IN THE SUPREME COURT OF FLORIDA

EDDIE ROGER WILSON,

Petitioner,

v. CASE NO. 74,872

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

I SUMMARY OF ARGUMENT

A retarded 10-year-old child with a mental age of 7-1/2 is, legally, not more vulnerable than any other child of tender years. The state wholly failed to prove any qualitative difference in these two types of disability sufficient to justify departure.

While perhaps somewhat less often than in cases of physical child abuse, sexual child abuse is typically committed by a family member or a person with custodial authority over the child. As a factor common to the vast majority of cases, abuse of familial or custodial authority is not a valid reason for departure.

The district court cited the correct standard when it held that the child's psychological trauma here did not support departure. The state's true disagreement is with the court's interpretation of the facts, but the state's view is objectively wrong, and cannot prevail.

II ARGUMENT

ISSUE PRESENTED

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

In its answer, the state argued that mental retardation is a "wholly separate vulnerability" not accounted for by section **800.04**, Florida Statutes, which proscribes lewd and lascivious acts upon or in the presence of children under the age of 16. In the state's view, as a "wholly separate vulnerability,'' retardation is thus a valid reason for departure. Both the retarded and young children share such characteristics as innocence and the lack of experience and education, but only age is actually an element of the offense of lewd assault. The state simply failed to make a convincing argument that a child's retardation is qualitatively different from a young child's tender years sufficient to justify departure.

This is particularly so in light of the fact that retardation is often expressed in terms of mental age. In both Hawkins, which involved the sexual battery of a retarded adult, and on which the state relied, and the instant case, the state's witnesses described the alleged victims as having a mental age younger than their chronological age. Hawkins v. State, 522 So.2d **488** (Fla. 1st DCA 1988). In the instant case, Dr. Goslin said the 10-year-old victim had a mental age of 7-1/2. While an adult victim with a mental age of 7-1/2 may be more vulnerable than the typical adult victim of sexual battery, a 7-1/2-year-old child is not more vulnerable than a

10-year-old child, at least not in a way which the law recognizes. Hawkins may be relevant where sexual batteries on adults are concerned, but it in no way demonstrates how a retarded child is more vulnerable than the typical child of tender years.

The state's argument as to why familial authority is a valid reason for departure overlooks a subtle but crucial point. The state argued familial authority is not an element of section 800.04, (appellant agrees), but that's not the point. Factors which are invalid as reasons for departure are not limited to elements of proof of the offense. Rather, they include other factors, which while they are not elements of proof, yet are "commonly appurtenant" to the offense, such as psychological trauma in cases of sexual battery. Lerma v. State, 497 So.2d 736 (Fla. 1986); Laberge v. State, 508 So.2d 416 (Fla. 5th DCA 1987). Psychological trauma is not an element of sexual battery, yet it is almost always present in the offense.

This court has previously recognized that an abuse of trust and/or familial authority in the case of physical abuse of a child is another such element, commonly present in many or most cases. Hall v. State, 517 So.2d 692 (Fla. 1988). The time has come for this court to acknowledge that the same is true of sexual child abuse. No matter how unfortunate this fact is, the fact remains, most sexual abuse of children (both lewd acts and sexual battery) is committed by family members, including stepparents, as here, or other persons, such as

teachers, babysitters and boyfriends of the mother, who occupy positions of trust and who have custodial authority over the child. Because it is an element common to so many of these cases, it fails to be a factor which distinguishes the particularly egregious case from the "typical" sexual abuse case.

The state relied on Gopaul v. State, 536 So.2d 296 (Fla. 3d DCA 1989), in which the 17-year-old defendant was convicted of sexual battery on his 19-month-old cousin. The Third District said that familial authority was a valid reason for departure because it was not common to virtually all sexual batteries. Having asked the wrong question, the Third District got the wrong answer. The right question is not whether familial authority is common to virtually all sexual batteries, but whether it is common to virtually all sex offenses against children. The right question gives a much different answer.

Undersigned counsel is not in a position to do a thorough empirical study of who the defendants are in cases of sex crimes against children. In her personal experiences with dozens of appeals of such convictions, not one defendant was a stranger to the child, and all the defendants were family members, including stepparents, or live-in boyfriends, or babysitters.

A review of the cases cited in the briefs in this case and other leading cases involving sex crimes against children demonstrates this fact. The one exception to the general rule is that where the offense is "flashing" or exposing genitals to a child, which involves no physical contact with the child, the

victims are often, perhaps usually, strangers to the defendant. See, e.g., Egal v. State, 469 So.2d 196 (Fla. 2d DCA), review den. 476 So.2d 673 (Fla. 1985); Kalinoski v. State, 414 So.2d 656 (Fla. 1st DCA 1982). Otherwise, the defendants were typically family members or others in a position of trust over the child. In Handley v. State, 542 So.2d 1045 (Fla. 3d DCA 1989) (State's Brief (SB), 13), the defendant charged under section 800.04 was the victim's stepgrandfather. In Gopaul, supra (SB-12), the victim was the teenaged defendant's 19-month-old cousin. In Glendening v. State, 536 So.2d 212 (Fla. 1988), the victim was the defendant's daughter. In Tingle v. State, 536 So.2d 202 (Fla. 1988), the victim was the defendant's daughter. In Smith v. State, 525 So.2d 477 (Fla. 1st DCA 1988), (SB-10), the victim was the 8-year-old daughter of the defendant's live-in girlfriend. In Heuring v. State, 513 So.2d 122 (Fla. 1987), the victim was the defendant's stepdaughter. In Laberge, supra, the defendant was the autistic child victim's teacher. In Coleman v. State, 485 So.2d 1352 (Fla. 1st DCA 1986) (SB-14), the defendant had married the victim's mother; they later divorced, but were living together at the time of the incident. The defendant argued that, as he was not a legal stepparent at the time, he did not have familial authority; the court said that living in the same household with the children was sufficient to constitute familial or custodial authority. In Williams v. State, 462 So.2d 36 (Fla. 1st DCA), review den. 471 So.2d 44 (Fla. 1985) (SB-11), where the defendant was charged with an offense under section 800.04, the victim was his

stepdaughter. Davis v. State, 517 So.2d 670 (Fla. 1987) (SB-11) is irrelevant to this issue as it involved a woman's murder of her husband. Virtually all of these defendants could be said to have abused a position of trust and/or familial authority. Due to the sheer commonality of this factor, it cannot justify departure. As this court previously noted in Hall:

> 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.

As to psychological trauma, despite the state's arguments to the contrary, the district court was fully cognizant both of the general rule of Lerma, holding psychological trauma to be an invalid reason for departure in sex offense cases, and the exceptions set out in Rousseau, Casteel and Harris, all of which it cited, when it held the instant case was more properly aligned with the general rule. Harris v. State, 531 So.2d 1349 (Fla. 1988); State v. Rousseau, 509 So.2d 281 (Fla. 1987); Casteel v. State, 498 So.2d 1249 (Fla. 1986); Lerma, supra.

The district court correctly stated the rule and its exceptions; the court is correct on the law. The state's main disagreement is not with the district court's discussion of the law; rather, the state disagrees with the district court's

interpretation of the facts. This is not an appropriate issue for supreme court review. Moreover, the state is objectively wrong on what constitutes a physical manifestation of trauma. In the instant case, the child displayed emotional and behavioral manifestations of trauma, but no physical signs. Fearfulness, sleep disturbances, and the mutilation of dolls are behavioral, not physical, manifestations of trauma. While the child here was severely psychologically traumatized, the state failed to persuade the district court that such trauma so far exceeded that found in a typical case of lewd assault that departure was justified. The state's burden of persuasion is not less here, and it still fails.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner 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 Gypsy Bailey, 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 10 day of January, 1990.

KATHLEEN STOVER