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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

CASE NO.

Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

ROBERT A. LETTMAN,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner herein was the Appellee and the Respondent the Appellant, in the Fourth District Court of Appeal. In this Brief, STATE OF FLORIDA will be referred to as the "Petitioner" and ROBERT A. LETTMAN, the "Respondent."

"A" means Petitioner's Appendix to the Jurisdictional Brief, and "e.a." means emphasis added.

STATEMENT OF THE CASE AND FACTS

On appeal to the Fourth District Court of Appeal, Respondent challenged his conviction and fifteen year sentence, for the third-degree murder of his daughter. (A, 1).

In its opinion, the Fourth District unanimously and summarily rejected Respondent's challenges to his conviction. (A, 1); Lettman v. State, 13 F.L.W. 1360 (Fla. 4th DCA, June 8, 1988). However, in analyzing Respondent's departure sentence of fifteen years (from a recommended range of three to seven years), the Fourth District found that said sentence was improperly based on three invalid reasons, and reversed Respondent's sentence, remanding for sentencing within the guidelines. (A, 1-4). Specifically, the Fourth District found, inter alia, that reliance on the factor of Respondent's violation and abuse of his daughter's trust, was invalid in this case, because the facts of Respondent's murder of his daughter, although "shocking," were not sufficiently "barbaric and grotesque" to warrant departure on this basis. (A, 3). While recognizing that other district appellate decisions had concluded that such abuses of trust and authority by a family member was a proper justification for guidelines departure sentences, such a reason was permissible in limited circumstances. (A, 3).

Furthermore, the Fourth District invalidated the trial court's reliance on vulnerability and tender age of the victim, as a departure reason, based on Byrd v. State, 516 So.2d 107 (FLa. 4th DCA 1987). (A, 3). The Byrd case concluded that vulnerability by age, unless combined with factors such as abuse of trust, is not alone sufficient as a departure reason. Byrd, supra, at 108.

Petitioner filed its Notice to Invoke Discretionary Jurisdiction in this case, on July 6, 1988. (A, 5).

POINT INVOLVED

WHETHER THE PETITIONER HAS PROPERLY INVOKED JURISDICTION OF FLORIDA SUPREME COURT IN THIS CAUSE, SINCE OPINION OF FOURTH DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER STATE APPELLATE COURTS?

SUMMARY OF ARGUMENT

Petitioner has appropriately invoked the jurisdiction of this Court. Such jurisdiction is based on direct and express conflict between the Fourth District's determination that abuse of familial trust and vulnerability of young victims were not valid reasons for Respondent's departure sentence, and other decisions of sister appellate courts and this Court, holding such factors valid, on very similar facts.

ARGUMENT

PETITIONER HAS PROPERLY INVOKED JURISDICTION OF FLORIDA SUPREME COURT IN THIS CAUSE, SINCE OPINION OF FOURTH DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER STATE APPELLATE COURTS.

In order to properly invoke the "conflict certiorari" jurisdiction of this Court, pursuant to Article V, Section 3(b)(3) of the Florida Constitution (1980), and Rule 9.030(a)(2)(A)(iv) Fla.R.App.P. (1980), Petitioner must demonstrate that there is "express and direct conflict" in the decision sub judice, with the holding of another prior state District Court of Appeal decision on the same rule of law. Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Mancini v. State, 312 So.2d 732 (Fla. 1975). The Supreme Court's discretionary jurisdiction is also properly invoked, based on conflict, when a particular state appellate court applies a particular rule of law to produce a different result, in a case with substantially the same facts, as those considered by the other court in developing or applying said rule of law. Mancini, supra, at 733 (e.a.).

It is therefore apparent that the Fourth District's ruling, invalidating a departure sentence based on abuse of a position of trust by Respondent over his three-year-old daughter, resulting in her murder by physical beating, clearly created express and direct conflict with this Court's opinion in Davis v. State, 517 So.2d 670 (Fla. 1987). In Davis, supra, this Court made it clear that abuse of trust was a valid reason for departure when the "crime committed was directly related to

the trust conferred on the defendant and the trust was the factor that made possible the commission of the crime," or formed the foundation for the crime. Davis, 517 So.2d, supra, at 674; see also, Moore v. State, 13 F.L.W. 890, 891 (Fla. 1st DCA, April 6, 1988). There is no question that Respondent's murder of his daughter, by physical child abuse, when the "child should be able to rely upon [Respondent] for love, care and protection" (R, 354-355), clearly resulted from the abuse by Respondent of his daughter's love and trust, and formed the basis for the crime. Davis; Moore. Thus, the Fourth District's focus upon factual comparison to other decisions, and subjective determination that the facts were not so shocking or barbaric as to warrant departure, constitutes express and direct conflict with this Court's Davis opinion, and the First District's opinion in Moore.

The Fourth District's conclusions are also in express and direct conflict with several First District decisions, and with the Second District's opinion in Jakubowski v. State, 494 So.2d 277 (Fla. 2nd DCA 1986). In Jakubowski, supra, the Second District approved as valid, a departure sentence imposed for the third-degree murder of a six-year-old boy by his mother's live-in boyfriend, based on the violation of the boy's trust in the defendant. Jakubowski, 494 So.2d, at 279. Thus, on virtually the same facts, the Second District reached an expressly conflicting conclusion, to that of the Fourth District herein. Similarly, in Jefferson v. State, 489 So.2d 860, 862-863 (Fla. 1st DCA 1986), the First District found the departure reason of abuse of trust valid, based on a mother's beating death of her twenty-month-old son. The Fourth District's contrary analysis and conclu-

sions clearly constitute further conflict, warranting acceptance of jurisdiction on this issue. Dodi Publishing; Marcini. Furthermore, the First District's opinions in Ross v. State, 478 So.2d 480, 481-482 (Fla. 1st DCA 1985)(abuse of trust a valid departure reason, when uncle of 12-year-old victim committed attempted sexual battery upon her, was in same house because of familial status); Williams v. State, 462 So.2d 36, 37 (Fla. 1st DCA 1984), rev. denied, 471 So.2d 44 (Fla. 1985)(abuse of trust valid basis for departure, when step-father committed lewd and lascivious assault on his 10-year-old step-daughter); and Stewart v. State, 489 So.2d 176 (Fla. 1st DCA 1986) (abuse of trust, by resident of household, in child abuse of 8-year-old victim), all constitute clear and direct conflict, given very similar facts, on the same legal issue. The Fourth District's analysis and conclusions that the facts were not barbaric enough to approve a departure sentence, based on abuse of familial trust, clearly cannot be reconciled with the observations of the First District in Ross and Williams, supra:

... for a child to be subjected to such an act by one in a position of familial authority to whom the child should be able to rely upon for protection and sanctuary from such vile conduct constitutes, by any standard, a substantial aggravating factor [warranting a departure sentence].

Ross, 478 So.2d, supra, at 482; Williams, 462 So.2d, at 37. The nature of this conflict continues to exist, despite this Court's ruling in Hall v. State, 517 So.2d 692 (Fla. 1988), which did not directly or implicitly overrule these aforementioned decisions.¹ Thus,

¹ The reliance in Moore, supra, a post-Hall case, on the Davis deci-

jurisdiction is proper, on this basis.

Furthermore, the Fourth District's determination that vulnerability of the 2 year, 10-month-old victim (R, 354-355), was not by itself a valid basis for departure (A, 3), conflicts with sister appellate courts which have directly recognized vulnerability, based on youthful and tender age of the victim, as a valid basis for departure. The Fourth District's reliance on Byrd v. State, 516 So.2d 107, 108 (Fla. 4th DCA 1987), wherein the panel determined that vulnerability by age was valid only when used in conjunction with abuse of trust, is directly contrary to the opinions in Coleman v. State, 515 So.2d 313, 315 (Fla. 2nd DCA 1987)(vulnerability of 10-year-old victim, left in defendant-brother's care after school, valid independent basis for departure); Cromer v. State, 514 So.2d 416, 417 (Fla. 1st DCA 1987)(vulnerability of 3-year-old victim of false imprisonment, recognized as valid departure reason, by judicial notice taken by appeals court); and Jakubowski, 494 So.2d, at 279 (6-year-old boy's vulnerability, due to age, valid reason for departure). Thus, jurisdiction is appropriate on this basis as well.² Dodi Publishing.

sion of this Court, illustrates, in a particularly appropriate way, the continuing conflict on use of the "abuse of familial trust" basis for departure sentencing.

² Clearly, the recognized validity of these two factors, in the conflicting decisions cited herein, alters the "harmless error" analysis, under Ross, supra, and Albritton v. State, 476 So.2d 158 (Fla. 1985).

CONCLUSION

Based on the argument and authorities cited herein, Petitioner respectfully requests that this Honorable Court ACCEPT jurisdiction and certiorari review of this cause, and proceed to decide said cause on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction, and accompanying Appendix, has been furnished, by courier, to ANTHONY CALVELLO, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 15th day of July, 1988.

Richard G. Bartmon
Of Counsel