

IN THE SUPREME COURT OF FLORIDA

JAMES REE,

Petitioner,

vs .

STATE OF FLORIDA,

Respondent.

CASE NO.

71,424

FILED

SID J. WHITE

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PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
AUTHORITIES CITED	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	
<u>POINT</u>	
PETITIONER HAS PROPERLY INVOKED THE JURIS- DICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT AND THAT OF OTHER DISTRICT COURTS OF APPEAL	6
CONCLUSION	10
CERTIFICATE OF SERVICE	10

AUTHORITIES CITED

	<u>PAGE</u>
<u>Austin v. State</u> , 507 So.2d 132 (Fla. 1st DCA 1987)	6
<u>Casteel v. State</u> , 498 So.2d 1249 (Fla. 1986)	6,7
<u>Dodi Publishing v. Editorial America, S.A.</u> , 385 So.2d 1369 (Fla. 1980)	6
<u>Jenkins v. State</u> , 385 So.2d 1356 (Fla. 1980)	6
<u>Lerma v. State</u> , 497 So.2d 736 (Fla. 1986)	6,7
<u>Mack v. State</u> , 489 So.2d 205 (Fla. 2d DCA 1986)	8
<u>Ree v. State</u> , 12 F.L.W. 2252 (Fla. 4th DCA Sept 16, 1987)	6
<u>Spivey v. State</u> , 481 So.2d 100 (Fla. 3d DCA 1986)	9
<u>State v. Rousseau</u> , 509 So.2d 281 (Fla. 1987)	6,7,9
<u>Williams v. State</u> , 500 So.2d 501 (Fla. 1986)	8

OTHER AUTHORITIES CITED

<u>Fla. Const.</u> (1980) Article V, § 3(b)(3)	6
<u>Fla.R.App.P.</u> Rule 9.0309(a)(2)(iv)	6
<u>Fla.R.Crim.P.</u> Rule 3.701(d)(11)	8

PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the Appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and Appellee in the lower courts. In this brief, the parties will be referred to as they appear before this Court.

The symbol "R" will denote record on appeal.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by way of an information filed in the Seventeenth Judicial Circuit with Count I, burglary, Count II, possession of burglary tools and Count 111, criminal mischief. R 227. Petitioner pled nolo contendere to all three (3) counts and he was placed on two (2) years probation.

On August 28, 1985, an affidavit of violation of probation was filed charging Petitioner with 1 Count I, violating the law by committing a sexual battery upon R [REDACTED] B [REDACTED], a person under the age of eleven (1); and Count II violating the law by committing a sexual battery upon A [REDACTED] E [REDACTED] a person under the age of eleven (11) years old. R 230.

A probation revocation hearing was held on the violations. At the conclusion of the hearing, the trial court found that Petitioner had violated his probation. R 189. The trial court in his written order of revocation of probation found that Petitioner had committed both counts of violation as alleged in the affidavit.

Petitioner was scored under the Fla. R. Crim. P. 3.701 Sentencing Guidelines. Petitioner's presumptive guidelines sentence range was in the 12 - 30 months incarceration range. R 190.

On March 21, 1986, the trial judge sentenced Petitioner to five (5) years in prison for Count I, five (5) years in prison for Count 11, and six (6) months in the Broward County Jail under Count III with credit for time served with the sentencing to run consecutively. R 216-217, 236-238. The trial judge declined to state at the hearing his reasons for departure but indicated that he would file a subsequent written order. R 210.

On March 26, 1986, the trial judge issued a written order specifying his four (4) reasons for departure. These reasons were as follows:

1. That substantial psychological and emotional trauma has been caused to the victim as a result of the Defendant's acts which have led to this violation of probation, the magnitude of which may only be fully realized at a stage much later in her life.
2. The Defendant was on probation for less than eight months before he committed the acts for which he is in violation leading this Court to conclude he is not suitable for rehabilitation.
3. The acts leading to this probation violation are sufficiently egregious and severe to warrant a substantial departure because he has satisfied the court's conscience of his having committed a crime still classified as capital under Florida law.
4. The Defendant's acts while on probation indicate a trend toward criminality of increasing severity and indicate the Defendant's sociopathic tendencies making departure essential for the safety and well being of the public.

See Supplemental Record.

Timely Notice of Appeal was filed by Petitioner.

On September 16, 1987, the Fourth District Court of Appeal in Ree v. State, 12 F.L.W. 2252 (Fla. Sept. 16, 1987) (see Appendix 1) held that two (2) of the four (4) reasons for departure were valid. The Fourth District applying this Honorable Court's decision in Albritton v. State, 476 So.2d 158 (Fla. 1985) reversed Petitioner's sentence and remanded for resentencing.

The Fourth District also reached another issue raised on appeal. The Court held that the written order of departure was not contemporaneous with the pronouncement of sentence. However, the Fourth District certified a question on that particular issue. <sup>1</sup>

Petitioner timely filed a motion for rehearing arguing that the two (2) grounds found to be valid for departure were, in fact, invalid under Florida guidelines law. (See Appendix 2). The Fourth District denied Petitioner's motion for rehearing on October 7, 1987. (See Appendix 3).

On October 29, 1987, Petitioner timely filed a Notice to Invoke Discretionary Jurisdiction solely on the basis that the decision conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. See Fla.R.App.P 9.030(a)(2)(A)(iv). (See Appendix 4).

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<sup>1</sup> MUST A TRIAL COURT PRODUCE WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES AT THE SENTENCING HEARING?

SUMMARY OF ARGUMENT

The decision, at bar, expressly and directly conflicts with this Honorable Court's decision in Lerma v. State, 497 So.2d 736 (Fla. 1986) and State v. Rousseau, 509 So.2d 281 (Fla. 1987) on the issue of psychological trauma to the victim as a basis for departure. This ground for departure cannot be independently considered as a circumstance of the violation of probation. The second "timing" of temporal reason upheld as a valid basis for departure by the Fourth District Court conflicts with this Honorable Court's decision in State v. Rousseau, supra at 283.



ARGUMENT

POINT

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND THAT OF OTHER DISTRICT COURTS OF APPEAL

To properly invoke the "conflict certiorari" jurisdiction of this Court, Petitioner must demonstrate that there is "express and direct conflict" between the decision challenged herein, and those holdings of other Florida appellate courts or this Honorable Court on the same rule of law to produce a different result than other state appellate courts faced with the substantially same facts. Dodi Publishing v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Article V, § 3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.0309(a)(2)(iv).

The opinion of the Fourth District Court of Appeal at bar, Ree v. State, 12 F.L.W. 2252 (Fla. 4th DCA Sept. 16, 1987) (Appendix 1) expressly and directly conflicts with the decisions of this Honorable Court in Lerma v. State, 497 So.2d 736 (Fla. 1986); Casteel v. State, 498 So.2d 1249 (Fla. 1986); State v. Rousseau, 509 So.2d 281 (Fla. 1987) and the First District's decision in Austin v. State, 507 So.2d 132 (Fla. 1st DCA 1987).

An affidavit of violation of probation was filed charging Petitioner with violating his probation by committing sexual batteries on two young females. The trial court revoked Peti-

tioner's probation on the basis of these two (2) violations. The trial judge cited four (4) reasons for departure from Petitioner's presumptive guidelines sentence.

At bar, the Fourth District held "that the first reason (psychological and emotional trauma of the sexual battery victims) was valid as constituting consideration of the circumstances forming the basis for the probation revocation."

This opinion expressly and directly conflicts with this Honorable Court's decision in Lerma v. State, supra. Even if psychological trauma could be a valid basis to depart herein, there is nothing indicated in the record that the victims sustained substantial, extraordinary or unusual psychological or emotional trauma. See Casteel v. State, supra.

State v. Rousseau, supra, wherein this Court held:

The final reason, psychological trauma to the victims, may in certain circumstances be a clear and convincing reason supporting departure. In this case, however, the trauma the victims suffered was simply the type of trauma that any victim of a burglary experiences when the sanctity of his or her home is violated and his or her possessions are taken. In other words, it is the type of trauma inherent in the crime of burglary.

Id. at 283.

The Fourth District apparently considered the "psychological trauma" as articulated by the trial judge as really something else i.e. circumstances of the violation of probation. However this basis (even if articulated by the trial judge) expressly and directly conflicts with the decision of the Second District in

Mack v. State, 489 So.2d 205 (Fla. 2d DCA 1986). In Mack, the probationer was placed on probation for five (5) years. Subsequently the defendant was charged with robbery and resisting arrest with violence which formed a basis of the violation of probation. At the hearing, the trial judge found that the defendant had violated the terms of his probation by committing the criminal offense for which he was arrested as well as absconding. The Court held:

Assuming, without deciding, that a trial judge may consider the substantive nature of probation violation charges as reasons for a departure, we find that departure in this case based on the commission of two felonies runs afoul of the provisions in rule 3.701(d)(11) that "reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction." Although the defendant had been arrested on the charges of committing the two felonies, he had not been convicted, on those charges at the time of sentencing in this case. We reject the state's argument that the trial judge's findings, for purposes of probation revocation, that the defendant committed these felonies was tantamount to conviction.

Id. at 206 (emphasis added).

Petitioner was not convicted of criminal offenses. To permit departure for offenses for which a defendant has not been convicted as indicated by the district court's holding is prohibited by Fla.R.Crim.P. 3.701(d)(11) and is in conflict with this Court's decision in Williams v. State, 500 So.2d 501 (Fla. 1986).

The second reason for departure (commission of crimes within eight months of being placed on two years probation) was held to be valid by the Fourth District on the authority of Spivey v. State, 481 So.2d 100 (Fla. 3d DCA 1986) (violation within one (1) month). This holding, at bar, expressly and directly conflicts with this Honorable court's decision in State v. Rousseau, supra as to the "timing" ground for departure:

The first of these reasons is that Rousseau committed three burglaries in a three week period. The district court evidently viewed the "temporal circumstances" of these crimes to justify departure. We disagree with this conclusion. Each of these three burglaries was scored as a primary offense in determining Rousseau's guidelines sentence. The record reveals no additional facts concerning the timing of these offenses which were not already factored into the guidelines score sheet. Therefore, this reason cannot justify departure.

Id at 283.

This Honorable Court should exercise its discretion and entertain this case on the merits because of its impact on the Florida sentencing guidelines in the context of sentencing subsequent to a probation revocation. Guidance on this re-occurring situation is necessary. Hence the ruling at bar expressly and directly conflicts with decisions of this Honorable Court and that of other district courts of appeal on the same question of law.

CONCLUSION

The decision of the Fourth District herein expressly and directly conflicts with decisions of this Honorable Court and that of other district courts of appeal on the same question of law. This Honorable Court should grant Petitioner's request for jurisdiction and hear this cause on the merits.

Respectfully submitted,

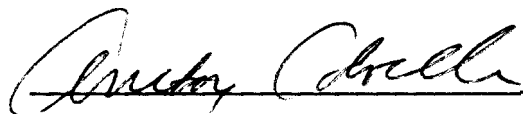
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to AMY DIEM, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 6<sup>th</sup> day of November, 1987.



Of Counsel