

IN THE SUPREME COURT OF FLORIDA

AARON HAMILTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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FILED  
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JAN 5 1989  
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By \_\_\_\_\_  
CASE NO. 73,398 Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

State v. Lofton, is distinguishable from this case because the per curiam affirmance in Lofton was controlled by cases pending before this Court for review. Therefore, this Court exercised jurisdiction in Lofton. In the instant case, two departure reasons were per curiam affirmed with only one departure reason controlled by a case pending review in this Court. Thus, the other departure reason found valid by the district court is not subject to review on appeal and is the law of the case. Inasmuch as the circumstances of the per curiam affirmance in this case differs from that in Lofton, this court does not have to exercise its jurisdiction under Lofton.

## ARGUMENT

THIS COURT MAY BUT DOES NOT HAVE TO EXERCISE ITS JURISDICTION IN A CASE WHERE TWO DEPARTURE REASONS WERE PER CURIAM AFFIRMED BUT THE DISTRICT DECISION CITED TO ONLY ONE OF THE DEPARTURE REASONS, A CASE PENDING REVIEW BEFORE THIS COURT. (Appellant's issue restated by appellee.)

The Fifth District's per curiam affirmance found two departure reasons valid and cited a case pending review before this court, Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988) as controlling authority. Young applies only to one of these two departure reasons. The district court affirmed these two departure reasons: 1) Violation occurred nine months after being sentenced to community control; and 2) burning three barns was a substantial, egregious and flagrant violation (See, Appendix A for scoresheet listing trial court's departure reasons.)

The District Court cited Young as controlling authority only as to the second departure reason. Nothing in Young makes it applicable to the first departure reason which was also found valid by the district court. As the district court per curiam affirmed the first departure reason without citing any case pending review before this court as to it, the first departure reason is the law of the case and res judicata applies as to it. South Florida Hospital Corporation v. McCrea, 118 So.2d 25 (Fla. 1960).

Thus, even if appellant should prevail on appeal to this Court as to the second departure reason; the first departure

reason would still be valid under the doctrine of the law of the case and could not be relitigated before this court on appeal.

In State v. Lofton, 13 F.L.W. 677 (Fla. November 23, 1988), this Court's ruling was premised on only one departure reason where the court's decision cited as controlling authority cases pending before this court for review. The instant case involves two departure reasons held valid in a per curiam affirmance with only one of the two departure reasons subject to this court's review under the jurisdictional authority discussed in State v. Lofton. As this court observed in Lofton in reversing the district court, "Even if Lofton's sentence were on direct appeal, it might still be upheld if the other grounds for departure were valid. Hester v. State, 520 So.2d 273 (Fla. 1988)."


Therefore, this court may choose to accept jurisdiction as to the second departure reason but nothing in Lofton requires it to accept jurisdiction where there are two departure reasons affirmed and only one subject to relitigation.

CONCLUSION

Based on the foregoing arguments, cases and authorities cited, appellee respectfully prays this honorable court may, but is not required to accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondents Brief on Jurisdiction has been furnished by mail to Daniel J. Schafer, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the petitioner, this 3<sup>rd</sup> day of January, 1989.

  
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