IN THE SUPREME COURT OF FLORIDA

MARK FRANKLIN BARRENTINE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,446

PETITIONER'S BRIEF ON JURISDICTION

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PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the First District Court of Appeal. He will be referred to as Petitioner in this brief. A one volume record on appeal will be referred to as "R", followed by the appropriate page number in parentheses. A two volume transcript will be referred to as "T". Attached hereto as an appendix is the opinion of the First District.

STATEMENT OF THE CASE AND FACTS

By third amended information filed December 4, 1985, petitioner was charged with lewd assault upon a child (R 38). At trial, [redacted], age 14, testified that he was riding his bike down Atlantic Blvd. in Jacksonville when petitioner asked [redacted] to help him get a motorcycle out of the mud in the woods. [redacted] agreed and walked down a trail to where he saw only the front end of a motorcycle. Petitioner offered [redacted] a cigarette and asked if he could suck [redacted]s dick. Petitioner then got on top of [redacted] and made [redacted] masturbate petitioner. Petitioner ejaculated onto [redacted] shirt. [redacted] ran off and saw a police car and reported the incident (T 49-62).

Petitioner presented an alibi defense (T 166-270) but was found guilty as charged (R 39; T 354-55). At a sentencing hearing, [redacted], the victim's mother, testified in aggravation that between the date of the crime and the trial, [redacted] had been suspended from school, had run away, and had become moody. Since the trial, however, he had been better (T 366-77). [redacted] testified that he had been scared to go back into the woods and had lost all of his girlfriends. People from school called him names and treated him strangely (T 378-81).

The court imposed a ten year sentence, departing from the recommended guidelines range of 5 1/2 to 7 years (R 62-65). As justification therefor, the judge wrote on the bottom of the scoresheet:

> The defendant's violent physical

> and sexual assault on a 14 year old boy, unknown to him and enticed into the woods for purposes of the assault, has caused the victim to suffer great and emotional trauma. (R 66; appendix at 2).

On appeal, petitioner argued that emotional trauma could not be a valid reason to depart from the recommended guidelines range, on authority of Lerma v. State, 497 So.2d 736,739 (Fla. 1986). The First District disagreed and held that the reason was valid (appendix at 3).

On April 24, 1987, a timely notice of discretionary review was filed.

SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the decision of the lower tribunal in the instant case conflicts with Lerma v. State, supra, on the same question of law. It also conflicts with a decision from another district court of appeal. The First District is not following Lerma, or is construing its holding too narrowly. As a result, a defendant who is convicted of lewd assault within the jurisdiction of the First District will have to accept a departure sentence based upon emotional trauma. This Court must accept jurisdiction to conform the opinion in the instant case to that in Lerma.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S HOLDING IN LERMA V. STATE, AND SO THIS COURT MUST ACCEPT DISCRETIONARY REVIEW.

In Lerma v. State, supra, this Court held:

> The state cites Hankey v. State, 485 So.2d 827 (Fla. 1986), to support its contention that emotional hardship on the victim may support a departure sentence. Hankey was convicted for burglary. Our holding in Hankey was premised upon the fact that emotional handship is not an inherent component of the crime of burglary. In contrast, emotional hardship can never constitute a clear and convincing reason to depart in a sexual battery case because nearly all sexual battery cases inflict emotional hardship on the victim. This same reasoning forces us to conclude that physical trauma cannot support a departure sentence in a sexual battery case.

497 So.2d at 739.

The First District has read Lerma too narrowly, has limited its holding to only sexual battery departure sentences, and has not applied Lerma to other crimes which, like sexual battery, always cause emotional trauma on a victim. See, e.g., Kokx v. State, 498 So.2d 534 (Fla. 1st DCA 1986) (Lerma not applicable to aggravated child abuse) and Lawson v. State, 498 So.2d 541 (Fla. 1st DCA 1986) (Lerma not applicable when both the victim of a sexual battery and her child suffer emotional trauma). The Second District has recognized that Lerma also

applies to lewd assault. Connell v. State, 502 So.2d 1272 (Fla. 2nd DCA 1987).[1]/

While lewd assault may not be technically a lesser offense of sexual battery, Hightower v. State, 488 So.2d 106 (Fla. 5th DCA 1986), review denied, case no. 68,717 (Fla. Apr. 2, 1987), the two crimes almost always cause emotional trauma to their victims, particularly because the victim of a lewd assault must be a child. Medical experts, legal commentators, and courts of other jurisdictions have recognized that there exists a "child sexual abuse syndrome", which describes the changes in emotional behavior, including those suffered by the victim in the instant case, common to children who have been the victims of any type of sexual abuse, and which is not limited to traditional sexual intercourse. See, e.g., State v. Middleton, 657 P.2d 1215 (Ore. 1983); State v. Myers, 359 N.W. 2d 604 (Minn. 1984); and Smith v. State, 688 P.2d 326 (Nev. 1984). See, e.g., Note, Rape Trauma Syndrome, 70 Va. Law Rev. 1657 (1984). See, e.g., Sgroi, Clinical Intervention in Child Sexual Abuse, at 40-41, which lists 20 common indicators of child sexual abuse:

1. Overly compliant behavior.
2. Acting-out, aggressive behavior.

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[1] The First District has an annoying habit of declining to follow this Court's decisions in guidelines cases. See, e.g., Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986), review pending, case no. 70,017, and Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986), review pending, case no. 70,164, which both decline to follow Whitehead v. State, 498 So.2d 863 (Fla. 1986).

3. Pseudo mature behavior.
4. Hints about sexual activity.
5. Persistent and inappropriate sexual play with peers or toys or with themselves, or sexually aggressive behavior with others.
6. Detailed and age-inappropriate understanding of sexual behavior (especially by young children).
7. Arriving early at school and leaving late with few, if any, absences.
8. Poor peer relationships or inability to make friends.
9. Lack of trust, particularly with significant others.
10. Non-participation in school and social activities.
11. Inability to concentrate in school.
12. Sudden drop in school performance.
13. Extraordinary fears of males (in cases of male perpetrator and female victim).
14. Seductive behavior with males (in cases of male perpetrator and female victim).
15. Running away from home.
16. Sleep disturbances.
17. Regresive behavior.
18. Withdrawal.
19. Clinical depression.
20. Suicidal feelings.

The victim in the instant suffered from at least seven of these conditions (no. 7,8,10,11,12,15,and 18).

Thus, it is obvious that the First District is in error in not recognizing that lewd assault also includes in its victims some degree of emotional trauma, just like sexual battery. This Court must grant review because of the conflict with Lerma and Connell, supra.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court grant discretionary review and proceed to hold that emotional trauma cannot serve as a valid reason for departure in a lewd assault sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 30 day of April, 1987.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER