IN THE SUPREME COURT
STATE OF FLORIDA

JESSIE LERMA,

Petitioner,

v.

CASE NO. 67,839

STATE OF FLORIDA,

Respondent.

_______________________/

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

None of the reasons given by the trial court to justify departure in this case, i.e., emotional trauma to the victim, excessive brutality, clear premeditation, the dangerousness of the defendant and the fact he was deserving of greater punishment than provided by the guidelines, fall into any of the three prohibited categories set out by this court in State v. Mischler, 11 F.L.W. 139 (Fla. April 3, 1986) and the sentence should be affirmed.

ARGUMENT

THE SENTENCE IMPOSED BY THE TRIAL COURT WAS NOT EXCESSIVE AND WAS BASED ON VALID REASONS FOR DEPARTING FROM THE SENTENCING GUIDELINES.

An appellate court's function in a sentencing guidelines case is merely to review the reasons given to support departure and determine whether the trial court abused its discretion in finding those reasons "clear and convincing." A reason which is prohibited by the guidelines themselves, can never be used to justify departure. Factors already taken into account in calculating the guidelines score can never support departure. A court cannot use an inherent component of the crime in question to justify departure. 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. "Clear and convincing" reasons require that the facts supporting the reasons be credible and proven beyond a reasonable doubt. The reasons themselves, must be of such weight as to produce, in the mind of the judge, a firm belief or conviction, without hesitancy, that departure is warranted. State v. Mischler, 11 F.L.W. 139 (Fla. April 3, 1986).

In the present case, none of the reasons given by the trial court to justify departure fall into any of the three prohibited categories, are supported by credible facts never challenged below as not proven beyond a reasonable doubt and are of such weight as to produce in the mind of the judge, a firm belief or conviction, without hesitancy, that departure is warranted.

Although the appellant challenges every utterance by the

trial judge as an invalid reason for departure, it is clear that the majority of the statements consist of factual background in support of the reasons and, thus, it is the opinion of the Fifth District Court of Appeal on rehearing that must be looked to in determining the validity of the reasons for departing from the guidelines recommended sentence (R 7-9). The appellant cannot hope to prevail by dissecting factual background and setting up invalid reasons for departure and virtually ignoring the analysis of the district court.

In its opinion, the district court found that victim injury and trauma constitute a valid, clear and convincing reason to depart from the recommended range, citing a previous case, Hankey v. State, 458 So.2d 1143 (Fla. 5th DCA 1984), which held that emotional trauma to the victim was a clear and convincing reason for departure (R 8). This court exercised its discretionary jurisdiction and reviewed Hankey. Although this court ultimately quashed the decision of the Fifth District Court of Appeal and remanded with directions to further remand to the trial court for resentencing, such quashal was not on the basis of this particular reason for departure. This court stated "Emotional hardship on the victim may, if the facts dictate, support departure. However, the facts supporting the reason must be credible and proven beyond a reasonable doubt." Hankey v. State, 11 F.L.W. 137, 138 (Fla. April 3, 1986). This court ultimately found that the trial court abused its discretion because the only evidence that the victim suffered emotional trauma were the blanket assertions of the trial court to that effect. That is not the case here, for,

as the appellant points out, the trial court based its departure sentence on the testimony of the investigating officer and the district court found record support for the trial judge's findings on all points (R 8).

The emotional trauma of the victim is clearly supported by the record. The precepts of State v. Cote, 11 F.L.W. 137 (Fla. April 3, 1986) are not violated because fear or trauma are not elements of a sexual battery through use of slight force, while fear or trauma is a necessary element of aggravated assault. Even if such trauma could be considered an inherent component of sexual battery through slight force, the emotional trauma was unusually greater than the trauma necessarily contained in the elements of the crime. See, Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984). The record reflects that the victim was: twice threatened with having her throat cut; suffered through forced intercourse and fellatio, believed she was to be abducted; was only a slight female menaced by the stocky muscular defendant whose actions led her to believe she may be killed; feared she had contracted infectious hepatitis as a result of the sexual battery, after being so diagnosed, and had to undergo testing and take antibiotics; and has to continue working at the same store with the stigma of being a rape victim because of her economic situation (R 8). The circumstances of such psychological trauma certainly do not inhere in the typical sexual battery with slight force, nor are they anywhere contemplated in the scheme or matrix of the guidelines, so as to run afoul of Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

While the appellant argues that victim injury is scored and cannot also be a factor supporting a departure sentence, the fact remains that psychological injury is not so scored. Although the district court made a passing reference to victim injury, it was in conjunction with trauma and the citation to Hankey conclusively reflects the district court was speaking of psychological injury or trauma.

That excessive brutality was used in the commission of the crime finds record support in the bruises inflicted on the victim, the difference in size between the victim and defendant and his threats to cut her throat and abduct her. Certainly, the usual sexual battery through "slight" force does not have such menacing and manhandling aspects to it, and such factors are not taken into account in calculating the guidelines score, are not inherent components of the crime or prohibited by the guidelines, as such manhandling while not common to the average sexual battery with slight force, falls somewhat short of a factor relating to the instant offense for which conviction has not been obtained. The instant factor is just the sort of reason referred to in Florida Rule of Criminal Procedure Statement of Purpose b.3: "The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." (Emphasis added). Such circumstance does not rise to the level of supporting a higher charge or an uncharged crime.

The district court also found that one of the circumstances of the way the crime was committed was "clear premeditation." District courts have specifically held that premeditation is an

inappropriate reason for departing from the guidelines. The decisions, however, were based on robbery convictions and the premise that premeditation is an inherent component of any robbery and hence, may be properly viewed as already embodied in the guidelines recommended sentencing range. Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984); Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA 1985); Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985). Premeditation and calculation are synonymous concepts and the reasoning of the First District Court of Appeal in Casteel v. State, 481 So.2d 72, 74 (Fla. 1st DCA 1986) should be applied to the present case:

> The second reason recognizes the calculated manner in which the crime was committed. Because sexual battery with use of a deadly weapon is not a specific intent crime, the calculated manner in which it was committed is not a necessary element and therefore not considered in the establishment of the recommended guidelines range. This too is a valid reason for departure.

This court has previously recognized the usual impulsiveness or spontaneity involved in a sexual battery. Doyle v. State, 460 So.2d 353, 358 (Fla. 1984) ("It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection"). It is clear that premeditation is not an inherent component of the present crime, nor is it prohibited by any of the remaining categories set out in Mischler. The fact that an aborted kidnapping may also have been contemplated makes this factor no less compelling in the context of the sexual

battery. Moreover, the facts show that the appellant immediately grabbed the victim and forced her into the back of the store after she finished waiting on another customer.

The last reason given for departing is that "Lerma is a dangerous individual, and that he is deserving of greater punishment than that recommended by the guidelines." That Lerma is a dangerous individual is fully supported by the record in this case in his actions during the sexual battery and such reason does not run afoul of Hendrix, because it is not based in any way upon prior convictions. That he is deserving of greater punishment than that recommended by the guidelines does not merely reflect a general disagreement with the guidelines sentence. See, Sabb v. State, 479 So.2d 845 (Fla. 1st DCA 1985), but is based on the finding of dangerousness, which is nowhere contemplated by or taken into account by the guidelines.

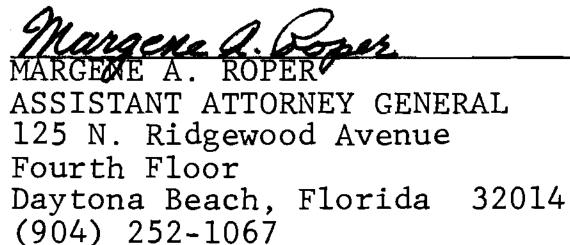
Lastly, the appellant challenges the length of the departure sentence. Based on the reasons for departure, youthful age, lack of criminal history and an admission of substance abuse, the Fifth District Court of Appeal concluded that "reasonable judges could impose disparate sentences in this case" and affirmed the sentence. This is the correct result. Albritton v. State, 476 So.2d 158, 160 (Fla. 1985); Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). In the present case, the trial court's discretionary power was not exercised in accordance with the whim or caprice of the judge and the district court utilized the proper standard of review of the extent of departure from a guideline sentence as set forth by this court.

CONCLUSION

Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is correct and should be approved by this court as the controlling law of this state and that the conflicting decision of the District Court of Appeal, First District should be quashed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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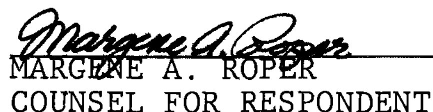
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished by mail to Brynn Newton, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the petitioner, this 18th day of April, 1986.



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