

IN THE SUPREME COURT OF FLORIDA

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SID J. WHITE  
DEC 22 1936  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Deputy Clerk

MARVIN RAYMOND BALLARD, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 68,967

PETITIONER'S REPLY BRIEF ON THE MERITS

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Public Defender

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TABLE OF CONTENTS

|                   | <u>PAGE</u> |
|-------------------|-------------|
| Table of Contents | i           |
| Authorities Cited | ii          |
| Argument --       | 1-3         |

POINT III

THE DISTRICT COURT EMPLOYED AN IMPROPER PROCEDURE AND DENIED PETITIONER HIS RIGHT TO BE PRESENT WITH COUNSEL AT RESENTENCING WHEN IT ALLOWED THE TRIAL COURT TO ENTER WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES UPON THE DISTRICT COURT TEMPORARILY RELINQUISHING JURISDICTION FOR THIRTY DAYS.

|                        |   |
|------------------------|---|
| Conclusion             | 4 |
| Certificate of Service | 4 |

AUTHORITIES CITED

| <u>CASES</u>  | <u>PAGE</u> |
|---|-------------|
| <u>Albritton v. State</u> , 476 So.2d 158<br>(Fla. 1985)                    | 2           |
| <u>Brown v. State</u> , 488 So.2d 641<br>(Fla. 2d DCA 1986)                 | 2           |
| <u>Casteel v. State</u> , 11 F.L.W. 631<br>(Fla. December 11, 1986)         | 2           |
| <u>State v. Oden</u> , 478 So.2d 51<br>(Fla. 1985)                          | 1           |
| <u>Watkins v. State</u> , 11 F.L.W. 2511<br>(Fla. 3d DCA December 12, 1986) | 2           |
| <br><u>OTHER AUTHORITIES</u>  |             |
| <u>Florida Rule of Appellate Procedure</u>                                  |             |
| 9.600((b))  | 1           |
| <u>Florida Rule of Criminal Procedure</u>                                   |             |
| 3.701(d)(14)  | 2           |

## ARGUMENT

### POINT III

THE DISTRICT COURT EMPLOYED AN IMPROPER PROCEDURE AND DENIED PETITIONER HIS RIGHT TO BE PRESENT WITH COUNSEL AT RESENTENCING WHEN IT ALLOWED THE TRIAL COURT TO ENTER WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES UPON THE DISTRICT COURT TEMPORARILY RELINQUISHING JURISDICTION FOR THIRTY DAYS.

Respondent totally misses the point. The fact that a district court may relinquish jurisdiction under Florida Rule of Appellate Procedure 9.600(b), does not mean that it can allow written reasons for departure to be entered many months after sentence has been imposed. The authority of Florida Rule of Appellate Procedure 9.600(b) does not come close to answering petitioner's objections to the procedure based on the authority of State v. Oden, 478 So.2d 51 (Fla. 1985). Respondent's suggestion that petitioner could have been heard on relinquishment upon his request overlooks that petitioner's motion for rehearing to the order relinquishing jurisdiction on these grounds was denied on December 4, 1985. (Appendix - 5). Although this denial was without prejudice to present these arguments to the trial court, the written reasons for departure had already been amended and entered on December 3, 1985. (Appendix - 5).

Chapter 86-273, cited by respondent, is not at all applicable to the district court's affirmance of a sentencing guideline departure in this case. First of all, the trial court did not find as a written reason for departure that the defendant had

previously violated probation but respondent claims this reason would support departure (Respondent's Brief at 9). A reason not expressly relied upon by the trial court may not be utilized by the district court or this Court as a reason to uphold the departure sentence. Casteel v. State, 11 F.L.W. 631 (Fla. December 11, 1986).

None of the reasons for departure utilized here are valid. The trial court's failure to follow the requirements of Florida Rule of Criminal Procedure 3.701(d)(14) does not convert this issue into one concerning the "extent of departure." Florida Rule of Criminal Procedure 3.701(d)(14) provides that:

The sentence imposed after revocation of probation or community control may be included within the original cell or may be increased to the next higher cell without requiring a reason for departure.

A failure to follow the dictates of that rule and factoring the defendant's legal status at the time of the offense into the guidelines scoresheet and also using that status as a basis to depart is improper. See Brown v. State, 488 So.2d 641 (Fla. 2d DCA 1986), Watkins v. State, 11 F.L.W. 2511 (Fla. 3d DCA December 12, 1986).

Chapter 86-273 does not invalidate this Court's decision in Albritton v. State, 476 So.2d 158 (Fla. 1985), as is seen by this Court's most recent expansion of that decision in Casteel v. State, supra. Albritton holds that if some reasons are found to be valid and other reasons are invalid then the district court has to determine if the same sentence would be imposed absent the

invalid reasons (under the standards set forth by this Court). Assuming all the reasons are good or the state shows beyond a reasonable doubt that the same sentence would have been imposed then before Chapter 86-273, a defendant could get review of the extent of departure, which will no longer be so when and if this Court adopts Chapter 86-273 as a Rule of Criminal Procedure. Nonetheless, in petitioner's case the state has not even attempted to show beyond a reasonable doubt that the trial court would have rendered the same departure sentence in the absence of either or both of the two stated written reasons for departure. Accordingly, reversal is required for resentencing within the guidelines recommended range.

CONCLUSION

Based on the foregoing, petitioner respectfully requests this Court to quash the decision of the district court and to remand for resentencing within the guidelines recommended range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to NOEL PELELLA, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 19<sup>th</sup> day of December, 1986.

*Margaret Good*

\_\_\_\_\_  
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