

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT
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JESSIE G. LERMA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,839
DCA-5 NO. 84-1695.

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON, ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Florida 32014-4310
904-252-3367

ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fifth District Court of Appeal and Respondent was the Appellee. In the brief the parties will be referred to as they appear before this Honorable Court.

In the brief the following symbol will be used:

"R" - Record on appeal.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by an information filed in the Circuit Court of Orange County, Florida, with sexual battery and kidnapping. (R 24-25) On September 14, 1984, he entered a plea of guilty to sexual battery. (R 37-38, 41) He was sentenced on October 30, 1984, to spend fifteen years in prison. (R 16, 46-47)

Notice of appeal was timely filed on November 20, 1984, and the Office of the Public Defender was appointed to represent Petitioner on appeal. (R 50, 56) On October 3, 1985, on motion for rehearing or clarification, the Fifth District Court of Appeal affirmed the judgment and sentence. (Appendix) Notice to invoke this Honorable Court's jurisdiction was filed in the District Court, pro se, on October 29, 1985.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S
DECISION DIRECTLY AND EXPRESSLY
CONFLICTS WITH THE DECISION IN
SMITH V. STATE, 10 FLW 2370
(Fla. 1st DCA October 18, 1985),
AND ALBRITTON V. STATE, 10 FLW
426 (Fla. August 29, 1985).

The District Court has upheld Petitioner's conviction and sentence for sexual battery, relying on its previous holdings that:

" . . . victim injury and trauma constitute a valid clear and convincing reason to depart from the recommended range, Hankey v. State, 458 So. 2d 1143 (Fla. 5th DCA 1984), and that the circumstances of the way the crime was committed, indicating excessive brutality and clear premeditation, may also be considered. Murphy v. State, 459 So. 2d 337 (Fla. 5th DCA 1984)."

(See, Appendix, Page 2.)

In Smith v. State, 10 FLW 2370 (Fla. 1st DCA October 18, 1985), the First District Court of Appeal held that the "[e]motional, as well as physical trauma, suffered by a victim" was an invalid basis for departure from the sentencing guidelines "where, as here, the trauma to which the trial court refers is inherent in the nature of the offense." In Smith, the defendant was convicted of sexual battery, as was Petitioner.

In addition to conflicting with Smith v. State, supra, the District Court's decision herein contravenes the holding in Albritton v. State, 10 FLW 426 (Fla. August 29, 1985), that a departure sentence based on both valid and

invalid reasons should be reversed and the case remanded for resentencing unless the state can show beyond a reasonable doubt that the trial court would have rendered the same sentence even in the absence of the invalid reasons.

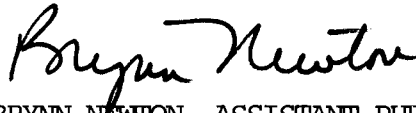
The Fifth District Court of Appeal's decision in this case, therefore, expressly and directly conflicts with the decision of another District Court of Appeal on the same question of law, i. e., whether a reason given for departure from the sentencing guidelines may be valid where the circumstance is inherent in the nature of the offense. Rule 9.030(a)(2)(A)(iv), F.R.App.P. This Honorable Court therefore has jurisdiction to review the District Court of Appeal's decision herein.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court assume jurisdiction over this cause, and review the District Court of Appeal's decision herein.

Respectfully submitted,


JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



BRYNN NEWTON, ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Florida 32014-4310
904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, by hand delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Jessie G. Lerma, 500 Orange Circle Avenue, Belle Glade, Florida 33430, this 12th day of November, 1985.



ATTORNEY