

IN THE SUPREME COURT OF FLORIDA

BYRON HARRIS,

Petitioner,

v.

Case No. 70,983

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF ARGUMENT	4
ARGUMENT	
THE DISTRICT COURT OF APPEALS CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.	5
CONCLUSION	11
CERTIFICATE OF SERVICE	11

TABLE OF CITATIONS

<u>Cases</u>	<u>Page(s)</u>
<u>Lerma v. State,</u> 497 So.2d 736 (Fla. 1986)	9
<u>State v. Rousseau,</u> 509 So.2d 281 (Fla. 1987)	8, 9

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

The record on appeal in the District Court of Appeal consist of four consecutively paged volumes and shall be referred to by the symbol "R" followed by the appropriate page number or numbers. The petitioner shall be referred to as Harris or petitioner. The respondent shall be referred to as the State or respondent.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case.

STATEMENT OF THE FACTS

The respondent will accept the petitioner's statement of the facts with the following addition or corrections.

While the victim was being forced to engage in oral sex with the petitioner. The petitioner told her that he wanted to have anal sex with her. (R 283)

Petitioner then ejaculated in the victims mouth and forced her to swallow his semen. (R 283) Petitioner then told the victim if she told anyone about this or told anyone about him he would find her and kill her. (R 285)

Although she was normal prior to the crime the victim is now fearful, unable to interact with people, afraid of leaving her home, unable to work, sexually dysfunctional, on medication and has had 13 appointments with her mental health professional from February to June. (R 536-540)

The trial judge found that this victim exhibited more psychological damage than any other victim the court could recall. (R 576).

The Court then ennuiciated two reasons for departure psychological injury as argued by the State and an escalating pattern of criminal behavior as a reason not argued by the State. (R 576)

SUMMARY OF ARGUMENT

The record supports a departure sentence as the evidence establishes infliction of psychological trauma arising from extraordinary circumstances and a discernible physical manifestation resulting from the psychological trauma.

ARGUMENT

THE DISTRICT COURT OF APPEALS CERTIFIED  
QUESTION SHOULD BE ANSWERED IN THE  
AFFIRMATIVE.

From the outset it must be recognized that this is a case of unquestioned guilt. This guilt is established not only by the victims testimony but by photographs from a hidden camera and by blood typing of stains on the victims clothing.

Being unable to win on the facts the petitioner lashes out at the victim and the Judge of the District Court of Appeals.

As to the victim it would appear the petitioners position is that once we convict him he is entitled to have the victim be placed on trial as to her injuries:

He apparently feels that the old adage of "In a society of laws, laws are enacted to protect the society and its members" should read In a society of laws, laws are enacted to protect those who refuse to obey the law.

As to the evidence of psychological trauma and injury the record is clear. The victim testified at trial and at the sentencing hearing. The petitioner therefore had two opportunities to attempt to impeach her credibility. He didn't, her testimony is unrebutted and is corroborated by the report of her psychological professional and the observations of the trial judge.

The petitioner did not object to the use of the psychologist's report nor did he seek to introduce any evidence as to the extent of normal psychological injury to victims of these crimes, nor did he ask for a continuance to do so. Finally the Court having observed the victim testify twice, made the finding that she exhibited more psychological damage than any other victim the court can remember.

The unobjected to evidence shows that prior to this offense the victim was a normal 23 year old with good relationship including a normal sexual relationship with her husband.

The evidence also shows that she was the victim of a horrible armed robbery, double sexual assault, and kidnapping.

As a result, the victim has been imprisoned in her home by fear. She can't hold a job and is on workmans compensation. She is unable to interact normally with other people. She is sexually dysfunctional. She is depressed and has these problem inspite of taking elavil a mood elevation drug, a drug for headaches and a barbituate to sleep.

How are the fact causing these injuries not inherent in the guidelines?

(1) She was constantly told she was going to have her head blown off, this is not an element of these offenses or considered in the guidelines.

(2) The sexual assault was premeditated as evidenced by the kidnapping and the petitioners manner of location of the exact spot for the rapes, this is not an element of these offenses or considered in the guidelines.

(3) The only thing that kept the victim from being anally penetrated was that the appellant ejaculated prior to accomplishing it. Threat of another rape was not an element of these crimes or considered in the guidelines.

(4) After ejaculation, he made the victim swallow the semen, which is not an element or considered in the guidelines.

(5) He threatened to hunt her, to find her and kill her if she told the police, this is not an element of these offenses nor a factor in the guidelines.

What is a physical manifestation? According to Webster's dictionary:

physical means, of or relating to the body, manifestation means, a demonstration of the existence, reality, or presence of a person, object, or quality.

Therefore a physical manifestation of emotional trauma is an emotional injury which demonstrates its existance or presence by its bodily expression.

In other words an emotional injury which presents identifiable physical sytoms. The physical manifestation of the

emotional trauma in this case are so great that:

1. They support the finding by an independent psychological professional that a previously normal person is unable to meet people, talk to people, will need prolonged psychological care, and is sexually dysfunctional.

2. They support the finding the victims fear is so great that an independent fact finding mechanism certified her for workmans compensation because she is unable to work.

3. They support the finding that the victim's ability to function as a normal human is horribly impaired, she is so impaired that a third independent professional or a medical doctor has proscribed not 1 not 2 but 3 separate medications. She's taking this medication months after the assault and even the use of three medication has not restored this victims ability to cope or function.

Therefore, the record establishes factors not inherent in the offenses and guidelines calculations plus extraordinary psychological trauma and physical manifestations. Thus whether you use extraordinary circumstances not inherent in the crime charged or the physical manifestation test this victim meet the standards set forth in State v. Rousseau, 509 So.2d 281 (Fla. 1987).

The petitioner nexts misstates the Rousseau test and

castigates the licensed therapist<sup>1</sup> without basis. The appellant had his opportunity to object to the report and cross examine the victim and offer other evidence to mitigate the courts finding regarding victim injury. In light of the trial judge's statement of his observation, it is a reasonable assumption that trial counsel chose not to delve into these areas so not to increase the amount of aggravating information in the record. Having waived it by not objecting the Appellant has no basis to complain now.

Continuing with the when you can't win on the facts attack any handy individual approach, Petitioner attempts to discredit the opinion of the District Court of Appeals by slandering the Judge who wrote the opinion, when he infers the Judge won't follow the law when it conflicts with his opinion. Once again the appellant is wrong.<sup>2</sup>

The truth of the matter is the appellant does not want to recognize and apply Rousseau, supra, which altered Lerma v. State, 497 So.2d 736 (Fla. 1986) as he doesn't agree with this courts restatement or alteration of Lerma, supra.

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<sup>1</sup> See Chapters 490, Fla. Stat. which establishes licensing for individuals who hold master's degrees in the field of psychology.

<sup>2</sup> See Randall Scott Blackshear v. State, 1st DCA Case #BO-202 Opinion filed September 3, 1987, where the 1st DCA with Judge Nimmons writing for the Court, reversed a departure sentence based on extraordinary psychological trauma to the victim.

Finally even if the court erred the sentence of the Appellant should not be vacated in this case as at sentencing the Court specifically and without a recommendation by the State Attorney found an escalating pattern of criminal activity and violence. In advancing its own reason the Court made it clear beyond the exclusion of any reasonable doubt that a departure sentence was appropriate and would be imposed whether psychological trauma was upheld or not.