

0.A 5-9-91

FILED

SID J. WHITE

FEB 28 1991

CLERK, SUPREME COURT

By Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,398

WILLIAM BERRY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF CERTIFIED QUESTION

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MARK S. DUNN
Florida Bar #0471852
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS ii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

POINT ON APPEAL 20

SUMMARY OF THE ARGUMENT 21

ARGUMENT

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION
IN DEPARTING FROM THE SENTENCING GUIDELINES, WHERE
IT PROVIDED A VALID REASON FOR SAID DEPARTURE..... 22

CONCLUSION 31

CERTIFICATE OF SERVICE 31

TABLE OF CITATIONS

| <u>CASES</u> | <u>PAGE</u> |
|--|-------------|
| Cumbie v. State, 16 F.L.W. S46 (Fla. January 3, 1991)..... | 23 |
| Fletcher v. State, 16 F.L.W. D93 (Fla. 2d DCA 1991)..... | 25 |
| Gardner v. State, 462 So.2d 874 (Fla. 2d DCA 1985)..... | 23 |
| Gopaul v. State, 536 So.2d 296 (Fla. 3d DCA 1988)..... | 22 |
| Harris v. State, 15 F.L.W. D2111 (Fla. 5th DCA 1990)..... | 25 |
| Hawkins v. State, 522 So.2d 488 (Fla. 1st DCA 1988)..... | 22 |
| Lonett v. State, 15 F.L.W. D2790 (Fla. 2d DCA 1990)..... | 25 |
| Perkinson v. State, 16 F.L.W. D295 (Fla. 1st DCA 1991)..... | 25 |
| Sanders v. State, 15 F.L.W. D2709 (Fla. 3d DCA 1990)..... | 25 |
| State v. Jackson, 478 So.2d 1054 (Fla. 1985)..... | 22 |
| State v. Mischler, 488 So.2d 523 (Fla. 1986)..... | 22 |
| Turner v. State, 510 So.2d 921 (Fla. 1st DCA 1987)..... | 23 |
| Williams v. State, 462 So.2d 36 (Fla. 1st DCA 1985)..... | 23 |
| Wilson v. State, 15 F.L.W. S429 (Fla. September 6, 1990)..... | 23 |
| <u>OTHER AUTHORITY</u> | |
| Rule 3.701(b)(6) Fla.R.Crim.P..... | 22 |
| Rule 3.701(d)(11) Fla.R.Crim.P..... | 22 |

INTRODUCTION

The Petitioner was the defendant in the trial court below. The Respondent, the State of Florida, was the prosecution. In this brief, the Petitioner will be identified as the "Defendant." Respondent will be identified as the "State." The symbol "T" will be used to designate the transcript of the lower court proceedings. The symbol "R" will be used to designate the record on appeal. The symbol "SR" will be used to designate the supplemental record on appeal. The symbol "p" will be used to designate the page of the Defendant's brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The victim in the instant cause, B [REDACTED] B [REDACTED] testified as follows as to the sexual abuse inflicted upon her by her father. (T. 335-451). She went to her father's abode to show him her son, his grandson, W [REDACTED], who was at the time of the crimes 2 years and 4 months old. (T. 339, 345-346). She was accompanied by her son's father, W [REDACTED] D [REDACTED], Sr.. (T. 345-346). All three of them wanted to see Defendant. (T. 346). Defendant had never met W [REDACTED] Sr., or seen his grandson. (T. 346). The victim testified that prior to this encounter her relationship with her father was relatively nonexistent. (T. 340-341). As she testified: "... I haven't seen him in a long time." (T. 345).

The Defendant was living with a woman named Celeste. (T. 348). Initially, when they first arrived, Defendant wasn't home. (T. 347-348). As they walked back to their car, W████████, Sr. saw her father. (T. 349). She was happy to see Defendant. (T. 350). He asked them upstairs to his apartment, and as soon as they sat down in the living room to converse, Defendant commenced snorting and smoking cocaine in their presence. (T. 350-352). Celeste stayed out of the way in the bedroom while this transpired. (T. 353).

The evening progressed, until Defendant suggested the victim, W████████, Jr. and W████████ Sr. spend the night. (T. 364-365). It was 11:30 p.m. and W████████ Sr. declined the invitation because he had to go to work. (T. 365). Initially, B████████ declined as well, because she had to baby-sit her brother when her mother left for work at 5:30 a.m.. (T. 365). She ended up staying with the son, and W████████ Sr. left with the car they arrived in. (T. 365).

After W████████ Sr. left, Defendant called her into his bedroom. (T. 366). She knelt at the foot of the bed, and her father asked her "to sniff the cocaine." (T. 366). Defendant "... was sniffing it..." on the bed. (T. 366). B████████ did not snort the cocaine, although Defendant wanted her to. (T. 366). Her father told her "...if I take some of it, that it would ease

my mind, and I told him that I didn't want to mess with it because I don't mess with drugs." (T. 367). Defendant was in his bikini swim trunks, and Celeste also was in the bedroom watching TV while this transpired. (T. 360, 368). Her little son was also present, lying on the bed. (T. 368).

Defendant wanted her to change into one of Celeste's nightgowns. (T. 368-369). She did not want to. (T. 368). Celeste gave her one of her nightgowns, which was thin, sleeveless, with a plunging neckline. (T. 369). Her father wanted her to change into the gown in the bedroom. (T. 370). "He said that I didn't have to be ashamed to change in front of him." (T. 370). She "always feel[s] ashamed to change in front of a man." (T. 370).

She decided to put the gown on, but in the bathroom. (T. 371). As she got off the toilet, Defendant entered the bathroom. (T. 371). He never asked her permission, and closed the door behind him, causing her to feel "uncomfortable." (T. 372). Her father then asked her to lift up her gown. (T. 373). When she didn't respond, he lifted it up. (T. 373). She pulled it back down. (T. 373). Her father then told her to look on the side of the toilet. (T. 373). There was a "...book with naked people in it...", which he picked up and asked her to look at. (T. 374). He made her look at it. (T. 374). He stopped when she told him: "...I don't look at no books like that." (T. 374).

Her father then asked her to take off the nightgown. (T. 375). When she wouldn't, he walked out of the bathroom to get a belt. (T. 375). She remained in the bathroom, he returned and again told her to take off the nightgown. (T. 375). When she refused, he grabbed her by the arm and pulled her into the bedroom. (T. 375-376). It hurt when he did this. (T. 376). Celeste meanwhile was still watching TV. (T. 376).

Her father then grabbed a coat hanger, causing Celeste to exit the bedroom. (T. 376). B [REDACTED] "...got scared." (T. 376). Her father stretched the hanger out double, "the long way, and he hit me with it. He beat me with it." (T. 383). The nightgown was still on, and her son was lying on the bed while Defendant beat her with the hanger. (T. 383). Her son started crying. (T. 384). Her father beat her on the buttocks. (T. 384). It was painful and she was scared, because her father had beaten her in a similar fashion when she was young. (T. 384).

B [REDACTED] told her father she wanted to go home, and he responded she "...wasn't going anywhere." (T. 384). She was scared, considered running out of the room, but couldn't because her son was present and she didn't want to leave him. (T. 385). Defendant again told her to take the nightgown off, which this time she complied with because she didn't want "to get hit anymore." (T. 386). She still had her underwear on. (T. 386).

Defendant instructed her to remove those as well, which she did. (T. 386). She was now completely naked, her father was clad only in his swimming trunks, and her son was lying on the bed. (T. 386-387).

She then testified as to the actual sexual battery. (T. 387-400). Defendant pushed her on to the bed.¹ (T. 387). Despite her pleas to let her go home, Defendant ordered her to spread her legs. (T. 389-390). She was scared, and Defendant had to force her legs apart. (T. 390). He placed the plate of cocaine between her legs, looked at her vagina, told her how good it looked, and queried how she could have a baby from somebody else. (T. 391-393). While Defendant did this she tried to cover herself with her hands. (T. 392).

Eventually, he pinned her arms down and began to perform oral sex on her vagina. (T. 393). She begged him not to do that and resisted. (T. 394). Defendant's response was to bite her "[b]etween my legs." (T. 394). He finally stopped and snorted some more cocaine. (T. 395). He then "...stuck his finger with the cocaine on it and put it in me." (T. 395). He then "...licked it back out." (T. 395). The cocaine burned her vagina. (T. 395).

¹ Recall that her little boy was lying on the bed, although he somehow managed to fall asleep. (T. 386-387, 389).

Defendant turned her over, although she tried to resist. (T. 396). He lifted her up to her knees and placed cocaine in her rectum with his finger. (T. 396-397). Again, she felt a burning sensation in her rectum. (T. 397). He licked the cocaine out of her rectum as well. (T. 397).

Celeste entered the room to ask Defendant for some money to go to the store. (T. 399). Defendant told her to suck B██████ nipples. (T. 399). Celeste refused. (T. 399).

B██████'s travail finally ended at 5:25 a.m. (T. 400). By the time B██████ got home, both her mother and little brother were gone. (T. 401). As soon as she got inside, she tried to sleep. (T. 402). Both her vagina and rectum burned. (T. 402). She didn't call the police right away because she was afraid, but eventually she did. (T. 402). W██████ Sr. showed up around 6:30 a.m., and she told him what had transpired. (T. 402-403). He in turn went and got her older sister T██████. (T. 403).

B██████ showed T██████ her buttocks. (T. 403). T██████ saw the marks from the coat hanger and T██████ and W██████ Sr. took her to the Jackson Memorial Hospital Rape Treatment Center. (T. 404). After being examined and relating to the doctors her father's abuse of her, she was taken to Detective Taber's office. (T. 404-408). While there, she provided a formal statement. (T.

408). She also exhibited the marks on her buttocks to Detective Taber. (T. 408).

B [REDACTED] s cross-examination was terminated by the following outburst by the Defendant:

THE DEFENDANT: B [REDACTED], didn't you tell me that you got raped by four men and a dog. (T. 447).

The State objected, and both counsels requested a sidebar. (T. 447-448). Defendant's counsel moved to withdraw, which the trial court denied. (T. 448). The State requested Defendant be found in direct contempt, which the trial court did:

THE COURT: Let the record reflect that I believe that the defendant was well aware of the sidebar conversation we had, regarding whether this issue should be brought up. I instructed counsel not to bring it up, counsel went back and explained it to the defendant, and the defendant had to shout it out in front of the jury.

I mean there's not going to be any mistrials. There's no motion.

MS. LeCLAINCHE: And may some curative --

THE COURT: I hold the defendant in contempt of court because I believe he deliberately did that for purposes he thinks it's going to avail him. I don't know. But it's not going to work.

MR. CARTER: I make a motion for mistrial, Your Honor. I renew my motion to withdraw.

THE COURT: Denied.

(T. 449-450).

The State requested and received a curative instruction to the jury. (T. 450-452).

Celeste Holmes, Defendant's live-in girlfriend at the time of the incident, corroborated B██████████'s testimony in every material respect. (T. 452-476). Her testimony included the following:

Q. Did there come a time when you went back to the bedroom door again?

A. Yes. I went back, and the third time I knocked, then he came to the door.

Q. Who came to the door?

A. William did.

Q. And what happened?

A. Well, he was upset, you know, he was wondering why I was knocking on the door.

Q. You say he was upset? How was he upset?

A. Like he really, he really wanted -- he was angry with me. He wanted to get like -- shake me apart or something. Like, you know, why am I disturbing him, you know, he's trying to have a discussion with his daughter.

Q. And what happened?

A. I went back into the living room while he was trying to talk to me. He told me, he was telling me about the discussion that he was having.

Q. Before you went back into the living room, when you were standing in the bedroom door with the defendant, could you see anything in the bedroom?

A. Yes, I did.

Q. Did you look in there?

A. Yes.

A. What did you see?

A. I saw B [REDACTED] lying on the bed. She didn't have any clothes on.

Q. How was she acting?

A. She was very upset. She was crying.

Q. You looked past the defendant, you saw B [REDACTED] lying on the bed without any clothes on and crying, what did you do?

A. Well, I didn't do anything. There was nothing I could do. They kept telling me. He went back in the room and I went back to the living room. He didn't let me in.

Q. You didn't try to go in and talk to B [REDACTED]?

A. No. No, because I was afraid to.

(T. 467-468).

Eventually, Defendant called her into the bedroom. He was standing at the foot of the bed, and B [REDACTED] was naked, lying on the bed crying. (T. 468-469). Defendant asked Celeste if B [REDACTED] had a beautiful body. (T. 469). Uncertain as to how she was to respond, Celeste answered affirmatively. (T. 470). Defendant asked her if she wanted to suck B [REDACTED]'s nipples. (T. 470). Celeste was "sick" from this suggestion. (T. 470). She said no, and never performed the act. (T. 470). At one point Defendant told her he was doing what he was supposed to, "...that's what a father is supposed to do, to help raise his daughters." (T. 470).

Celeste never called the police, because she "...was afraid of what was going to happen after B [REDACTED] left." (T. 472). She also corroborated B [REDACTED] testimony as to Defendant's drug usage. (T. 473-476). She admitted she partook of the cocaine as well. (T. 474). She also testified how Defendant had related how he sexually abused B [REDACTED]s, older sister T [REDACTED] when he was living in their household. (T. 496-497). As he had told B [REDACTED] Defendant saw it as 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." (T. 497). Defendant had this conversation with Celeste prior to his sexual abuse of B [REDACTED] (T. 498). B [REDACTED]s older sister, T [REDACTED] testified in corroboration, again in every material respect, with the testimony of the victim. (T. 538-556). When she got to Mom's house, after being driven there by W [REDACTED] Sr., she found the victim as follows:

She was in total shock. She was trembling. She was crying. She was upset.

(T. 543).

T [REDACTED] saw the marks on B [REDACTED]s buttocks from the coat hanger. (T. 543). She took B [REDACTED] to the Rape Treatment Center. (T. 542). B [REDACTED] told T [REDACTED] that their father had attacked her. (T. 543).

T [REDACTED] then testified how her father had sexually abused her when she was nine years old. (T. 545-549). The sexual abuse stopped when she was ten, when her father left the household. (T. 549). Defendant apparently returned to the household again when she was thirteen, and resumed his debauchery. (T. 550-551). As a direct consequence of Defendant's decadence, T [REDACTED] ran away from home to live with her grandmother. (T. 551). She finally told her grandmother and aunt what her father had done, and compelled her to reveal such to her mother and Defendant in their presence. (T. 552-554).

No one ever called the police, because Defendant said he would never do it again, and T [REDACTED] believed him, unfortunately. (T. 554). When B [REDACTED] told her what happened, T [REDACTED] called their mom and told her Defendant did it again. (T. 554). Her mother instructed her to take B [REDACTED] to the hospital, which she did. (T. 554).

B [REDACTED]'s mom, L [REDACTED] M [REDACTED] testified in corroboration with the testimony of her daughters. (T. 560-571). Detective Taber, Sexual Battery Unit, Metro-Dade, testified as to B [REDACTED]'s interview and subsequent formal statement. (T. 586-590). Detective Taber also witnessed the marks on B [REDACTED] buttocks. (T. 593-595).

All of the evidence seized from Defendant's apartment pursuant to a valid search warrant, corroborated the testimony of the victim. (T. 596-618). This included a Penthouse and/or Playboy in the bathroom, and several items of evidence tied to the use of cocaine. (SR. 1-28/ T. 596-618). Celeste Holmes also provided a formal statement. (T. 620).

Dr. Blachar examined B [REDACTED] at the Rape Treatment Center, and testified as to the "...horizontal slash marks, which would be consistent with being slapped or whipped with a wire coat hanger." (T. 637). His findings as a result of his examination of the victim, were consistent with the history that she gave him. (T. 640). Walter Bodie, chemist, Metro-Dade, testified as to evidence of cocaine seized from Defendant's apartment. (T. 661-681). Teresa Merit, serologist, Metro-Dade, testified there was no evidence of Defendant's sperm, which was consistent with B [REDACTED]'s testimony that he only performed oral sex upon her. (T. 682-694).

Detective Simmons, Metro-Dade, was Detective Taber's supervisor. (T. 709-711). Defendant executed a Miranda Rights Waiver Form in the presence of both Detectives Simmons and Taber. (SR. 30; T. 719-725). The trial court duly found that Defendant's statements were freely and voluntarily given. (T. 726).

Defendant stated that he hugged and kissed B [REDACTED] and then asked her to disrobe in front of him "...as a demonstration of her love for him." (T. 737). She became frightened and ran into the bathroom. (T. 737-738). Defendant followed and again instructed her to get undressed. (T. 738). His intentions were honorable, "...he just wanted to instill trust in his daughter." (T. 738). B [REDACTED] refused to cooperate. (T. 739).

At this point Defendant became angry "because she wasn't doing as he said." (T. 739). He forced her to look at pornographic magazines he kept in the bathroom. (T. 739). At the same time he fondled her breasts and vagina with his hand. (T. 739). He then grabbed her by the arm and pulled her into the bedroom. (T. 739). B [REDACTED] was crying and "rather hysterical by this point." (T. 740).

He admitted striking her several times with the wire hanger because she refused to get undressed. (T. 740). He admitted performing oral sex on her vagina, so as to overcome her shyness towards him. (T. 741). He admitted biting her vagina. (T. 742). He threatened to do it again if she wasn't quiet. (T. 742). He admitted inserting his finger into her rectum after he had dipped it in Benzocaine. (T. 742-743). He denied inserting cocaine into this area. (T. 743). He claimed he didn't use cocaine that night. (T. 743). He admitted he inserted his tongue into the rectal cavity. (T. 744).

He admitted that he told her 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." (T. 745). It was his belief that once his daughters reached the age of thirteen or fourteen, he should indoctrinate them in the ways of sex on an ongoing basis. (T. 746). Defendant, because of B [REDACTED]'s emotional state, asked her if she felt like she had been raped. (T. 747). B [REDACTED] apparently responded "yes, daddy." (T. 747). Defendant said he then apologized to her and that he was sorry she misinterpreted his sexual relations with her. (T. 747). 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." (T. 747).

His daughter remained hysterical, and he called Celeste in to attempt to calm her. (T. 748). He told Detective Simmons he threw the wire hanger away in a dumpster outside his apartment. (T. 749). Defendant then confessed extensively as to his sexual advances to T [REDACTED] (T. 749-750). Defendant declined to give a formal statement because he was too emotionally upset at this point. (T. 751). He did demonstrate the configuration he bent the wire hanger into. (T. 753).

The jury found Defendant guilty of Sexual Battery as to Count I charged in the Information. (T. 867). It found him not

guilty of Sexual Battery charged in Counts II and III. (T. 867-868). It found him guilty of possession of Cocaine as charged in the Information. (T. 868).

The State moved to depart from the Sentencing Guidelines on the following grounds:

MR. WALLEISA: We do not have a motion pending to depart the sentence and guidelines.

Presumptive [sic] guidelines, Judge. Based upon the crime that he was convicted of before and had five and a half years. State has filed a motion to depart from the sentence of guidelines. Grounds for that is, that is alleged that the defendant took advantage of his, on the victim, his daughter, and in the motion we cited Turner and Williams have a couple of additional cases.

In support of that, Hawkins versus State found at 522 So.2d 488, in the First District, March 17th, 1988. And Gopel G-O-P-O-E-L, found at 13 Fla. Law Weekly, 2693, December 23rd, 1988. The Third District Court of Appeals.

In addition, Judge, the state alleged in its motion to depart from the sentencing guideline that the defendant's pattern behavior demonstrates a pattern of from non-violence to violence. Citing Kyes versus State and Mayes versus State.

The basis for that, Judge, we have certified copies of prior convictions which the defendant was convicted carrying a concealed firearm, a non-violent felony. He is now being convicted of sexual battery personal injury crime. It's a second-degree felony. Third basis for the State's motion to depart is the possibility of longlasting traumatic effects on the victim's son who was present during the crime. The victim's son who was present in the apartment during the commission of the crime upon the victim in this case,

B [REDACTED] B [REDACTED] And we've cited the cases. David versus State is supporting that demonstration. The fourth basis for the motion to depart is no longer applicable.

(T. 872-873).

The trial court's concerns with Defendant's sexual abuse of his family members was established as part of the record:

THE COURT: What concerns me is the man now has certain grandchildren, and when he's out, he's going to start the same thing with his grandchildren because he has a duty to do this.

MR. WALLEISA: And he's going to start on somebody else's children, and they're not his grandchildren. And he's going to find himself another schoolteacher who will try to get him some more fifth grade teachers. I don't know what he's doing. I thought I can go up one step. Why can't I go up one step without a reason?

MR. WALLEISA: That went into effect October 1st 1988, for crimes committed that day, Judge. This crime was committed in 1987.

(T. 880).

The record then exhibits the following reason for departure:

MR. WALLEISA: Judge, the testimony from the witness stand was very clear that she went there to look for her father to introduce him to her boyfriend and his grandson.

THE COURT: To reconcile, to introduce him to her boyfriend and grandson.

MR. WALLEISA: To reestablish relations with her father.

THE COURT: Forget about the rape. I'm going to find it sufficient.

MR. CARTER: I don't know exactly what they are.

THE COURT: That the violation of the familial relationship, that there was a familial authority in trust between the defendant and the victim, his daughter.

MR. CARTER: Based on?

THE COURT: Based on a father/daughter relationship and all the surrounding circumstances.

MR. CARTER: Judge, I would ask you to elaborate on surrounding and circumstances, so when I take this to appeal, I won't have to be asked to come on a second time to ask what's surrounding and circumstances.

What is surrounding and circumstances?

THE COURT: What about the pattern? What happened with the first daughter, the older daughter and then going with the second daughter?

MR. WALLEISA: Judge, I would be --

MR. CARTER: You'd ask the jury not to consider that to reach a verdict.

THE COURT: I know what I asked them. I'm not trying to reach a verdict. A verdict has been reached already.

MR. WALLEISA: I have an agreement with Mr. Carter that that would be a crime that he was not convicted, therefore, that could not be considered.

THE COURT: I can't consider it?

MR. WALLEISA: No, Judge. That is opposed to the familial relationship.

MR. CARTER: Do what you want and I'll appeal you.

MR. WALLEISA: It's your record.

THE COURT: State will withdraw the order.

MR. CARTER: I'd like this typed up quickly.

MR. WALLEISA: I'll make notes so I won't make any mistakes as I understand it.

THE COURT: On a familial relationship, the familial trust relationship is the only valid reason I could see to depart.

MR. CARTER: And you're placing a familial relationship upon the father that they're --

THE COURT: Father and daughter.

MR. CARTER: Fine.

THE COURT: She trusted her father, she went over there to introduce him to the grandson. To let him see his grandson.

MR. WALLEISA: I'll draw an order based upon that pronouncement, Judge.

THE COURT: I'm ready to sentence the defendant. Sentence him to fifteen years as to Count I.

MR. CARTER: You better do an adjudication, first. You'll adjudicate him first. Thank you.

THE COURT: Adjudicate the defendant guilty of Count I and Count IV as found by the jury.

As to your Count I, I sentence the defendant to 15 years in the state penitentiary. As to Count IV, I sentence the defendant to 5 years in the state penitentiary, sentence to run consecutive one after the other.²

Anything else?

MR. CARTER:; Yes. We still have matters in your contempt to try the case, or you're not?

MR. WALLEISA: That's correct.

² Defendant's Judgment and Sentence are not included in the Record on Appeal. The State will supplement with said documents when it files its brief.

THE COURT: I'll rule that was in the heat of the excitement of the trial and discharge the contempt.

Okay.

(T. 884-887).

The trial court's written order on departing complied with its oral pronouncement, and included attached case law:

FINDINGS OF FACTS

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

The Court finds that the defendant, William Berry, Jr., took advantage of his familial authority and trust in committing sexual battery on his daughter, B [REDACTED] Berry. 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.

(T. 64-73).

POINT ON APPEAL

WHETHER THE TRIAL COURT, GIVEN THE FACTS IN THE INSTANT CAUSE, ABUSED ITS DISCRETION IN DEPARTING FROM THE SENTENCING GUIDELINES, WHERE IT PROVIDED A VALID REASON FOR SAID DEPARTURE BASED UPON SAID FACTS?

SUMMARY OF THE ARGUMENT

The trial court provided a valid written reason for departing from the sentencing guidelines. Said reason, abuse of familial trust in that Defendant committed a sexual battery upon his daughter, is clearly supported by the record. His sentence should be affirmed.

ARGUMENT

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION
IN DEPARTING FROM THE SENTENCING GUIDELINES, WHERE
IT PROVIDED A VALID REASON FOR SAID DEPARTURE.

The Florida Supreme Court provided the following standard of review for departure sentences:

. . . [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).

Reasons for any departure from the sentencing guidelines must be in writing. State v. Jackson, 478 So.2d 1054 (Fla. 1985); Rules 3.701(b)(6) and 3.701(d)(11) Fla.R.Crim.P..

A defendant's abuse of his familial authority and trust has been held to be a valid reason to depart from the sentencing guidelines. Gopaul v. State, 536 So.2d 296 (Fla. 3d DCA 1988) (Baby-sitting cousin of 19-months-old girl was in position of trust with her and her forcible rape by him was violation of that trust which was a valid reason for a sentencing guideline departure.); Hawkins v. State, 522 So.2d 488 (Fla. 1st DCA 1988) (Defendant's standing in position of familial authority to sexual battery victim, his aunt who is mentally retarded and confined to a wheelchair by

cerebral palsy by virtue which special trust existed between defendant and victim which defendant abused, provided valid reason for departure from sentencing guidelines.); Turner v. State, 510 So.2d 921 (Fla. 1st DCA 1987) (Fact that defendant took advantage of familial authority and trust in committing lewd and lascivious assault on victim, his fifteen-year-old daughter, constituted valid and overpowering reason for departing from sentencing guidelines.); Williams v. State, 462 So.2d 36 (Fla. 1st DCA 1985) (Fact that ten-year-old child was assaulted by her stepfather, one in familial authority whom she should have been able to rely upon for protection and sanctuary, was a substantial aggravating circumstance allowing departure from sentencing guidelines for conviction of lewd, lascivious or indecent assault upon a child less than 1 year of age.); Gardner v. State, 462 So.2d 874 (Fla. 2d DCA 1985) (Trial court in its written statement did not improperly base reasons for departure from sentencing guidelines on defendant's social status, i.e., fact that he was a school teacher but, rather, principal basis for departure was defendant's abuse of his position of trust.)

The State is well aware of recent cases emanating from this Court, in which it has held that abuse of familial authority over a victim is an invalid reason for departure. Wilson v. State, 15 F.L.W. S429 (Fla. September 6, 1990); Cumbie v. State, 16 F.L.W. S46 (Fla. January 3, 1991) In Wilson, this Court found the reason not to be valid where he was convicted of lewd and

lascivious assault upon a child under 16 years of age. This Court reasoned as follows:

In *Lerma v. State*, 497 So.2d 736 (Fla. 1986), we analyzed justification for departure in a sexual battery case. The *Laberge* court understood our intent in *Lerma* to be

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 guidelines sentencing, a departure sentence, rather than the recommended sentence, could be authorized in most cases.

508 So.2d at 417. (footnote omitted) We agree with the *Laberge* court that, "as emotional harm is a common factor to sexual battery, so "vulnerability" and "breach of trust" are factors common in child molestation cases." (footnote omitted) *Id.*

Id.

In *Cumbie*, this Court found the same to be true for a conviction of attempted sexual battery. It reasoned:

As we stated in *Wilson*, any act of child molestation involves an abuse of authority and breach of trust. A factor should not be approved as a valid reason for departure if it routinely will authorize departure sentences. *Wilson; State v. Rousseau*, 509 So.2d 281, 284 (Fla. 1987).

Id.

In the instant cause, Defendant argues that the fact that the victim "...was 19, did not live with [him] and was not in his

custody..." supports his position that abuse of familial authority was an invalid reason for departure. Upon this basis, the State submits that the instant cause is clearly distinguishable from Wilson and Cumbie which concern child molestation. Similarly, District Court opinions, which have followed Wilson, have involved child victims. Perkinson v. State, 16 F.L.W. D295 (Fla. 1st DCA 1991); Lonett v. State, 15 F.L.W. D2790 (Fla. 2d DCA 1990); Fletcher v. State, 16 F.L.W. D93 (Fla. 2d DCA 1991); Sanders v. State, 15 F.L.W. D2709 (Fla. 3d DCA 1990); Harris v. State, 15 F.L.W. D2111 (Fla. 5th DCA 1990).

It is the State's position in the instant cause, that the victim's age and allegedly emancipated status demonstrate that Defendant's sexual battery does not necessarily include "...an abuse of authority and breach of trust..." as seen in the child cases supra. Further, Defendant's own admissions as to his belief that it was his responsibility as a father to indoctrinate his daughter(s) sexually, demonstrate that he used his parental role to exert pressure on her to engage in sex, which constitutes "...an abuse of authority and breach of trust," not inherent in the sexual battery he was convicted of. As the Third District found, in affirming the trial court's reason for departure:

... 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.

(R. 64; A. 2)

Indeed, the victim testified that she had not seen her father "...in a long time...", and that she was essentially attempting to reestablish a relationship that had become relatively nonexistent. (T. 339-346). Instead, her intentions were met with Defendant's repugnant behavior, which constituted an abuse of his position as her father.

First, Defendant attempted to have his daughter, B [REDACTED] snort cocaine so as to "ease" her mind. (T. 367). Unsuccessful, he then attempted to have her change into a sheer nightgown in his presence, because she didn't have to be ashamed to change in front of him. (T. 368-370). Because she "always feel[s] ashamed to change in front of a man," E [REDACTED] reluctantly went to the bathroom to change. (T. 370-371). Not to be denied, Defendant followed her into the bathroom. (T. 371). He never asked her permission, and he closed the door behind him. (T. 372).

He asked her to lift her gown, when she didn't respond, he lifted it himself. (T. 373). She pulled it back down. (T. 373). He then forced her to look at a "...book with naked people in it." (T. 374). The State will defer from reiterating Defendant's odious and repugnant behavior with his daughter, and will refer

this Court to its Statement of Facts for details of this sordid encounter.

However, the State would illustrate Defendant's abuse of familial trust through his own comments made to B [REDACTED]. He told her that he was supposed to be the first man to make love to her, and that her first child was supposed to be his. (T. 387-388). He said that her vagina looked good, and how he couldn't see how she could have a baby from somebody else and not him. (T. 388). He told her "...that a father should be the only one, the first one to mess with the daughter, and that all he wanted, he wanted all of his daughters to have his first child". (T. 398). While Defendant said these things and committed despicable acts upon B [REDACTED] her two-year-old son was lying on the bed. That her son was aware of at least some of Defendant's transgressions, was demonstrated by her testimony that her son started crying when Defendant beat her with the hanger. (T. 383-384).

Celeste Holmes testified that after Defendant attempted to get her to suck B [REDACTED]'s nipples, Defendant commented that what he was doing to B [REDACTED] was "...what a father is supposed to do, to help raise his daughters." (T. 470). Prior to the crimes committed upon B [REDACTED] Defendant had told Celeste about sexually assaulting B [REDACTED]'s older sister T [REDACTED] (T. 496-497). Defendant told Celeste that it was his duty as a father to indoctrinate his daughters in the ways sex "...to make sure that she was prepared for all the other men that came into her life." (T. 497).

T ██████ testified as to Defendant's sexual abuse of her when she was younger. (T. 545-551). Defendant confessed to Detectives Taber and Simmons as to sexually abusing both B ██████ and T ██████ when she was younger. (T. 737-750). In that confession, Defendant stated that "...he just wanted to instill trust in his daughter." (T. 738). He related 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." (T. 745). It was his belief that once his daughters reached the age of thirteen or fourteen, he should indoctrinate them in the ways of sex on an ongoing basis. (T. 746).

This testimony demonstrates a clear abuse of familial trust on Defendant's part. He alleges in his brief that "familial authority" did not cause her to submit, rather violence and the threat of future violence did. (p. 8). Yet, B ██████ testified that Defendant had beaten her with a wire hanger when she was young, when he was still living with her mother, and violating T ██████ (T. 384). It was this memory of her father beating her when she was a little girl that made his threats of future violence real, and was one of the reasons for her submitting. But, there was another reason as well. She wanted to run away, but she couldn't because her son was there, and she didn't want to leave him. (T. 385).

Defendant's argument that his sentence was aggravated solely because she was a relative is absurd, given the testimony, including Defendant's own, which demonstrates his warped sense of a father's responsibilities toward his daughter. Further, the State submits that worthless checks and stealing from one's parents to support a drug habit, are hardly as egregious as the sexual battery committed by Defendant on his own daughter in the instant cause.

Finally, studies of sexual offenders have demonstrated that they are seldom capable of rehabilitation. After their release from incarceration they resume their ways. That the trial court was concerned with Defendant's future propensities was demonstrated as follows:

THE COURT: What concerns me is the man how has certain grandchildren, and when he's out, he's going to start the same thing with his grandchildren because he has a duty to do this.

MR. WALLEISA: That's quite possible, Judge. Could there be any position --

THE COURT: And he's going to start on somebody else's children, and they're not his grandchildren. And he's going to find himself another school teacher who will try to get him some more fifth grade teachers. I don't know what he's doing.

(T. 880).

The State submits that it is Defendant's own representations as to his belief in his role as a father, that clearly

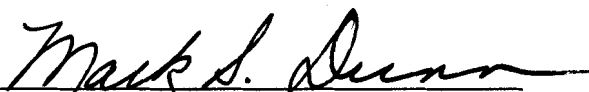
demonstrate that abuse of familial trust is a valid reason in this cause. He exploited his familial position in an attempt to engage in sex with his daughter, who only wanted to reconcile with him by showing him his grandson. Given the facts of the instant cause, the State respectfully urges this Court not to create a per se rule on abuse of familial authority and trust as a reason for departure. Rather, it urges this Court to determine if such a reason is valid on a case by case basis. The facts of this case, particularly Defendant's representations as to his role as a father, demonstrate that his departure sentence was based upon a valid reason. The Third District's opinion should be affirmed.

CONCLUSION

Based upon the foregoing facts, authorities and reasoning, the State respectfully submits that this Court affirm Defendant's sentence.


Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General


MARK S. DUNN
Florida Bar #0471852
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to ARTHUR CARTER, ESQ., Law Offices of Maria and John Lipinski, P.O. Box 97-0679, Miami, Florida 33197-0679 on this 26th day of February, 1991.


MARK S. DUNN
Assistant Attorney General

/bf