

IN THE SUPREME COURT OF FLORIDA

MARK FRANKLIN BARRENTINE,

Petitioner,

vs.

CASE NO. 70,446

STATE OF FLORIDA,

Respondent.

FILED

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RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CITATIONS

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CASES

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RESPONDENT'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Petitioner, Mark Franklin Barrentine, the criminal defendant and appellant below in the appended Barrentine v. State, 12 F.L.W. 905 (Fla. 1st DCA April 1, 1987), will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority below, will be referred to as "the State."

No references to the record on appeal will be necessary.

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional question are related in the unanimous opinion of the First District Court of Appeal in Barrentine v. State, which the State adopts as its statement of the case and facts. The State thus rejects petitioner's "statement of the case and facts" to the extent that these impermissibly stray from the face of the decision over which review is sought, see Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Reaves v. State, 485 So.2d 829 (Fla. 1986).

STATEMENT OF JURISDICTION/SUMMARY OF ARGUMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv) on the ground that this decision allegedly conflicts with a decision of this Court, Lerma v. State, infra, and with a decision of the Second District, Connell v. State, infra, on the same question of law. However, no basis for conflict certiorari jurisdiction exists insofar as the cases petitioner relies on for same are factually and legally distinguishable from the decision over which review is sought.

ISSUE

THE COURT SHOULD NOT GRANT DISCRETIONARY REVIEW OVER THE DECISION BELOW ON THE BASIS OF ALLEGED BUT NONEXISTANT CONFLICTS WITH ONE OF ITS OWN DECISIONS AND THAT OF ANOTHER DISTRICT COURT OF APPEAL

ARGUMENT

In Lerma v. State, 497 So.2d 736, 739 (Fla. 1986), this Court decreed that "emotional hardship can never constitute a clear and convincing reason to depart [from the sentencing guideline recommendation] in a sexual battery case because nearly all sexual battery cases inflict emotional hardship on the victim." In Connell v. State, 502 So.2d 1272, 1273 (Fla. 3rd DCA 1987), review pending (Fla. 1987), Case No. 70,155, the Second District, without pausing to analyze the distinction between sexual battery and lewd assault, interpreted Lerma to hold that the "psychological harm inflicted [by that defendant] upon the victims [of both these offenses] cannot justify departure." Fortunately, in Barrentine v. State, 12 F.L.W. 905, 906, the First District recognized that while "nearly all sexual battery cases inflict emotional hardship on the victim," such is not the case with lewd and lascivious assault cases,¹ so that

¹ With modest imagination, one can envision numerous scenarios in which the "victims" of a violation of § 800.04 would not suffer psychological damage. For example, a group of large, street-smart, heterosexual 15 year old boys might well experience nothing more than amusement at the sight of a young, petit female prostitute who disrobes herself and commits lewd acts in their presence.

"[p]sychological trauma suffered by the victim may justify departure from a recommended guideline sentence."

"Obviously, two cases cannot be in conflict if they can be validly distinguished." Morningstar v. State, 405 So.2d 778, 783 (Fla. 4th DCA 1981) (Anstead, J., concurring), affirmed, 428 So.2d 220 (Fla. 1982). Barrentine cannot be in conflict with either Lerma or Connell because these cases can be validly distinguished on grounds that they involve sentencing guideline departures in cases of sexual battery whereas the instant case does not. The fact that the Connell was incorrectly decided on the lewd and lascivious assault front augurs in favor of this Court granting the State's petition for review in that case, but does not counsel in favor of granting petitioner's petition to review the correct decision below. See § 960.02, Fla. Stat.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Court must summarily DENY the petition for writ of conflict certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing "Respondent's Brief on Jurisdiction" has been forwarded to Mr. P. Douglas Brinkmeyer, P.O. Box 671, Tallahassee, FL 32302, by hand delivery, this 6th day of May, 1987.

John W. Tiedemann

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