

IN THE SUPREME COURT  
STATE OF FLORIDA

**FILED**  
SUBSTITUTE

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CLERK, SUPREME COURT

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Chief Deputy Clerk

JESSIE G. LERMA,  
Petitioner,

v.

CASE NO. 67,839

STATE OF FLORIDA,  
Respondent.

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APPLICATION FOR DISCRETIONARY REVIEW  
OF THE DISTRICT COURT OF APPEAL, FIFTH  
DISTRICT OF FLORIDA.

BRIEF OF RESPONDENT ON JURISDICTION

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## SUMMARY OF ARGUMENT

The present decision is not in express and direct conflict with those cases holding that emotional and physical trauma suffered by a victim is an invalid basis for departure, where the trauma is inherent in the nature of the offense and a departure sentence based on both valid and invalid reasons should be reversed, and the case remanded for resentencing, where the state does not show beyond a reasonable doubt that the trial court would have rendered the same sentence in the absence of the invalid reasons.

ARGUMENT

THE PRESENT DECISION IS NOT IN EXPRESS  
AND DIRECT CONFLICT WITH THE DECISION  
OF THE FLORIDA SUPREME COURT IN ALBRITTON  
V. STATE, 476 So.2d 158 (Fla. 1985), AND  
THE DECISION OF THE FIRST DISTRICT COURT  
OF APPEAL IN SMITH V. STATE, 10 F.L.W.  
2370 (Fla. 1st DCA Oct. 18, 1985).

In Smith v. State, 10 F.L.W. 2370 (Fla. 1st DCA, Oct. 18, 1985), the First District Court of Appeal held that the "emotional, as well as physical trauma, suffered by a victim" was an invalid basis for departure from the sentencing guidelines "where, as here, the trauma to which the trial court refers is inherent in the nature of the offense." On the basis on the decision in Smith, the petitioner finds express and direct conflict with the present decision. However, the only similarities between the Smith decision and the present decision is the fact that both defendants were convicted of sexual battery.

The injury to the victim in the present case, unlike that in Smith, is neither inherent in the offense nor properly considered by the sentencing guidelines in scoring. While the elimination of unwarranted disparity in sentencing is, indeed, a noble goal, the fact remains that not all categories of crimes or all sexual batteries are in parity with one another. It is for this reason, that Florida Rule of Criminal Procedure 3.701(b) (a), states that, "the penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." The circumstances surrounding the offense in the present case are totally dissimilar from the circumstances in Smith, supra. In the present case, the victim was

an especially susceptible single female and was more physically and emotionally traumatized than the average victim of this degree of sexual battery. She was a slight female, weighing approximately 108 pounds, while the defendant is a stocky, muscular male. She was bruised by the defendant's forceable attack. She was, no doubt, in terror that she would be abducted and killed. After the defendant's arrest, the defendant was diagnosed as having active infectious hepatitis. The victim had to be informed of this fact, and on two occasions had to undergo blood testing and the administration of antibiotics, and live with the fear that she may contract this serious disease. Her stigma as a rape victim in the community in which she lives is continued as due to her economic condition she is forced to continue to work at this same store. Thus, the victim injury and the circumstances of the way the present crime was committed are dissimilar from the factual scenario in Smith, and warranted a more severe sentence. Furthermore, unlike the victim in Smith, the trauma was not inherent in the nature of the offense itself, but was also a result of the circumstances of the way the crime was committed, including the time the crime was committed, i.e., while the defendant had active infectious hepatitis. The defendant was the moving force which set these events and circumstances into existence and it was proper for the trial judge to consider them in sentencing. Thus, the Smith decision and the present decision being factually distinct, there is no express and direct conflict between the two decisions.

The alleged conflict between the present decision and


Albritton v. State, 476 So.2d 158 (Fla. 1985), presupposes that conflict exists between the present decision and Smith, and that the present decision is incorrect while the decision in Smith is correct. Thus, it is clear that there is no conflict between the present decision and this court's decision in Albritton, as any such conflict presupposes that conflict will be found between the present case and Smith, and there will be no conflict between the present decision and Albritton until such conflict with Smith is first found. The Fifth District Court of Appeal found none of the written reasons for departure to be invalid, thereby requiring the state to show beyond a reasonable doubt that the trial court would have rendered the same sentence even in the absence of consideration of the invalid reasons. Thus, the only issue in this petition is whether conflict exists between the present decision and the decision of the First District Court of Appeal in Smith v. State, supra.

CONCLUSION

The decision of the District Court of Appeal, Fifth District, that the petitioner Jessie G. Lerma seeks to have reviewed is not in direct and express conflict with the decision of the District Court of Appeal, First District in the case of Smith v. State, 10 F.L.W. 2370 (Fla. 1st DCA, Oct. 18, 1985), nor is the present decision in direct and express conflict with any decision of this court. Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is correct and does not conflict with the decisions of this court or other district courts, and this court, therefore, should decline to exercise its discretionary jurisdiction to hear this cause.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief of Respondent on Jurisdiction has been hand delivered to Brynn Newton, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the petitioner, this 2nd day of December, 1985.

  
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