially innocuous, the beyond a reasonable doubt/totality of circumstances standard is both appropriate and sufficient.

## POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING APPELLANT TO A TERM OF INCARCERATION BEYOND THE SENTENCING GUIDELINES RECOMMENDATIONS AND THE APPELLATE COURT DID NOT ABUSE ITS DISCRETION IN AFFIRMING THE SENTENCE EVEN THOUGH TWO OF THE FIVE GROUNDS CITED WERE DEEMED INVALID AS THE REMAINING GROUNDS WERE SO CLEAR AND CONVINCING THE TRIAL COURT'S EXERCISE OF DISCRETION IN DEPARTING FROM THE GUIDELINES WOULD NOT BE AFFECTED.

## ARGUMENT

Petitioner complains that the trial court erred by imposing sentences outside those recommended by the guidelines.[1] The State submits that when the entire record is considered in conjunction with the sentencing order, it is apparent that the trial court did not abuse its discretion in imposing a departure sentence. The justifications set forth are supported by the record and are clear and convincing reasons for the sentence imposed.

It is further apparent that the district court did not err in affirming the depature sentence. The district court disallowed two of the five grounds asserted by the

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[1] Petitioner was convicted of Sexual Battery with the use of a deadly weapon and Burglary of a dwelling with an assault and with a deadly weapon and was sentenced to 30 years on each count to be served concurrently. The recommended guidelines range was 17-22 years. R 66-74; T 957-991.

trial judge. Reason number three, Petitioner's pattern of criminal conduct which rendered a continuing threat to the community, was stricken as the ground was premised on the defendant's current and prior convictions. Hendrix v. State, 475 So.2d 1218 (Fla. 1985); Smith v. State, 479 So.2d 804, 808 (Fla. 1st DCA 1985). See, Casteel v. State, at 128. Also disallowed was Reason number five, lack of remorse by Petitioner. The district court concluded the factor was not supported by the record and was invalid. Id. citing Scurry v. State, 472 So.2d 779 (Fla. 1st DCA 1985).

The three remaining factor cited by the trial court were affirmed. Casteel at 128. These findings: use of the knife, the calculated manner in which the crime was committed and the unique circumstances in which the crime was committed which resulted in emotional trauma to the victim, were deemed sufficiently valid to support a departure from the guidelines recommendation. Id. Using the test set down by this Court in Albritton v. State, 476 So.2d 158 (Fla. 1985), the First District was able to find beyond a reasonable doubt that the sentences imposed would have been the same had the trial court not considered the two invalid factors. The number of invalid factors was not significant and the valid grounds asserted were so egregious and were supported by overwhelming evidence in the record. Compare, Smith v. State, at p. 808.

Petitioner quarrels with the validity of the affirmed grounds under Point II. Under this point, he submits that the appellate courts are unevenly applying the Albritton test and seeks a rule of per se reversibility. IB at 6-7. Petitioner argues that a "mere counting process" is being used to evaluate cases in which some factors are declared invalid and others approved. IB at 7. A review of the case law cited reveals that much more is involved in appellate review than "mere counting". Id. at 7-8 Appendices B and C. This is particularly evident in Smith v. State which is included in Appendix B as indicative of "counting". According to Petitioner, reversal occurred in Smith because one factor was affirmed and five grounds were declared invalid. A review of the opinion discloses an analysis not recognized by Petitioner. The First District stated:

> In this case, after examination of the reasons for departure stated by the trial court, we conclude that the permissible reasons for departure, viewed objectively are not sufficient for application of the 'beyond a reasonable doubt' standard....The trial court's reliance on a significant number of invalid factors, on the one hand, and the sparsity of supporting particulars for the valid reason for departure, on the other, prevents this court from being able to find beyond a reasonable doubt that the sentences given appellant would have been the same had the court not considered the improper factors.

Id. at 807-808. The six factors given by the trial judge in support of the departure sentence were also discussed

by the appellate court. Id. at 808. The foregoing clearly reflects more than "mere counting".

Similar analysis is evident upon review of other opinions cited by Petitioner. Sabb v. State, 479 So.2d 845, 847 (Fla. 1st DCA 1985); Ochoa v. State, 476 So.2d 1348, 1349 (Fla. 2d DCA 1985); Hall v. State, 478 So.2d 385 (Fla. 2d DCA 1985); Ross v. State, 478 So.2d 480 (Fla. 1st DCA 1985); Brinson v. State, 478 So.2d 1174, 1175-1176 (Fla. 2d DCA 1985); Parker v. State, No. 85-856 (Fla. 5th DCA January 16, 1986) [11 FLW 213-214]; Phillips v. State, No. BE-79 (Fla. 1st DCA January 23, 1986) [11 FLW 268]; Patterson v. State, No. 85-906 (Fla. 4th DCA January 22, 1986) [11 FLW 238]; Dirk v. State, 479 So.2d 265 (Fla. 5th DCA 1985); Sanchious v. State, 478 So.2d 1191 (Fla. 5th DCA 1985); Thompson v. State, 478 So.2d 462, 465 (Fla. 1st DCA 1985); Shelton v. State, 478 So.2d 433 (Fla. 5th DCA 1985). Karliss v. State, 477 So.2d 1092 (Fla. 4th DCA 1985); Thrasher v. State, 477 So.2d 1083, 1085 (Fla. 1st DCA 1985); Allen v. State, 476 So.2d 309, 310 (Fla. 2d DCA 1985).

Upon review, some of the cases cited indicate that none of the justifications cited by the trial court were clear and convincing. Dawkins v. State, 479 So.2d 818 (Fla. 2d DCA 1985); Allen v. State, 479 So.2d 257 (Fla. 2d DCA 1985); Davis v. State, 476 So.2d 303 (Fla. 1st DCA 1985). Others declare the trial court's rational unclear. Irwin v. State, 479 So.2d 153 (Fla. 2d DCA 1985);

Pommier v. State, 476 So.2d 284 (Fla. 1st DCA 1985). Other opinions are short and do not include the appellate court's analysis. Racino v. State, 479 So.2d 816 (Fla. 4th DCA 1985); Cord v. State, 478 So.2d 1191 (Fla. 5th DCA 1985); Wiggins v. State, 476 So.2d 257 (Fla. 4th DCA 1985). Still other cases were reversed due to other improprieties. Borden v. State, 479 So.2d 823 (Fla. 5th DCA 1985); Vandenynden v. State, 478 So.2d 429 (Fla. 5th DCA 1985); Davis v. State; Deer v. State, 479 So.2d 323 (Fla. 5th DCA 1985). The foregoing clearly indicates that appellate courts are demonstrating considerably more analysis than a "mere counting" of valid and invalid justifications.

In the alternative, Petitioner advocates further refinement of the reasonable doubt/harmless error standard. Id This Court has steadfastly affirmed the test originally set forth in Albritton v. State. See, State v. Burch, 476 So.2d 663 (Fla. 1985); State v. Carney, 476 So.2d 165 (Fla. 1985); Brooks v. State, 476 So.2d 163 (Fla. 1985); State v. Young, 476 So.2d 161 (Fla. 1985); Wade v. State, No. 66,957 (Fla. February 6, 1986) [11 FLW 54-55]. Each time, the same test has been restated: it must be shown beyond a reasonable doubt that the invalid reasons would not have affected the sentence.

Albritton requires that the State fulfill this burden; however, this does not necessitate the filing of supplemental briefs as Petitioner suggests. IB at 10-11.

Where the State fulfills its burden in the trial court, the trial court relies upon this evidence in departing from the recommended sentence and this rationale is reflected in the record, there is compliance with the Albritton. Supplemental briefs are unnecessary. If evidence of the clear and convincing grounds is not discernible from the record to the extent that it is evident the sentence would not be affected, then reversal is required.

In the dissenting opinion, Judge Zehmer refers to the State's failure to present an "argument to use to carry its burden under this [Albritton] test." Casteel v. State at 129. Judge Zehmer refers to the State's appellate argument which was submitted prior to this Court's opinion in Albritton.[2] Although not argued on appeal for good reason, the State satisfied its burden below and the justifications are supported by the record. For this reason, the dissenting opinion is unpersuasive. The Albritton test is satisfied upon review of the record in this case. Supplemental briefs were unnecessary.

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[2] Respondents note that Petitioner's briefs filed in the district court did not challenge the validity of factor three. Despite this failure, the district court reviewed the factor in light of this court's opinion in Hendrix v. State, So.2d (Fla. 1985), and declared the factor invalid. Casteel at 128; State's answer brief at pp 10-12. Under the circumstances, such review seems one-sided.

## POINT II

## THE APPELLATE COURT DID NOT ERR IN AFFIRMING THREE OF THE GROUNDS SUPPORTING THE DEPARTURE SENTENCE.

### ARGUMENT

The first ground set forth by the trial judge involves the defendant's use of a dangerous weapon, to wit: a knife, in the commission of the sexual battery and burglary. R 72; T 988-989. Petitioner argued that use of the knife was already taken into consideration as an element in the offenses charged. Petitioner's initial district court brief at 19. Petitioner's conviction was for sexual battery with a deadly weapon, however in committing the sexual battery Petitioner used a deadly weapon and used in actual physical force likely to cause serious bodily harm thus fulfilling both prongs of Section 794.011(3), Florida Statutes, comprising a life felony. The physical force exerted was independent of the knife; the victim was severely beaten and her jaw was broken. See, State's Trial Exhibits 2 and 3.

Similarly, the burglary becomes a first degree felony upon fulfillment of Section 810.02(a) [during the course, makes an assault or battery upon any person] and (b) [is armed], Florida Statutes. Consequently the degree and penal sanctions of the offenses were increased by reliance upon circumstances independent of the use of the knife thereby properly enabling consideration of the factor as ground for departure. The factor had not been previously

calculated into the guidelines formula. c.f. Burch v. State, 462 So.2d 548 (Fla. 1st DCA 1985); Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985). The district court agreed with this argument in affirming the first factor. Casteel at 128.

It is proper to premise a departure upon the amount of force used even when force is a factor relating to the offense charged. Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984). Excessive use of force has been held a proper ground for departure. Id.; Harrington v. State, 455 So.2d 1317 (Fla. 2d DCA 1984); Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984).

In support of factor two, the calculated manner in which the crime was committed, the prosecutor argued the instant sexual battery was far from ordinary:

> First of all, number one, that this was a heinous and deviate sexual crime we are talking about here. The defendant broke the victim's jaw and then forced the victim to perform oral sex on him after he had broken her jaw.

T 962, 985-6. After oral sex, the defendant forced the victim to undress, shoved her onto the bed and committed a second sexual battery by penetrating her vagina with his penis. The defendant was so engaged when the police arrived. T 202-203; 302-304. The district court concluded that since sexual battery is not a specific intent crime, the calculated manner in which the crime was committed is not a necessary element and is not included

in the guidelines compulation. Therefore it is a valid reason for departure. Casteel at 128 citing Lerma v. State, 476 So.2d 275 (Fla. 5th DCA 1985).

In challenging factor two, Petitioner still relies upon Alford v. State, 460 So.2d 1000 (Fla. 1st DCA 1984) and Brooks v. State, 456 So.2d 1305 (Fla. 1st DCA 1985) approved, 476 So.2d 163 (Fla. 1985). IB at 15-16. However in Alford the conclusatory factor was set forth without facts from the record "to serve as illumination, the reasons wholly fail to relate to anything within the context of the case." Id. at 1001. Similarly in Brooks, the district court concluded that such a reference was "inappropriate to the particular crime" of armed robbery. Id. at 1307. Both Alford and Brooks opinions expressed dissatisfaction with use of a "prepared sheet containing a 'shopping list' of aggravating and mitigating factors." Brooks at 1307; Alford at 1001. In Petitioner's case, a "shopping list" was not used.

In affirming factor four, the First District found the emotional trauma of the victim was heightened by the traumatic effect of the sexual battery on the victim and her fifteen year old son. The traumatic effect on both was a valid reason for departure. Casteel at 128. This finding is fully supported by the record. The victim and her teenage son testified at the sentencing hearing and specifically addressed the physical and psychological consequences of the defendant's criminal acts. T 970-975.

This finding is fully supported by the record. The victim suffered psychological trauma which affected her relationship with her son thereby causing additional emotional trauma to her. T970-971. The son testified to similar emotional problems: "extreme restlessness", "can't sleep at night", "very rarely eat now", "problems getting along with people; "problems being around my friends", inability to deal with what happened to his mother, as well as problems and arguments with his mother. T974-975; See State's answer brief at pp. 15-16.

Petitioner attempts to convince this court that if approved, the finding of "trauma to the victim and his or her family will become an automatic reason for departure in almost every case, especially one involving sexual battery, and will make a mockery of the guidelines." IB at 16-17. This premise is mere speculation. It is also untrue. The instant circumstances are atypical and aggravation of sentence is justified under these circumstances. It would be unfair to limit the trial court's exercise of discretion in this case because of speculation on the affect to future cases which may present less complelling facts.

These factual circumstances are particularly egregious and Appellant's sentence should correspond with his acts. Similar egregious facts were present in Ross v. State, and in Ocohoa v. State and the departure

sentences were affirmed. See also, Griffin v. State, 470 So.2d 103,104 (Fla. 2d DCA 1985).

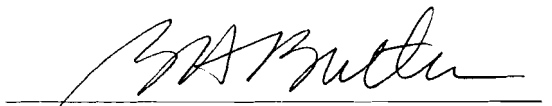
In conclusion, the State submits the justification for departure from the guidelines recommendation set forth by the trial court are clear and convincing. It is apparent from the record that the trial court would have imposed the same sentence based on the three factors affirmed by the district court. Therefore Petitioner's sentence need not be vacated and remanded back to the trial court.

## CONCLUSION

Based on the foregoing reasons and citations of authority, Appellee respectfully submits that the opinion of the Court of Appeal, First District which approves judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to P. Douglas Brinkmeyer, Assistant Public Defender, P. O. Box 671, Tallahassee, Florida 32302, this 7th day of March, 1986.

Barbara Ann Butler
Assistant Attorney General

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