

IN THE SUPREME COURT OF FLORIDA  
FOURTH DISTRICT

**FILED**  
SEP 1 1983

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COURT OF APPEALS

CASE NO. 72,731

STATE OF FLORIDA, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 ROBERT A. LETTMAN, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent 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. Petitioner 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

Respondent rejects Petitioner's Statement of the Case and Facts for failure to comply with the appellate rules.

Respondent was charged by indictment with third degree murder "by unlawfully committing the felony offense of Child Abuse; in that ROBERT ARTHUR LETTMAN did knowingly or by culpable negligence permit physical injury to a child...." R339. He was convicted as charged and scored under the Fla.R.Crim.P. 3.701 sentencing guidelines to a presumptive guidelines sentence range of three (3) to seven (7) years in prison. R353. The trial judge in a written order departed from Respondent's guidelines range and sentenced Respondent to fifteen (15) years in prison with credit for time served.

On appeal, the Fourth District affirmed Respondent's conviction but reversed his departure sentence because all three (3) grounds relied on by the trial court for departure were invalid. Lettman v. State, 13 F.L.W. 1360 (Fla. 4th DCA June 8, 1988).

### SUMMARY OF ARGUMENT

The opinion of the Fourth District Court of Appeal at bar, Lettman v. State, 13 F.L.W. 1360 (Fla. 4th DCA June 8, 1988) (Appendix) does not expressly and directly conflict with the decisions of this Honorable Court. Rather the Fourth District expressly relied on this Court's holding in Hall v. State, 517 So.2d 692 (Fla. 1988) to reach the current result that the trial court reversibly erred in departing from Respondent's guidelines sentence range.

The cases cited by Petitioner for "conflict" jurisdiction have either been overruled by this Court's decision in Hall or are distinguishable from the situation at bar wherein Respondent was convicted of third degree murder through the underlying felony of child abuse.

ARGUMENT

POINT

PETITIONER HAS NOT PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT.

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 holding 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 substantially the 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. 9.030-(a)(2)(A)(iv).

The opinion of the Fourth District Court of Appeal at bar, Lettman v. State, 13 F.L.W. 1360 (Fla. 4th DCA June 8, 1988) (Appendix) does not expressly and directly conflict with the decisions of this Honorable Court. Rather the Fourth District expressly relied on this Court's holding in Hall v. State, 517 So.d 692 (Fla. 1988) to reach the correct result that the trial court reversibly erred in departing from Respondent's guidelines sentence range.



In Hall, this Court reviewed a departure based inter alia, on "a special position of trust within the family unit." This Court held that use of familial authority was an invalid reason for departure, stating:

There are, of course, some cases of child abuse which occur outside the family unit. However since the use of familial authority exists in so many child abuse cases, its adverse effect may have been taken into consideration in the setting of the guideline ranges for that offense. In any event, to permit a built-in basis for departure in so many child abuse cases would be contrary to the purpose and spirit of the sentencing guidelines.

Id. at 695. See also Eldridge v. State, 13 F.L.W. 1042 (Fla. 5th DCA Apr. 28, 1988).

The contrary lower court decisions cited by Petitioner, Jakubowski v. State, 494 So.2d 277 (Fla. 2d DCA 1986); Jefferson v. State, 489 So.2d 860 (Fla. 1st DCA 1986); Ross v. State, 478 So.2d 480, 481-482 (Fla. 1st DCA 1985); Williams v. State, 462 So.2d 36, 37 (Fla. 1st DCA 1984), rev. denied, 471 So.2d 44 (Fla. 1985) and Stewart v. State, 489 So.2d 176 (Fla. 1st DCA 1986) are no longer viable. Hence an abuse of family trust can not be used to depart in a "child abuse" case. Hall. In Davis v. State, 517 So.2d 670 (Fla. 1987), the defendant was convicted of second degree murder.

Respondent also seeks jurisdiction because of an alleged conflict with other district courts of appeal which have recognized "vulnerability" based on the youthful and tender age of the victim. First this Court in Williams v. State, 492 So.2d 1308

(Fla. 1986) found that vulnerability of a sleeping stabbing victim not sufficient to justify departure. Second it is a fundamental principle of sentencing guidelines law that an inherent component of the offense can not be used to depart from the presumptive guidelines sentence range. State v. Mischler, 488 So.2d 523, 526 (Fla. 1986), Lerma v. State, 497 So.2d 736 (Fla. 1986). All children are vulnerable to adults. As the Second District in one case relied upon by Petitioner for "conflict" jurisdiction stated: "Standing alone the tender age of the victim could be said to be an inherent component of the offense charged and thus an impermissible reason for departure. State v. Mischler, 488 So.2d 523 (Fla. 1986)." Jakubowski v. State, 494 So.2d 277, 279 (Fla. 2d DCA 1986). The Jakubowski court's further conclusion that vulnerability coupled with an abuse of trust "might be valid if sufficiently articulated" is now erroneous in light of Hall.

Two other cases cited by Petitioner for "conflict" jurisdiction on the basis of vulnerability are not only wrongly decided but also distinguishable. In Coleman v. State, 515 So.2d 313, 315 (Fla. 2d DCA 1987) the defendant was convicted of second degree murder not a "child abuse" case. And in Cromer v. State, 514 So.2d 416, 417 (Fla. 1st DCA 1987) the defendant was convicted of false imprisonment. Hence the Mischler rule invoked here would not be applicable to those crimes.

Therefore Petitioner's petition for review should be denied.

CONCLUSION

Based upon the foregoing Argument and the authorities cited herein, Respondent respectfully requests this Honorable Court to deny Petitioner's petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to RICHARD BARTMON, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 29th day of July, 1988.

*Jeffrey J. Anderson*  
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