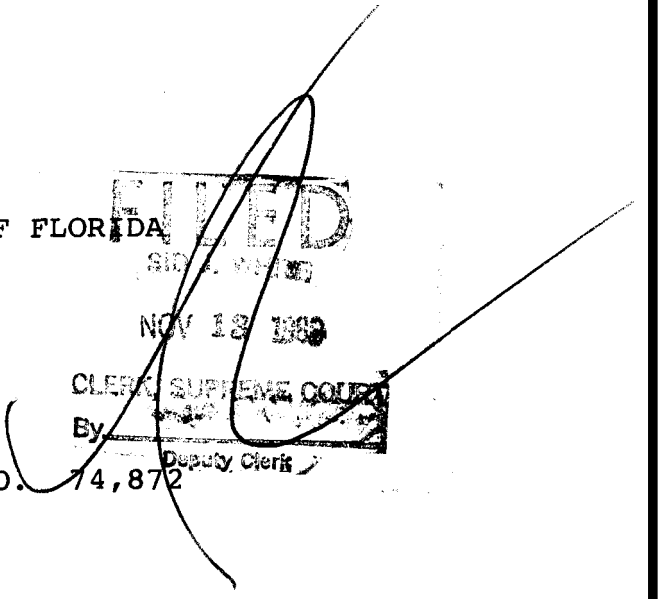
IN THE SUPREME COURT OF FLORIDA



EDDIE ROGER WILSON,

Petitioner,

v. CASE NO. 54,872

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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	:	

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the district court's affirmance of a guidelines-departure sentence imposed after a nolo plea. The transcripts and record on appeal will be referred to as "R."

II STATEMENT OF THE CASE

Appellant was charged by amended information filed June 29, 1988, with two counts of lewd assault and one count of capital sexual battery (R-1). An information, charging a single count of lewd assault, was originally filed May 27, 1986, more than two years earlier. The offense was alleged to have occurred between January 1, 1983, and May 5, 1986 (R-6).

Appellant pleaded nolo contendere to two counts of lewd assault and was sentenced September 28 to 25 years in prison (15 years on the first count followed by 10 years consecutive on the second count) plus five years probation (R-95-97). His presumptive guidelines sentence was 5-1/2 - 7 years (R-129). The reasons for departure were:

> 1. The victim in this case is the defendant's stepdaughter, who suffers from mild mental retardation, and by virtue thereof she was in a particularly vulnerable position because of the trust she placed in the defendant. Hawkins v. State, 522 So.2d 488 (Fla. 1st DCA 1988).
>
> 2. Because the sexual assault was committed by one in a position of familial authority and the defendant was convicted of a crime not predicated upon the existence of such relationship, the unusual mental trauma which was caused to the victim was not inherent in the crime itself and not factored into the sentencing guidelines.
>
> 3. The trauma suffered by the victim was of such an aggravated nature as to exceed that which is inherent in the usual case of a lewd and lascivious act and demonstrable physical manifestations resulted from the trauma.

(R-132-33).

Notice of appeal was timely filed September 30, **1988 (R-107).**

The First District Court of Appeal affirmed September 13, **1989,** holding the third reason was invalid, but the first and second were valid, but certifying conflict as to the valid reasons with Laberge v. State, infra, and in addition, certifying a question as to the second reason. Notice to invoke discretionary jurisdiction was timely filed October 12.

III STATEMENT OF THE FACTS

Although appellant, Eddie Wilson, entered a plea of nolo contendere in the instant case, the transcripts and record on appeal are about 380 pages long, consisting in large part of the testimony of various witnesses as to the amount of psychological trauma suffered by E[redacted] Eddie's stepdaughter and the alleged victim.

According to psychologist Evelyn Goslin, E[redacted] has an IQ of ***66***, which means mild mental retardation. At age **12,** E[redacted] was functioning at a seven-year-old level and had difficulty answering open-ended questions. According to Goslin, E[redacted] didn't like her dad from the beginning. He was mean, especially when drinking. He had hit her and her mother and brother, and sometimes messed with her. There were threats if she did not comply **(R-242-48).**

Due to her age when it began, the length of abuse, threats of violence, and her mother's failure to protect her, E ——— was particularly vulnerable. She suffered from more than the usual number of symptoms experienced by abused children. Dr. Goslin sees 80 to 100 sexually abused children a year: only **3** or **4** others experienced trauma at E[redacted]s level. There was violence in her thought processes. When asked to define join, E[redacted] said if somebody is going out to rob or kill someone and you go, too, then you join them **(R-254-61,266).**

Dr. Goslin, the guardian ad litem (Cari Roth), and E[redacted]'s mother, M[redacted] reported various disturbed acts by E[redacted]. She drew a picture of three frightened girls who

were being attacked by snakes. Each snake had "sh-sh" over it **(R-250-51)**. She stabbed a stuffed bear between its legs; Eddie had given her the bear. She decapitated a Cabbage Patch doll with a razor; Eddie had given her the doll **(R-193-200)**.

Other symptoms included nightmares; complaints of stomach-ache that had no medical basis; fearfulness, she would not sleep in her bedroom, but slept with her mother instead, and was afraid to get her clothes; she put up a sign that said, bad room, do not enter; overly dependent on her mother; under-achievement in school, she had repeated first grade once and second grade twice **(R-252-55)**. Her cousin, who attended the same school, told the other kids what happened, which embarrassed her **(R-155)**. E[redacted] made a marked improvement when she changed bedrooms with her brother, and again when she changed schools **(R-167)**.

Over vigorous objection, Major Crum of the Wakulla Sheriff's Office and state attorney investigator Al Gandy testified about a prior incest offense, which involved appellant's natural daughter, D[redacted] The state argued the testimony was admissible because there was no multiplier for the same type offense, and the scoresheet did not account for the facts of the prior offense **(R-288-98)**.

His sister, brother-in-law and stepmother testified in Eddie's behalf that he was good to the children, there was affection between Eddie and E[redacted] and the children did better in school after M[redacted] and Eddie married **(R-319-28)**.

The prosecutor asserted DOC needed a 10-year sentence to complete an MDSO (Mentally Disordered Sex Offender) program. After acknowledging that appellant would be ineligible for administrative gain-time, the judge said appellant would serve 10 years on a 30-year sentence (R-372-73).

IV SUMMARY OF ARGUMENT

Of three reasons for departure, the district court held two - the child's mental retardation and appellant's position of familial authority - to be valid. This was error as both reasons are invalid where the offense can only be committed against a child, and this court has previously recognized that offenses against children are unfortunately, but frequently, committed by family members. (The district court held the third reason - psychological trauma - to be an invalid basis for departure.)

The judge also tied the length of sentence imposed to the need for appellant to complete an MDSO program, but the factual premise concerning how long a sentence was required to fulfill this purpose was wrong. Objectively, a guideline sentence, no longer than one-quarter of the one imposed, would have been plenty long enough for appellant to complete an MDSO program.

The trial court's reasons for departure were impermissible and appellant should be resentenced within the guidelines.

V ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED IN EXCEEDING THE GUIDELINES WITHOUT PERMISSIBLE REASONS.

This is an appeal from the district court's affirmance of appellant's guideline-departure sentence imposed after he entered a plea of nolo contendere. Wilson v. State, 548 So.2d 874 (Fla. 1st DCA 1989).

The first two reasons for departure were:

> 1. The victim in this case is the defendant's stepdaughter, who suffers from mild mental retardation, and by virtue thereof she was in a particularly vulnerable position because of the trust she placed in the defendant. Hawkins v. State, 522 So.2d 488 (Fla. 1st DCA 1988).
>
> 2. Because the sexual assault was committed by one in a position of familial authority and the defendant was convicted of a crime not predicated upon the existence of such relationship, the unusual mental trauma which was caused to the victim was not inherent in the crime itself and not factored into the sentencing guidelines.

The district court held both reasons to be valid, but certified conflict on both with Laberge v. State, 508 So.2d 416, 417 (Fla. 5th DCA 1987). In addition, as to the second reason, the court certified this question:

> Whether abuse of a position of familial authority over a victim may constitute a clear and convincing reason justifying the imposition of a departure sentence for convictions of lewd and lascivious assault upon a child under 16 years of age?

Wilson, 548 So.2d at 876.

Laberge addressed reasons for departure which were quite similar to the instant case. Laberge was a teacher's aide at a school for mentally and emotionally handicapped children who was convicted of lewd assault upon a 8-year-old autistic boy who was a student at the school. The trial court departed from the guidelines recommendation of 12 to 30 months. The reasons for departure were:

> 1) the court found and adjudicated defendant to be a mentally disordered sex offender under section 917.012, Florida Statutes, and that treatment of the defendant under this act requires a sentence longer than the guidelines recommendation,
> 2) the defendant violated a public and private trust resulting from the defendant's custodial control over the child victim, and
> 3) the unusual and extraordinary circumstances of the child victim's handicapped condition make him especially vulnerable.

Laberge, 508 So.2d at 416. The Fifth District rejected all the reasons for departure and remanded for resentencing within the guidelines.

Of the vulnerability of children in lewd assault cases, the Fifth District said:

> Everyone in society is vulnerable and must trust others to not harm or hurt or steal. Everyone who breaks a criminal law violates this trust. Being naturally innocent in sexual matters, all children are especially vulnerable to the physical, mental, and emotional harm that can result from exposure to gross adult lewd acts. To protect children from that harm is the very purpose for section 800.04, Florida Statutes, which prohibits lewd acts on, or in the presence of, children.

Laberge at 417.

In Hawkins, a 19-year-old man committed sexual battery on his 25-year-old aunt, who was retarded, had cerebral palsy, and was confined to a wheelchair. An adult victim's retardation or other disability may be an aggravating factor in sexual battery, because it is not a factor "typical" of most adult sexual battery victims. On the other hand, where the statute defines a sexual offense upon a child, the statute has already accounted for the "disability" and particular vulnerability of a child of tender years. That the child was retarded does not aggravate the offense beyond the inherent aggravation of age in a sexual offense against a child of tender years. Hawkins applies to sexual batteries against adults: it is inapposite here.

Put another way, while mental retardation is indicated by low IQ, it can also be described by assigning a mental age, as distinguished from a chronological age, to the subject. For example, in Hawkins, supra, the 25-year-old retarded victim was described as having a mental age of 6-1/2. In the instant case, Dr. Goslin described the child at the time of the incident as having a physical age of 10 and a mental age of 7 (R-242). Mental retardation may very well make an adult victim of sexual battery more vulnerable than the typical adult victim; retardation, does not, however, enhance the vulnerability of a victim who is already statutorily defined as a child of tender years.

In other words, sexual battery of a 6-1/2-year-old child is a more serious offense than sexual battery of an adult.

That is why the Hawkins' victim retardation, which made her like a child, was an aggravating factor compared to the "typical" sexual battery of an adult. On the other hand, lewd assault on a 7-year-old is not a more serious offense than lewd assault on a 10-year-old. That is why E[redacted]s retardation in the instant case is not an aggravating factor compared to the typical lewd assault on a child.

As to the second reason, the Florida Supreme Court has rejected familial authority as a reason for departure where the offenses are, by their nature, committed only against children and, often, within the family setting. In Hall v. State, 517 So.2d 692 (Fla1988), an aggravated child abuse case, the Florida Supreme Court said:

> 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 guidelines.

Id. at 695.

This principle is no less applicable to sex offenses against children. As the Fifth District said in Laberge:

> While, of course, some such acts are committed by strangers to the children, unhappily experience shows that such statutes are most commonly violated by persons who take advantage of a trust position involving the care, custody, teaching, and training of children, such as educational, religious, social, and child care workers, relatives, stepparents and babysitters (a true

> one to one relationship). Because it is only a difference in degree that all children are vulnerable to being victimized by lewd acts and because all who violate this statute also violate some degree of trust, departure from the recommended guidelines sentence for the offense of lewd acts on or in the presence of a child ... should not be based on these two particular factors.

Laberge, 508 So.2d at 417. See also Note, Are Children Competent Witnesses?: A Psychological Perspective, 63 Wash.U.L.Q. 815, 821-22 (1985):

> Identification of a perpetrator in sexual abuse cases is not a crucial issue because the perpetrator is usually a close friend or relative of the victim.[41]

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[41] In a three-year study of New York City sexual abuse cases, concluded in 1971, researchers found that in 75% of the cases reported, the offender was a member of the child's own household, a relative not living in the neighborhood, a neighbor, a friend, or a person in the community with whom the child had frequent contact. Undeutsch, Courtroom Evaluation of Eyewitness Testimony, 33 Int'l Rev. of Applied Psychology 51 (1984); accord Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault, 40:2 J. of Soc. Issues, 125, 126 (1984).

After reviewing the facts that guidelines sentences are imposed in 82.1% of cases and departures both upward and downward "fall into the peripheral 17.9%," the Fifth District reasoned:

> In considering whether emotional harm is a valid reason for departure in sexual battery cases, the supreme court in Lerma v. State, 497 So.2d 736, 739 (Fla. 1986) stated that "emotional hardship" can never constitute a clear and convincing reason to depart because nearly all sexual-battery cases inflict emotional hardship on the

> victim (emphasis supplied). We understand Lerma to hold that any factor, though not an element of the offense, that is commonly appurtenant to the offense, such as emotional harm in a sexual battery case, should not be used to authorize a departure sentence because, contrary to the intent of the guidelines sentencing, a departure sentence, rather than the recommended sentence, could be authorized in most cases.

Laberge, 508 So.2d at 417. Applying this analysis to the facts then before the court, the Fifth District said:

> All we hold here is that as emotional harm is a common factor to sexual battery, so "vulnerability" and "breach of trust" are factors common in child molestation cases. ... If they are held to authorize departure sentences, the "exceptional case" will become the rule, and departure sentences, rather than recommended sentences, will be authorized in a large percentage of all sentences based on violations of section 800.04, Florida Statutes.

Id. at 417-18.

As the courts acknowledged in Hall and Laberge, the child's vulnerability, and abuse of trust or of familial authority are factors common to most child abuse and child sex offense cases. Under the rationale of Hall and Laberge, factors common to the majority of cases cannot justify departure because such factors are insufficient to distinguish the extraordinarily severe case from the "typical" case. Because they are typical of the offense, neither the child's vulnerability nor appellant's "familial authority" justified departure in the instant case.

A second argument against departure is that the phrase "familial authority'' refers to an offense of which appellant

was not convicted. An offense which did not result in conviction cannot be used to justify departure. Rule 3.701(d)(5), Fla.R.Crim.P.

While acknowledging that the child herein was "very severely traumatized,'' the district court nevertheless held that the third reason - psychological trauma - was an invalid basis for departure, because severe trauma is inherent in the offense. Appellant agrees with the district court's discussion of this point and does not appeal it.

Even if the state, or this court, were to disagree with the district court's application of the principles concerning departure based on psychological trauma, the dispute would be based on application, but not on the principles themselves. On the principles involved, there is no conflict. The district court said:

> We do not, however, find the third reason given by the trial judge for the departure - aggravated nature of the psychological trauma sustained by the victim - to be a valid reason under the circumstances presented. Generally, emotional hardship can never constitute a clear and convincing reason for departure in lewd and lascivious assaults; however, there may be some circumstances in which the emotional trauma suffered by the victim is clearly not inherent in the offense charged or is ***so*** substantial that it results in discernible physical manifestations. Barrentine v. State, 521 So.2d 1093,1094 (Fla. 1988). Although the victim in the instant case was very severely traumatized, we believe this case is more properly aligned with those applying the general rule, rather than the exception thereto, that emotional trauma is not a valid reason for departure. ~~See Barrentine~~, Lerma v. State, 497 So.2d 736 (Fla. 1986), receded from on other grounds,

State v. Rousseau, 509 So.2d 281 (Fla. 1987), Blackshear v. State, 513 So.2d (Fla. 1st DCA 1987), approved in part, quashed on other grounds, 531 So.2d 956 (Fla. 1988). Cf. Harris v. State, 531 So.2d 1349 (Fla. 1988); Hall v. State, 517 So.2d 692 (Fla. 1988); Casteel v. State, 498 So.2d 1249 (Fla. 1986); Smith v. State, 526 So.2d 1060 (Fla. 1st DCA 1988).

Wilson, 548 So.2d at 876.

Lastly, although these remarks were not included in the written departure order, at the sentencing hearing, the state asserted that a defendant had to receive a 10-year sentence in order to complete an MDSO program. The state cited no authority for this assertion. While acknowledging that he would not be eligible for administrative gain-time, the judge said appellant would serve 10 years on a 30-year sentence. This colloquy is reasonably inferable of meaning the judge imposed the 30-year sentence so appellant would serve 10, and 10 years were necessary to complete an MDSO program.

This premise was objectively wrong. The limitations on admission to the MDSO program are that an inmate may not be transferred for treatment if he has more than 15 years remaining to expiration of sentence or presumptive parole release date (PPRD), or less than 8 months (remaining before expiration or PPRD). Rule 33-19.001(5), Fla.Admin.Code. Admission to the MDSO program requires a minimum of eight months of incarceration, not 10 years| Eight months of incarceration would require an imposed sentence more than eight months, of course, but far, far less than 30 years. Where the court has specifically tied the length of sentence imposed to a factual premise,

and the factual premise is wrong, that is reason enough to remand for resentencing.

The Fifth District also addressed this issue in Laberge. The court said:

> In Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), approved, 476 So.2d 161 (Fla. 1985), the court found that there was no logical connection between the defendant's need for mental treatment and an extended term of imprisonment. In Vance v. State, 475 So.2d 1362 (Fla. 5th DCA 1985), this court agreed with the observations in Young and now it appears Young is again applicable in this case. All persons convicted of section 800.04, Florida Statutes, are potentially mentally disordered sex offenders. The adjudication of the defendant to be a mental disordered sex offender under section 917.012, Florida Statutes, does not per se constitute a clear and convincing reason to depart from the recommended guidelines sentence. There is no evidence that the treatment contemplated for the sex offender under that statute cannot be accomplished within the recommended guidelines sentence. Therefore, the first reason for departure is not a clear and convincing reason.

Laberge, 508 So.2d at 417.

The two reasons which the First District approved below are invalid bases for departure. The district court previously disapproved a third reason. Even if this court were to disagree that all the reasons for departure were invalid, where the court relied on both permissible and impermissible reasons for departure, remand for resentencing is required under Albritton v. State, 476 So.2d 158 (Fla. 1985). Finally, the judge tied the length of sentence imposed to the perceived need for appellant to complete an MDSO program, but the factual

premise concerning how long a sentence was required to fulfill this purpose was wrong. Objectively, a guideline sentence, no longer than one-quarter of the one imposed, would have been plenty long enough for appellant to complete an MDSO program. Appellant must be resentenced within the recommended guidelines range.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, appellant requests that this Court answer the certified question in the negative, reverse the district court affirmance of his sentence, and remand for resentencing within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to John M. Koenig, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Eddie Roger Wilson, Inmate no. 857910, Apalachee Correctional Institution, P.O. Box 699, Sneads, Florida 32460, this 13 day of November, 1989.

KATHLEEN STOVER

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