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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,474

JAMES BARNES,  
Petitioner,

-vs-

THE STATE OF FLORIDA,  
Respondent.

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ON APPLICATION FOR DISCRETIONARY REVIEW

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PETITIONER'S REPLY BRIEF  
ON THE MERITS

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I.

THE FAILURE TO GIVE ANY INSTRUCTION TO THE  
JURY ON HOW TO CONSIDER COLLATERAL CRIME EVIDENCE  
CONSTITUTED FUNDAMENTAL ERROR.

Defendant relies on his arguments in the initial brief regarding this issue.

II.

USE OF FAMILIAL TRUST TO EFFECTUATE THE CRIME  
IS NOT A VALID GROUND FOR DEPARTURE.

The state seeks to convince this Court that the trial court's departure sentence is supported by valid reasons. In so doing, the state glosses over this Court's decisions which directly address the invalidity of the departure grounds below. The state does so only because this Court's rulings compel a result contrary to the state's positions.

The state claims that the trust breached in this case is totally distinguishable from the marital trust involved in this Court's decision, Davis v. State, 517 So.2d 670 (Fla. 1987). In Davis this Court found that the circumstances of a wife, distraught by financial difficulties, shooting her husband six times while he slept next to her, did not constitute the type of breach of marital trust which would justify a guidelines departure sentence. The state tries to distinguish the husband and wife relationship in this case from that in Davis by arguing that in Davis the marital trust that causes a married couple to sleep in

the same bed did not make possible the commission of that crime, but whereas here the defendant's getting the victim to come home early to their joint residence uniquely made this offense possible. The state would have this Court distinguish Davis by finding that the "marriage" was involved in Davis, but "trust" was involved here. This weak, if not absurd, attempt to distinguish Davis from this case only highlights exactly how squarely Davis applies here.

Certainly this Court would have reached no different result in Davis if the wife defendant in that case had lied to her husband to get him to come to bed earlier than usual, and then after his falling asleep had shot him six times. This Court did not in Davis state that breached trust did not in any way enable the crime, because clearly in some way it did. Most likely the victim in Davis trusted his wife not to murder him as he slept, or he would have slept elsewhere. Married people don't always automatically sleep in the same bed or even live in the same residence. The status of being married did not cause the victim in Davis to sleep with his wife in any different sense than marital status affected the wife victim's decision in this case to go to the marital residence.

This Court specifically stated in Davis that breach of trust in a familial relationship may justify a ground for departure only when the crime committed was **directly** related to the trust conferred on defendant and that trust was **the** factor that made possible the commission of the crime. Davis v. State, 517 So.2d at 674. Just as this Court in Davis found that in a bedtime

spousal murder no such particular trust formed the foundation of the crime, no such particular trust was the cornerstone of this crime, in which Mr. Barnes got his wife to leave work and return to their joint marital residence. Moreover, just as this Court found that murder in the marital bed in Davis was not directly related to a specific trust, lying to cause one's spouse to come home earlier than usual is likewise neither directly related to any specific trust, nor the direct cause of the crime in this case.

The state gives equally flawed treatment to this Court's recent decision in Wilson v. State, 567 So.2d 425 (Fla. 1990). In Wilson this Court held that abuse of familial trust cannot justify a departure sentence for a conviction of a lewd and lascivious assault upon a child under sixteen years. In so holding, this Court stated that factors which are not an element of any conviction offense but which are commonly associated with the offense should not be grounds for a departure sentence. This reasoning is consistent with this Court's repeated desire to avoid creating large loopholes in the guidelines, since vast exceptions to the guidelines would make the departure sentence the norm and render the guidelines meaningless. Id. at 427; Davis v. State, 517 So.2d at 674. The state suggests, however, that this Court's reasoning in Wilson is limited solely to lewd and lascivious assault cases and therefore has no applicability to this case. Brief of Appellee at 30-31. Such a narrow reading of Wilson ignores the reasoning behind both that case and Davis.

The state, in arguing the inapplicability of Wilson, also

avoids mention of the impact of Wilson on Turner v. State, 510 So.2d 920 (Fla. 1st DCA 1987), on which the district court solely relied in upholding the familial trust ground for departure. Barnes v. State, 562 So.2d 729 (Fla. 3d DCA 1990). Since Wilson clearly rejects the holding of Turner, the district court's decision regarding this issue is not based on precedent.

The inappropriateness of the departure sentence in this case is further highlighted by the state's argument that here "used children to accomplish goal" is a valid departure reason.<sup>1</sup> Regarding this ground for departure, the state equates a defendant's involvement of a child in drug trafficking, as occurred in Nodal v. State, 524 So.2d 476, 478 (Fla. 2d DCA), review denied, 531 So.2d 1354 (Fla. 1988), with Mr. Barnes' telling his stepson to lie to the child's mother. Certainly involving a child in the negotiations and sale of large amounts of drugs is not comparable to telling a child to lie to his mother.

The state also argues that because the stepson saw the initial steps leading up to the crime but did not see the attempted shooting itself, this alone is a sufficient reason to depart from the guidelines, even absent any evidence that he was traumatized by the events that he saw. The stepson saw Mr. Barnes point a gun at Mrs. Barnes and overheard Mr. Barnes in the house say he was going to kill his wife. (Tr. 463, 464, 472, 486). How the stepson was affected by these observations is unknown, since the record only shows that he remained with his

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Defendant addressed the illegality of this ground for departure at length in his initial brief. Brief of Appellant at 22-25.

brother in the back yard throwing rocks. (Tr. 486).

This Court has set forth the rule that inherent trauma may be presumed from a child's viewing of excessive and unusual brutality against a parent. Casteel v. State, 498 So.2d 1249 (Fla. 1986). In Casteel v. State, 498 So.2d 1249 (Fla. 1986) this Court upheld as a ground for departure the psychological trauma suffered by a sexual battery victim and her fifteen year old son who witnessed the armed sexual attack against her. Similarly, in the other cases which the state cites as supporting authority for this departure ground, the victim's child actually witnessed a brutal and violent crime perpetrated upon the victim. See Fryson v. State, 506 So.2d 1117 (Fla. 1st DCA 1987), rev'd on other grounds, 533 So.2d 294 (Fla. 1988) (ground for departure upheld when based on fact that deceased's son saw defendant shoot victim-father dead and then attempt to kill both son's mother and the son himself); Mora v. State, 515 So.2d 291 (Fla 2d DCA 1987) (departure sentence was upheld when based on the fact that several small children witnessed a violent sexual assault on their mother); Melton v. State, 501 So.2d 96 (Fla. 1st DCA 1987) (district court, relying on its decision in Davis, which was reversed by this Court, upheld a departure sentence based on victim's children's viewing of two defendants' stabbing of victim and attempted sexual assault upon her).

This case does not meet this Court's threshold rule, because these facts do not rise to the level of the above cases in which presumed harm was appropriately found. From what the stepson here saw, it cannot be presumed under all the circum-



stances that he suffered severe psychological trauma. The brief display of the weapon and the overheard threat, especially in light of the tumultuous history of the Barnes marriage, may have had little effect on the child. Since the boy did not witness the attempted shooting, it is unknown whether the boy thought defendant was serious about his threats, or whether he viewed the incident as another argument in the marriage. Under these circumstances evidence of any psychological trauma to the stepson is required to show that the stepson's viewing of the events which did not constitute the convicted crime actually resulted in serious and unusual trauma to the boy.

Many scenes of domestic fighting take place at home in front of children. If this Court were to establish that what the stepson saw in this case were a ground for departure, then that ground for departure would be available in a large body of domestic crimes. Any time a spouse brandished a weapon against another person, in front of the children, a departure sentence would be allowed. Certainly creation of such a large exception to the guidelines would make a departure sentence the rule in domestic crimes.

The state seeks to justify the departure ground of victim psychological trauma by claiming "[t]he trauma felt by the victim in this case was not like the trauma felt by most murder victims." Brief of Appellee at 37. To exemplify that Mrs. Barnes suffered trauma greater than an actual murder victim, the state offers that she was too afraid to give her address in open court before she heard the life sentence pronounced in this case. The

state then buttresses this feeble reason with a boilerplate assertion that the sentencing judge is in the best position to observe the effect the accused's actions had on the victim. Clearly grounding a departure sentence on this general basis would render the guidelines meaningless. Moreover, the fear the victim described in this case is simply the kind of trauma any victim would feel after having experienced an attempt on his or her life. There is nothing unique or extraordinary about the victim's psychological trauma and there was no physical manifestation of that trauma, as required by this Court in State v. Rousseau, 509 So.2d 218, 284 (Fla. 1987). The cases on which the state relies to support this departure ground, Green v. State, 455 So.2d 586 (Fla. 2d DCA 1984) and Ross v. State, 478 So.2d 480 (Fla. 1st DCA 1986), are both district court cases decided before this Court's Rousseau decision and are inapplicable in that they fail to apply the Rousseau standard.

Finally, the last written ground for the departure life sentence is grounded on the weakest of all the stated reasons for departure, the number of times the defendant pulled the trigger. The state, in responding to defendant's argument regarding this ground for departure, completely fails to address Rule 3.701(d)(11) of the Florida Rules of Criminal Procedure, which states that a defendant cannot receive a departure sentence based on a crime of which he was not convicted. Defendant, who was convicted for one count of attempted first-degree murder cannot then receive a departure sentence based on three other acts of attempted first-degree murder, for which he was not charged,

tried or convicted.

The state urges this Court to uphold the departure life sentence based on "the manner in which the crime was committed", when this ground was never previously mentioned by either the trial or district courts. Thus, the state, which cannot reconcile the trial court's departure ground with Rule 3.701(d)(11), instead asks this Court to create another ground for departure out of the illegal ground plainly written in this record. As this Court has noted in Casteel v. State, 498 So.2d 1249, 1252 (Fla. 1986), an appellate court cannot consider a ground for departure not expressly relied upon by the trial court. The patent illegality of this ground for departure is emphasized by the state's inability to justify it except by creating a new and never previously raised ground for departure.

Each of the trial court's grounds for departure are illegal, and the district court's opinion upholding them should therefore be quashed. This cause should be remanded to the district court with directions that defendant be resentenced within the guidelines.

CONCLUSION

Based on the foregoing facts, authorities and arguments, defendant respectfully requests this Court to quash the decision of the district court of appeal, and remand the case to the district court with directions that a new trial be granted or that defendant be resentenced within the sentencing guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128, this \_\_\_ day of April, 1991.

  
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