IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS-

CASE NO. 68,973

EDWARD LEON ROUSSEAU,

RESPONDENT.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent, Edward Leon Rousseau, was charged by three separate informations with burglary of a dwelling and grand theft (R 14-16). On February 15, 1985, Respondent withdrew his previously "non-guilty plea" and entered a guilty plea to the three burglary charges "with the understanding that upon acceptance of the plea the State will announce a nol pros on the second count in each information and the court will order a presentence investigation." (R 31). Respondent's plea was accepted and he was sentenced on March 22, 1985 (R 36-37,86). Pursuant to the sentencing guidelines Respondent's recommended sentence was community control or 12-30 months incarceration inasmuch as his scoresheet reflected a total of 50 points (R 61,68,75). Respondent Rousseau was sentenced to three concurrent terms of five years imprisonment to be followed by 10-year probation and was ordered to make full restitution to his victims. (R 97-99). In imposing such a sentence, the trial judge departed from the guidelines' recommended sentence and as reasons thereof stated that: 1) Rousseau committed three burglaries in a three-week time span; 2) his victims suffered psychological trauma; 3) the victims' homes were violated; 4) Rousseau's prior record was extensive; and 5) the court feels that a larger period of incarceration was necessary to make the defendant understand his crimes would not be tolerated in Clay County (R 61-62,68-69,75-76,98). A notice of appeal was timely filed challenging the sentence departure (R 79,81).

The First District Court of Appeal by Order dated April 22, 1986, affirmed Respondent's sentence finding two out of the five reasons to be valid and concluding that it was "convinced beyond a reasonable doubt that the absence of the invalid reasons would have not affected the sentence imposed herein." (Order, April 22, 1986, p. 2-3).

Respondent Rousseau, on April 22, 1986, filed a Motion for Rehearing on grounds that pursuant to **State v. Mischler,** 11 F.L.W. 139 (Fla. April 3, 1986), the appellate court was obligated to find his sentence departure improper and therefore a remand for resentencing was required, alternatively petitioning the appellate court to certify the question under consideration.

By Order dated May 30, 1986, the appellate court agreed with Respondent Rousseau inasmuch as it found two of the three invalid reasons fell within the categories established by **Mischler** as mandating an automatic reversal. That court, however, certified as being of great public importance the following question:

> When an appellate court finds that a sentencing court, in departing from the presumptive guideline sentence, relied upon a reason within the three categories condemned in **State v. Mischler,** 11 F.L.W. 139 (Fla. April 3, 1986), may the appellate court apply the harmless error rule articulated in **Albritton v. State,** 476 So.2d 158 (Fla.1985) or is reversal mandated without regard for the harmless error rule?

(Order, May 30, 1986, p. 2). Mandate was issued by the lower appellate court on June 17, 1986. On June 26, 1986, Petitioner, the State of Florida, filed a Notice to Invoke Discretionary Jurisdiction on grounds the lower court's decision conflicted

with either a decision of another district court of appeal or of this Court. On July 1, 1986, Petitioner filed an Amended Notice to Invoke Discretionary Jurisdiction thereby asserting that the question had been certified by the lower court by its Order dated May 30, 1986.

SUMMARY OF ARGUMENT

Since nothing in **State v. Mischler,** 11 F.L.W. 139 (Fla. April 3, 1986), purports to indicate that the Court therein was modifying the standard of review appellate courts should apply when reviewing sentence departures grounded on both valid and invalid reasons, the harmless error analysis enunciated in **Albritton v. State,** 476 So.2d 158 (Fla.1985), is still the applicable standard the appellate courts should follow.

ISSUE

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT, IN DEPARTING FROM THE PRESUMPTIVE GUIDELINE SENTENCE, RELIED UPON A REASON WITHIN THE THREE CATEGORIES CONDEMNED IN **STATE V. MISCHLER,** 11 F.L.W. 139 (FLA. APRIL 3, 1986), MAY THE APPELLATE COURT APPLY THE HARMLESS ERROR RULE ARTICULATED IN **ALBRITTON V. STATE,** 476 So.2d 158 (FLA.1985) OR IS REVERSAL MANDATED WITHOUT REGARD FOR THE HARMLESS ERROR RULE?

ARGUMENT

Petitioner contends nothing in **State v. Mischler,** 11 F.L.W. 139 (Fla. April 3, 1986), purports to adopt a per se reversible standard as the rule Florida appellate courts must apply when reviewing a sentence departure grounded on both valid and invalid reasons. Rather, the harmless error analysis enunciated in **Albritton v. State,** 476 So.2d 158 (Fla.1985), is still the applicable and proper standard and consequently, the question certified should be so answered.

In **Albritton, supra,** the question under consideration was the standard of review appellate courts should apply when reviewing trial courts' sentence departures, the reasons provided in support thereof being both valid and invalid. Three potential resolutions to the question were considered:

(1) Reliance on an invalid reason, regardless of the presence of a valid reason, is per se reversible error;

(2) reliance on a valid reason, regardless of the presence of invalid reasons, is per se affirmable; or

(3) reliance on valid and invalid reasons should be reviewed applying a harmless error analysis.

(e.s.) **Id.** at 159. In adopting the third alternative above, the court went on and held that:

> When a departure sentence is grounded on both valid and invalid reasons . . . 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 affected the departure sentence.

Id. at 160. Sub judice, in reviewing Respondent Rousseau's sentence departure the lower tribunal correctly found that two of the five reasons given by the trial court as grounds to depart were valid. And in affirming the sentence, it too correctly held that **Albritton** supported the affirmance inasmuch as that court was convinced beyond a reasonable doubt that the absence of the invalid reasons would have not affected the trial court's decision to depart from the guidelines' recommended sentence. On rehearing, however, the court receded from its earlier holding and agreed with Rousseau that **State v. Mischler** mandated an automatic reversal if an invalid reason fell within the prohibited categories enunciated therein, and therefore, reversed and remanded the case for resentence.

The language upon which the appellate court relied, at Respondent's insistence, to find that **Mischler** mandated an automatic reversal is as follows:

> A reason which is prohibited by the guidelines themselves can never be used to justify departure. **Santiago v. State,** 478 So.2d 47 (Fla.1985). Factors already taken into account in calculating the guidelines score can never support departure. **Hendrix v. State,** 475 So.2d 1218 (Fla.1985). A court cannot use an inherent component

> of the crime in question to justify departure. **Steiner v. State,** 469 So.2d 179, 181 (Fla.3rd DCA 1985); **Baker v. State,** 466 So.2d 1144 (Fla.3rd DCA 1985). If any of the reasons given by the trial court to justify departure fall into any of the three above-mentioned categories, an appellate court is obligated to find that departure is improper.

(e.s.) at 140. Petitioner, of course, submits such a broad and literal reading of the above quoted language is totally erroneous because such an interpretation presupposes that **Mischler** overruled **Albritton** which is clearly not true.

First, there is nothing in **Mischler** to the effect that the court therein was overruling, rejecting or even modifying **Albritton.** Indeed, this fact is abundantly obvious even if one were to read **Mischler** hastily. Why? Simply because **Mischler** referred to and cited with approval no other than **Albritton,** and as such, it must be presumed that the **Mischler** court was well aware of **Albritton** and its holdings. And obviously, if the Court in **Mischler** wanted to overrule its prior **Albritton** holding or even modify it, it could have easily done so. Secondly, **Mischler** dealt only with the issue of what a clear and convincing reason was or was not, and more specifically, **Mischler** dealt with the quantum of evidence necessary to find a given reason clear and convincing. Thirdly, Petitioner cannot help but wonder the rationale behind the **Mischler** court's review of the other nonprohibited reason or reasons immediately after it found the first two reasons invalid because they fell within one of the three prohibited categories enunciated therein. Surely, if **Mischler** was in fact implementing a per se reversible error rule there would have been no necessity for the Court

to go on and consider these other reasons inasmuch as its findings as to the first two reasons would have mandated the alleged automatic reversal. Petitioner submits and suggests that by proceeding forward and analyzing the nonprohibited reason or reasons, the **Mischler** court was applying no other than its harmless error standard simply because if there would have been "credible facts" to prove "beyond a reasonable doubt" Mischler's lack of remorse for example, then, the issue would have clearly been whether in the absence of the invalid reasons the trial court would have nonetheless departed.

Subsequent decisions by this Court support Petitioner's contentions that the standard of review is that enunciated in **Albritton.** For example, in **Scurry v. State,** 11 F.L.W. 254 (Fla. June 5, 1986), this Court stated in its footnote that the certified question therein, to-wit: the appellate court's duty to review other reasons for departure where one is found invalid pursuant to Rule 3.701, was answered in **Albritton.** See also, **Agatone v. State,** 11 F.L.W. 205 (Fla. May 1, 1986); **Adams v. State,** 11 F.L.W. 291 (Fla. June 26, 1986); **Williams v. State,** 11 F.L.W. 289 (Fla. June 26, 1986); **Sloan v. State,** Case No. 67,421 (Fla. July 10, 1986)--all reaffirming **Albritton.**

It is also noteworthy to note that the lower appellate court has since receded from its holding that **Mischler** overruled or modified **Albritton.** See, **Daniels v. State,** 11 F.L.W. 1433 (Fla.1st DCA June 25, 1986), wherein the First District, while acknowledging its decision on rehearing sub judice, held that

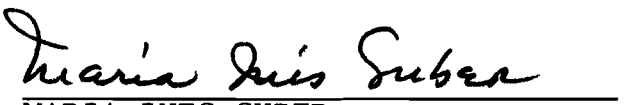
in view of this Court's subsequent pronouncements clarifying **Mischler**, the holding in **Mischler** did not establish a per se rule of reversal.

CONCLUSION

Based on the foregoing, the Petitioner respectfully asks this Court to hold that the harmless error analysis enunciated in **Albritton** is still the standard to be followed by the appellate courts when reviewing a sentence departure grounded on both valid and invalid reasons, and additionally, that nothing in **Mischler** purported to otherwise hold.

Respectfully submitted,

JIM SMITH
Attorney General



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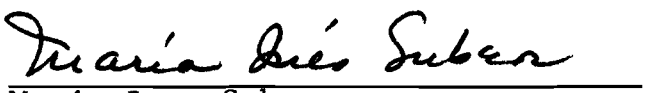
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been forwarded to Ms. Ann Cocheu, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 22nd day of July 1986.



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