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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,<sup>3</sup>298

WILLIAM BERRY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

\* \* \* \* \*

ON PETITION FOR DISCRETIONARY REVIEW

\* \* \* \* \*

AMENDED BRIEF OF RESPONDENT ON JURISDICTION

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## INTRODUCTION

The Petitioner, WILLIAM BERRY, was the defendant in the trial court and the appellant in the Third District Court of Appeal. The Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties shall be referred to as Petitioner and Respondent in this brief. The symbol "A" will be utilized to designate the Appendix to this Brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Briefly, the following facts brought out at Petitioner's trial are pertinent to this Court's determination of whether to invoke its power of discretionary review in the instant cause. While the victim's two-year-old son was lying on a bed nearby, her father, Petitioner, beat her with a wire clothes hanger. Her son started crying. Her father had beaten her in a similar fashion when she was young.

Petitioner forced B [REDACTED] on the bed where her son was lying, although he somehow managed to fall asleep. Petitioner performed oral sex on her vagina. When she resisted he bit her. He inserted cocaine into her vagina with his finger, which burned. Petitioner then licked it out.

He turned her over, although she continued to resist. He lifted her up to her knees and placed cocaine in her rectum with his finger, which also burned. Again, he licked the cocaine out of her rectum.

Petitioner had a live-in girlfriend at the time named Celeste. At one point he called Celeste into his room to have her suck the victim's nipples. Celeste declined. Petitioner told Celeste he was doing what he was supposed to do, "...that's

what a father is supposed to do to help raise his daughters."<sup>1</sup> Petitioner told the victim that it was his duty as a father to indoctrinate his daughter "...to make sure that she was prepared for all the other men that came into her life."

Petitioner's confession to the police reveals the following. His intentions were honorable, "...he just wanted to instill trust in his daughter." He admitted telling B [REDACTED] that "...it was his job as a father, to teach her about love, and therefore she should submit to him and to have sexual intercourse with him." He claimed to have attempted to calm B [REDACTED] by telling her he had done "...similar things in a sexual way with her sister T [REDACTED] when she was a teenager."<sup>1</sup>

The trial court made the following findings of fact:

The Court having heard the testimony of B [REDACTED] B [REDACTED] the victim in this cause, the Court finds that the defendant, William Berry, Jr., stood in a position of familial authority over B [REDACTED] B [REDACTED] by his relationship as her father. The Court further finds that based upon the testimony of B [REDACTED] B [REDACTED] the defendant committed the sexual battery for which he was convicted during the renewal of the family relationship between himself and B [REDACTED] B [REDACTED] and at a time when B [REDACTED] B [REDACTED] was introducing the defendant to his two-year-old grandson.

The Court finds that the defendant, William Berry, Jr., took advantage of his familial

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<sup>1</sup> The victim's sister, T [REDACTED] testified that Petitioner had sexually abused her when she was nine-years-old. When Petitioner returned to the household, when she was thirteen-years-old, the sexual abuse resumed.

authority and trust in committing sexual battery on his daughter, B [REDACTED] B [REDACTED]. Based upon the authority of Gopaul v. State, 13 F.L.W. 2693 (3rd DCA December 23, 1988); Hawkins v. State, 522 So.2d 488 (1st DCA 1988); Turner v. State, 520 So.2d 920 (1st DCA 1987); Williams v. State, 462 So.2d 36 (1st DCA 1985) and Gardner v. State, 462 So.2d 874 (2d DCA 1985), the Court finds that the defendant's abuse of his familial authority and trust constitutes a substantial reason to depart from the sentencing guidelines.

On Appeal, the Third District agreed with the trial court's findings:

Where a defendant was in a position of familial authority and by virtue of that authority a special trust existed which he breached, a valid reason for a guideline departure sentence existed. Gopaul v. State, 536 So.2d 296 (Fla. 3d DCA 1988). In our view the same rule applies notwithstanding that the rape victim is the defendant's emancipated teenaged daughter. It was the familial relationship which brought the girl, along with her infant child, back to her father's home for a visit where she was forced to submit to her father's advances under the threat of violence.

Affirmed.

POINT ON APPEAL

WHETHER THE DECISION OF THE THIRD DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE FIFTH DISTRICT ON THE ISSUE OF ABUSE OF FAMILIAL AUTHORITY AND TRUST AS A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES?



SUMMARY OF THE ARGUMENT

In each of the cases cited by Petitioner in his jurisdictional brief, where he asserts conflict with the instant cause, the facts were dissimilar to those in the instant cause. On the authority of Reaves v. State, 485 So.2d 829, 830 (Fla. 1986) the State submits there is no conflict and this Honorable Court should deny discretionary jurisdiction.

## ARGUMENT

THE DECISION OF THE THIRD DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT AND THE FIFTH DISTRICT ON THE ISSUE OF ABUSE OF FAMILIAL AUTHORITY AND TRUST AS A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES.

Footnote 3 of this high court's per curiam opinion in Reaves v. State, 485 So.2d 829, 830 (Fla. 1986) is extremely pertinent to this jurisdictional determination:

3. This case illustrates a common error made in preparing a jurisdictional brief based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions alleged in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant.

In each of the cases cited by Petitioner in his jurisdictional brief the facts were dissimilar to those in the instant cause. In Davis v. State, 517 So.2d 670 (Fla. 1987) a wife murdered her husband while he was asleep. Hall v. State, 517 So.2d 692 (Fla. 1988) involved parents committing child abuse on their two young children. In that case this Court reasoned: "...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." Id. at 695 Finally, Odom v. State, 15 F.L.W. D1347 (Fla. 5th DCA 1990) involved the lewd and lascivious assault of a stepfather on his stepchild.

The question certified in Wilson v. State, 548 So.2d 874 (Fla. 1st DCA 1989) and Cumbie v. State, 15 F.L.W. 1618 (Fla. 1st DCA 1990) was:

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 a conviction of *attempted capital sexual battery*?

In the instant cause, we have a father sexually abusing his daughter because, by his own admission, "*...it was his job as a father, to teach her about love, and therefore she should submit to him and to have sexual intercourse with him.*" Further, he admitted attempting to calm his daughter by telling her he had done "*...similar things in a sexual way with her sister T [REDACTED] when she was a teenager.*" These admissions clearly exemplify Petitioner's abusing his position and trust as a natural father. The facts in the instant cause warranted the valid reason for departure.

As to Petitioner's analogy to teenage children stealing from their parents to support a drug habit, he utilized this comparison in his brief to the Third District. Respondent stated then, and it will state now, that stealing from one's

parents to support a drug habit, is hardly as egregious as the sexual battery committed by Petitioner on his own daughter in the instant cause. Reasons for departure are reviewed on a case by case basis and should continue to be so. As this Court has held:

. . . [A]n appellate court's function in a sentencing guidelines case is merely to review the reasons given to support departure and determine whether the trial court abused its discretion in finding those reasons "clear and convincing." (Citations Omitted.)


State v. Mischler, 488 So.2d 523 (Fla. 1986).

CONCLUSION

There is no express and direct conflict between the instant cause, decisions of this Court, and the Fifth District. Based upon the foregoing facts, authorities and reasoning, Respondent respectfully submits this Honorable court deny discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv) Fla.R.App.P. .

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to ARTHUR CARTER, Esq., Special Assistant Public Defender, Suite 306, 1399 N.W. 17th Avenue, Miami, FL 33125 and Offices of MARIA BREA LIPINSKI, JOHN H. LIPINSKI of Counsel, P.O. Box 97-0679, Miami, FL 33197-0679 on this 19<sup>th</sup> day of September, 1990.



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