

**FILED**  
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AUG 24 1990  
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Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,398

WILLIAM BERRY,

Petitioner,

versus

THE STATE OF FLORIDA

Respondent.

APPEAL FROM THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA  
IN AND FOR DADE COUNTY

AMENDED PETITIONER'S BRIEF ON JURISDICTION

ARTHUR CARTER, ESQUIRE  
Special Asst. Public Defender  
Suite 306  
1399 N. W. 17th Avenue  
Miami, Florida 33125

Offices of  
MARIA BREA LIPINSKI  
JOHN H. LIPINSKI  
Of Counsel  
P. O. Box 97-0679  
Miami, Florida 33197-0679  
(305) 253-7557

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## STATEMENT OF THE CASE AND FACTS

At his trial, the Petitioner was convicted of Sexual Battery and Possession of a Controlled Substance. The Defendant's guidelines sentence was 4 1/2 to 5 1/2 years (T. 874). The Defendant was sentenced to 15 years and 5 years consecutively, totalling 20 years (T. 885).

The sole reason given for the guidelines deviation (R. 64) was that the Petitioner abused his familial authority and trust with his daughter.

The Petitioner appealed this issue to the Third District Court of Appeal which issued an opinion (A. 1-2), affirming the Petitioner's conviction. The Petitioner's timely Motion for Rehearing (A. 3-4) was denied.

This appeal follows.

## INTRODUCTION

The Petitioner was the appellant in the district court and the defendant in the trial court. The Respondent was the appellee in the district court and the prosecution in the trial court. The parties will be referred to as they stand in this court. Record references will be by the letter "R". References to the trial transcripts will be by the letter "T". References to the district court's opinion (included in Petitioner's Appendix) will be by the letter "A". All emphasis is added unless otherwise indicated.

QUESTION PRESENTED

Whether The Opinion Of The Distric Court Of Appeal, Third District, In The Instant Case, Is In Direct Conflict With The Opinions of This Court In Davis v. State, 517 So29 670 (Fla. 1987); Hall v. State, 516 So2d 692 (Fla. 1988) And Of The Fifth District Court of Appeal in Odom v. State, 15 FLW D1347 (Fla. 5 DCA 1990) In That The Crime Of Which Petitioner Was Convicted Of Committing Against His 19-year old Emancipated Daughter, Who Did Not Reside With Him, Was Not Directly Related To The Trust Conferred On The Petitioner And That Trust Was Not The Factor That Made Possible The Commission Of The Crime, Thereby Providing A Valid Basis For Deviating From The Sentencing Guidelines

## SUMMARY OF THE ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT OUTSIDE (ABOVE) THE SENTENCING GUIDELINES SOLELY ON THE BASIS OF A VIOLATION OF FAMILIAL TRUST. THE VICTIM WAS THE DEFENDANT'S EMANCIPATED 19-YEAR OLD DAUGHTER WHO DID NOT LIVE WITH THE DEFENDANT. THE CRIME WAS NOT MADE POSSIBLE DUE TO A BREACH OF TRUST, BUT BECAUSE OF THE VICTIM'S FEAR OF PHYSICAL VIOLENCE.

ARGUMENT

I

The Opinion Of The District Court Of Appeal, Third District, In The Instant Case, Is In Direct Conflict With The Opinions Of This Court In Davis v. State, 517 So2d 670 (Fla. 1987); Hall v. State, 517 So2d 692 (Fla. 1988) And Of The Fifth District Court Of Appeal In Odom v. State, 15 FLW D1347 (Fla. 5 DCA 1990) In That The Crime Of Which Petitioner Was Convicted Of Committing Against His 19 year old Daughter, Who Did Not Reside With Him, Was Not Directly Related To The Trust Conferred On The Petitioner And That Trust Was Not The Factor That Made Possible The Commission Of The Crime, Thereby Providing A Valid Basis For Deviating From The Sentencing Guidelines.

The Petitioner was charged with and convicted of sexual battery by means of physical force not likely to cause serious injury (R. 7).

B [REDACTED] was 19 at the time. She did not live with the Petitioner. She had not seen the Petitioner for some time. She was not in the Petitioner's custody. She did not submit to the Petitioner because he was her father, but because she didn't want to get hit anymore (violence) and wanted to run but could not leave her son (T. 383). Until she was hit she refused to submit (T. 373).

In contrast to the case cited in the District Court opinion, B [REDACTED] was not a minor (19), was not retarded, was emancipated with a child of her own, did not live with the petitioner and was not in his custody. She did not submit due to mental incapacity or tender age or because she depended on the petitioner. She submitted because she had refused his advances and he hit her. The petitioner's "familial authority" did not cause her to submit. Violence and the threat of future violence did.

The petitioner submits that his sentence was aggravated/guidelines exceeded solely because the victim was a relative. He submits that that is not a clear and convincing reason for guidelines departure. If it were, any worthless check between cousins would be a basis for departure

and a jail sentence. A child (of 18 or 50) stealing from his parent could be sentenced to the statutory maximum. How many teenage children who steal from their parents (to support a drug habit or otherwise) would fact the prospect of prison for their first conviction, like this defendant (he had never previously been adjudicated for a crime).

In its opinion, the District Court stated, in pertinent part:

In our view the same rule (as to familial authority) applies notwithstanding that the rape victim is the Defendant's emancipated teen-aged daughter. It was the familial relationship which brought the girl, along with her infant child, back to her father's home for a visit where she was forced to submit to her father's advances under the threat of violence.

(A. 1-2)

The sole authority cited in the District Court opinion was Gopaul v. State, 536 So2d 296 (Fla. 3d DCA 1988), a case in which a 19-year-old assaulted a nineteen-month-old baby cousin while babysitting.

This court in Davis v. State, supra, found guidelines deviation for abuse of familial trust improper in a case where a wife killed her husband while he was sleeping in the marital bed finding that:

In the instant case, no particular trust bestowed on Davis by the victim formed the foundation of the crime; the crime was not directly related to a specific trust as in the above cases (P. 674)

Davis, in contrast, did not take advantage of a position of authority over a victim who was a young child (P. 674).

Likewise, in Hall v. State, 517 So2d 692 (Fla. 1988), this Court found guidelines deviation for breach of familial trust improper in a case where parents committed child abuse on their two young children. Also, in Odom v. State, 15 FLW D1347 (Fla. 5th DCA 1990), the Court found guidelines deviation for breach of familial trust improper in a case where the Defendant was the victim's stepdaughter and the victim lived with the Defendant.

The Petitioner would also note that the question presented has

previously been certified to this court in the cases of Wilson v. State, 548 So2d 874 (Fla. 1st DCA 1989) and Cumbie v. State, 15 FLW D1618 (Fla. 1st DCA 1990).

In light of the facts of this case, the Petitioner submits that his sentence is in direct conflict with this Court's opinions in Hall v. State, supra, and Davis v. State, supra and that he must be resentenced.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, the Petitioner respectfully requests this Honorable Court to accept Jurisdiction of this Cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General at 401 N.W. 2nd Avenue, Miami, Florida 33128, on this 3 day of August, 1990.

Respectfully submitted,

LAW OFFICES OF  
MARIA BREA LIPINSKI  
JOHN H. LIPINSKI  
at  
Post Office Box 97-0679  
Miami, Florida 33197-0679  
(305) 253-7557

  
JOHN H. LIPINSKI, ESQUIRE  
Of Counsel