

# Supreme Court of Florida

## ORIGINAL

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No. 76,474

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JAMES BARNES, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

[September 12, 1991]

OVERTON, J.

This is a petition to review Barnes v. State, 562 So. 2d 729 (Fla. 3d DCA 1990), where the district court held that Barnes' use of familial trust to effectuate the crime justified a departure sentence. We find conflict with Davis v. State, 517 So. 2d 670 (Fla. 1987). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

In this case, the petitioner called his wife home from work and then attempted to kill her. The trial court departed, using as one of the reasons Barnes' use of his familial trust to accomplish this crime. In Davis, we rejected the use of a familial trust as grounds for departure under circumstances where a

wife shot a husband where he was sleeping in bed. Subsequent to the district court's decision in this case, we held, in Wilson v. State, 567 So. 2d 425 (Fla. 1990), that abuse of familial trust cannot justify a departure sentence in a lewd and lascivious assault of a sixteen-year-old child.

Accordingly, consistent with Davis and Wilson, we quash the decision of the district court in Barnes and remand for further proceedings in accordance with Davis and Wilson. We choose not to address the other issue presented in this cause.

It is so ordered.

SHAW, C.J. and 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. The majority cites Wilson and Davis where this Court rejected the use of familial trust as a basis for departure in crimes of violence against family members. Based upon these two cases and the instant case, the majority is taking an unduly restrictive position toward departure for abuse of trust in a family relationship where an act of violence is involved.

In contrast, this Court has approved departure for abuse of trust for property crimes which did not involve family members. See Davis, 517 So.2d at 673-674 (citing with approval Hankey v. State, 485 So.2d 827 (Fla. 1986) (burglary victim gave defendant job, entrusted him with key to fulfill duties, and defendant abused position by using key to enter place of business after hours to steal money and items of value) and citing Gardener v. State, 462 So.2d 874 (Fla. 2d DCA 1985) (teacher abused position of trust by selling cocaine on school property)). As characterized by this Court, each of these cases involved a crime which "was directly related to the trust conferred on the defendant and the trust was the factor that made possible the commission of the crime." Davis, 517 So.2d at 674.

In the instant case, the record contains evidence that Barnes abused his familial trust in committing this crime. Barnes lured his wife home from work by instructing his twelve-year-old stepson to call her at work and tell her that their home had been burglarized. When the wife arrived home, Barnes attempted to kill her; however, the gun misfired four times. In

direct contrast to the circumstances in Davis, it was the particular trust bestowed on Barnes by his wife and stepson that formed the foundation of this crime. This is precisely the circumstance that creates a clear and convincing reason for departure. I would approve the decision below which upholds the departure sentence.

GRIMES, J., concurs.

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

Third District - Case No. 88-1360

(Dade County)

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