# IN THE SUPREME COURT OF FLORIDA

MARK FRANKLIN BARRENTINE,

Petitioner,

vs.

CASE NO.

EME COURT

STATE OF FLORIDA,

Respondent.

# RESPONDENT'S BRIEF ON JURISDICTION

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# TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
STATEMENT OF JURISDICTION/SUMMARY OF ARGUMENT	4
ISSUE	4
THE COURT SHOULD NOT GRANT DISCRETIONARY REVIEW OVER THE DECISION BELOW ON THE BASIS OF ALLEGED BUT NONEXISTANT CONFLICTS WITH ONE OF ITS OWN DECISIONS AND THAT OF ANOTHER DISTRICT COURT OF APPEAL	
ARGUMENT	4
CONCLUSION	6
CERTIFICATE OF SERVICE	6
APPENDIX	7

# TABLE OF CITATIONS

CASES	CASES
Barrentine v. State, 12 F.L.W. 905 (Fla. 1st DCA April 1, 1987)	1, 4
Connell v. State,  502 So.2d 1272 (Fla. 3rd DCA 1987), review pending (Fla. 1987), Case No. 70,155	4
<u>Jenkins v. State</u> , 385 So.2d 1356 (Fla. 1980)	2
Lerma v. State, 497 So.2d 736 (Fla. 1986)	3
Morningstar v. State, 405 So.2d 778 (Fla. 4th DCA 1981), affirmed, 428 So.2d 110 (Fla. 1982)	5
Reaves v. State, 485 So.2d 829 (Fla. 1986)	2
STATUTES	
§ 800.04, Fla. Stat. § 960.02, Fla. Stat.	2 5
RULES	
Fla.R.App.P. 9.030(a)(2)(A)(iv)	3
OTHERS	
Article V, Section 3(b)(3) of the Constitution of the State of Florida	3

#### IN THE SUPREME COURT OF FLORIDA

MARK FRANKLIN BARRENTINE,

Petitioner,

vs.

CASE NO. 70,446

STATE OF FLORIDA,

Respondent.

## RESPONDENT'S BRIEF ON JURISDICTION

### PRELIMINARY STATEMENT

Petitioner, Mark Franklin Barrentine, the criminal defendant and appellant below in the appended <u>Barrentine v. State</u>, 12 F.L.W. 905 (Fla. 1st DCA April 1, 1987), will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority below, will be referred to as "the State."

No references to the record on appeal will be necessary.

All emphasis will be supplied by the State.

### STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional question are related in the unanimous opinion of the First District Court of Appeal in <u>Barrentine v. State</u>, which the State adopts as its statement of the case and facts. The State thus rejects petitioner's "statement of the case and facts" to the extent that these impermissibly stray from the face of the decision over which review is sought, see <u>Jenkins v. State</u>, 385 So.2d 1356 (Fla. 1980); <u>Reaves v. State</u>, 485 So.2d 829 (Fla. 1986).

# STATEMENT OF JURISDICTION/SUMMARY OF ARGUMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv) on the ground that this decision allegedly conflicts with a decision of this Court, Lerma v. State, infra, and with a decision of the Second District, Connell v. State, infra, on the same question of law. However, no basis for conflict certiorari jurisdiction exists insofar as the cases petitioner relies on for same are factually and legally distinguishable from the decision over which review is sought.

#### ISSUE

THE COURT SHOULD NOT GRANT DISCRETIO-NARY REVIEW OVER THE DECISION BELOW ON THE BASIS OF ALLEGED BUT NONEXISTANT CONFLICTS WITH ONE OF ITS OWN DECISIONS AND THAT OF ANOTHER DISTRICT COURT OF APPEAL

### **ARGUMENT**

In Lerma v. State, 497 So.2d 736, 739 (Fla. 1986), this

Court decreed that "emotional hardship can never constitute a

clear and convincing reason to depart [from the sentencing

guideline recommendation] in a sexual battery case because nearly

all sexual battery cases inflict emotional hardship on the

victim." In Connell v. State, 502 So.2d 1272, 1273 (Fla. 3rd DCA

1987), review pending (Fla. 1987), Case No. 70,155, the Second

District, without pausing to analyze the distinction between

sexual battery and lewd assault, interpreted Lerma to hold that

the "psychological harm inflicted [by that defendant] upon the

victims [of both these offenses] cannot justify departure."

Fortunately, in Barrentine v. State, 12 F.L.W. 905, 906, the

First District recognized that while "nearly all sexual battery

cases inflict emotional hardship on the victim," such is not the

case with lewd and lascivious assault cases, 1 so that

With modest imagination, one can envision numerous scenarious in which the "victims" of a violation of § 800.04 would not suffer psychological damage. For example, a group of large, street-smart, heterosexual 15 year old boys might well experience nothing more than amusement at the sight of a young, petit female postitute who disrobes herself and commits lewd acts in their presence.

"[p]sychological trauma suffered by the victim may justify departure from a recommended guideline sentence."

"Obviously, two cases cannot be in conflict if they can be validly distinguished." Morningstar v. State, 405 So.2d 778, 783 (Fla. 4th DCA 1981) (Anstead, J., concurring), affirmed, 428 So.2d 220 (Fla. 1982). Barrentine cannot be in conflict with either Lerma or Connell because these cases can be validly distinguished on grounds that they involve sentencing guideline departures in cases of sexual battery whereas the instant case does not. The fact that the Connell was incorrectly decided on the lewd and lascivious assault front augurs in favor of this Court granting the State's petition for review in that case, but does not counsel in favor of granting petitioner's petition to review the correct decision below. See § 960.02, Fla. Stat.

#### CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Court must summarily DENY the petition for writ of conflict certiorari.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing "Respondent's Brief on Jurisdiction" has been forwarded to Mr. P. Douglas Brinkmeyer, P.O. Box 671, Tallahassee, FL 32302, by hand delivery, this 64 day of May, 1987.

John W. Tiedemann

Assistant Attorney General