

# Supreme Court of Florida

## ORIGINAL

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No. 76,398

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WILLIAM BERRY, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

[October 17, 1991]

PER CURIAM.

We have for review Berry v. State, 561 So.2d 330 (Fla. 3d DCA 1990), based upon conflict with Davis v. State, 517 So.2d 670 (Fla. 1987). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

In Berry, the district court held that Berry's use of familial trust to effectuate the rape of his emancipated teenaged daughter justified a departure sentence. We addressed the same issue in Barnes v. State, No. 76,474 (Fla. Sept. 12, 1991), and rejected the use of familial trust as grounds for departure under circumstances where a husband called his wife home from work and then attempted to kill her. Similarly, in Davis, we rejected familial trust as a grounds for departure where a wife shot her husband while he was sleeping in bed.

Consistent with Barnes and Davis, we quash the decision of the district court in Berry and remand for further proceedings in accordance with Barnes and Davis.

It is so ordered.

SHAW, C.J. and OVERTON, McDONALD, BARKETT and KOGAN, JJ., concur.  
HARDING, J., dissents with an opinion, in which GRIMES, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

HARDING, J., dissenting.

I dissent based upon my dissenting opinion in Barnes v. State, No. 76,474 (Fla. Sept. 12, 1991).

GRIMES, J., concurs.

Application for Review of the Decision of the District Court of  
Appeal - Direct Conflict of Decisions

Third District - Case No. 89-706

(Dade County)

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and Law Offices of Maria Brea Lipinski and John H. Lipinski,  
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