IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 79,261

ANDREAS OBOJES, ETC., :

Respondent. :

_____/

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

## I PRELIMINARY STATEMENT

Respondent, Andreas Obojes, was the defendant in the trial court and the appellant in the First District Court of Appeal. Petitioner, the State of Florida, was the prosecuting authority and appellee in the courts below. The parties will be referred to as they appear before this Court.

The one volume record on appeal will be referred to herein as "R" followed by the appropriate page number in parenthesis. The six volume transcript will be referred to as "T." A copy of the lower court's opinion is attached as the appendix hereto and will be referred to as "A."

## II STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's Statement of the Case and Facts with the following additional facts:

At trial, Respondent objected to the introduction of his diary on relevancy grounds (R 96-97; T 255-259). The objection was overruled (T 259).

On direct appeal, the District Court held that the diary excerpts were relevant as they tended to show that Respondent committed the crimes in question (A 2). The District Court affirmed Respondent's convictions for armed burglary, armed robbery, armed kidnapping and three counts of sexual battery with a deadly weapon, but reversed his departure sentences, finding both of the trial court's written reasons for departure invalid (A 2-8). As to the second reason, professional manner, the District Court relied on Hernandez v. State, 575 So.2d 640 (Fla. 1991), for the proposition that "professional manner" is an invalid reason for departure in any case. As to the first departure reason, premeditation or calculation, the court ruled that premeditation or planned calculation was an inherent component of armed robbery, and of armed burglary and kidnapping, since both were committed with the intent to commit a robbery (or sexual battery). The court further held that in light of this Court's opinion in Hernandez, supra, premeditation was also an invalid reason for departure on the offense of sexual battery, but certified the following question as one of great public importance:

WHETHER, IN LIGHT OF THAT LANGUAGE CONTAINED IN HERNANDEZ V. STATE, 575 SO.2d 640, 642 (FLA. 1991), CONCERNING PREMEDITATION OR ADVANCE PLANNING, THAT REASON REMAINS A VALID REASON JUSTIFYING THE IMPOSITION OF A DEPARTURE SENTENCE IN SEXUAL BATTERY CASES?

(A 8).

Petitioner seeks review of this certified question.

## III SUMMARY OF THE ARGUMENT

Respondent urges this Court to uphold the rationale of the lower court and answer the certified question in the negative. Because some degree of planning and calculation is common to practically all crimes, including sexual batteries, this reason cannot, consistent with the principles of the guidelines, constitute a valid reason for departure. Moreover, premeditation was an inherent element of the other scored offenses and thus already factored into the guidelines computation. To allow a departure for this same reason for the sexual battery conviction would amount to double dipping.

## IV ARGUMENT

ISSUE PRESENTED

WHETHER, IN LIGHT OF THAT LANGUAGE CONTAINED IN HERNANDEZ V. STATE, 575 SO.2D 640, 642 (FLA. 1991), CONCERNING PREMEDITATION OR ADVANCE PLANNING, THAT REASON REMAINS A VALID REASON JUSTIFYING THE IMPOSITION OF A DEPARTURE SENTENCE IN SEXUAL BATTERY CASES?

In Hernandez v. State, 575 So.2d 640 (Fla. 1991), this Court reviewed a number of opinions in which district courts of appeal addressed the issue of whether the "professionalism" of the crime is a valid reason for departure. Noting that these cases involved drug offenses, as well as robbery, burglary, and grand theft offenses, this Court ruled that professionalism is an invalid reason for a departure because "'professionalism' is an aspect of a defendant's background that is computed in the presumptive guidelines' sentence by means of a defendant's prior criminal history." Id., at 642. Thus, even if it could be clearly established, professionalism is already taken into account and may not be considered twice. The Court reasoned:

> We believe there is little distinction between planning and premeditation and the professional manner in which a crime is committed. As we have stated, the facts relied upon in this case and in many of the district court cases cited above reveal planning on the part of each defendant, not skillfulness. This type of planning is common to most crimes and thus cannot constitute a valid reason for departure.
>
> * * *
>
> For these reasons we find the professional manner in which a crime is committed to be an invalid reason for departing from a recommended guideline sentence in any case.

Id., at 642 [emphasis added; citation and footnotes omitted].

Relying on the above-quoted language in Hernandez, the court below held: "Thus it appears that the supreme court has now decided that premeditation or advance calculation is not a legitimate reason for departure for practically all crimes." (A 7). The lower court certified the issue, however, because Hernandez did not explicitly address the offense of sexual battery, nor did it expressly recede from certain language in Casteel v. State, 498 So.2d 1249 (Fla. 1986), and Lerma v. State, 497 So.2d 736 (Fla. 1986).

Petitioner principally relies on the holdings of Casteel and Lerma to urge this Court to reverse the District Court and affirm the trial court's departure reason. Respondent contends that Casteel and Lerma have been implicitly overruled by this Court's more recent opinion in Hernandez. In the alternative, Respondent maintains that those decisions are inapplicable to the facts here because premeditation was inherent in some of the scored offenses and was thus factored into Respondent's presumptive guidelines range.

Despite numerous revisions in the guidelines themselves, and refinements in the case law, certain guiding principles have remained constant since this Court first began reviewing reasons for departure. First and foremost is that the guidelines are intended to eliminate unwarranted disparity and to promote uniformity of sentences. See Albritton v. State, 476 So.2d 158 (Fla. 1985). Consequently, Florida Rule of Criminal Procedure 3.701(d)(11) seeks to discourage departures from the

recommended or presumptive ranges unless there are circumstances or factors which reasonably justify aggravating or mitigating the sentence. In keeping with this principle, this Court has consistently held that neither reasons prohibited by the guidelines themselves, nor factors already taken into account in calculating the guidelines score, nor an inherent component of the crime in question can ever by used to justify departure from the guidelines. State v. Mischler, 488 So.2d 523 (Fla. 1986); Scurry v. State, 489 So.2d 25 (Fla. 1986).

An inherent component of the offense has been defined as a characteristic or factor which necessarily precedes or follows the criminal act itself, even though it is not included as a statutory element of the offense. A factor which usually and ordinarily results from an offense is an invalid reason for departure. State v. Fletcher, 530 So.2d 296, 297 (Fla. 1988).

Numerous cases have rejected premeditation as a basis for departure where it is an element or inherent component of the offense charged. See e.g., State v. Fletcher, 530 So.2d 296 (Fla. 1988)(calculated premeditation and planning inherent in all drug trafficking and conspiracies); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987)(premeditation invalid reason to depart for robbery); Brown v. State, 587 So.2d 563 (Fla. 1st DCA 1991)(premeditation invalid reason to depart for robbery with a deadly weapon and threatening to discharge a destructive device); Campbell v. State, 558 So.2d 34 (Fla. 1st DCA 1989) (substantial premeditation improper basis for departure for trafficking in cocaine); Melton v. State, 501 So.2d 96 (Fla.

1st DCA 1987)(calculated manner in which crimes were committed improper basis to depart for burglary and aggravated battery). The courts have also rejected advance planning or calculation as a valid departure reason where the offenses charged did not require a mens rea. See e.g., Scurry v. State, supra; Koleta v. State, 592 So.2d 1267 (Fla. 2d DCA 1992)(facts that defendant walked to bedroom and armed himself with a gun, then returned to living room and shot seated victim in face did not justify departure sentence for second murder based on cold and calculated manner in which crime was committed).

In Hallman v. State, 560 So.2d 223, 227 (Fla. 1990), this Court stated that while many crimes can be said to be premeditated, there are only a few which are so carefully planned and executed as to warrant an extraordinary sentence. In State v. Fletcher, supra, however, the Court held that even where there is evidence of lengthy, sophisticated, and careful planning, premeditation cannot justify a departure where it is inherent in the crime. Finally, in Hernandez v. State, supra, this Court recognized that planning is common to most crimes and thus cannot constitute a valid reason for departure.

These cases suggest that premeditation or calculation can only be a basis for departure in those exceptional cases where premeditation is not an element or an inherent component of the offense, and where the facts are so egregious as to justify an extraordinary sentence. Because premeditation and planning are inherent in most crimes, such factors will rarely be legitimate reasons for departure. Some degree of premeditation and

planning is inherent in all sexual batteries, particularly where the sexual battery is committed in the course of a burglary or kidnapping, as here. Because premeditation is an inherent component of the offense, i.e., a characteristic or factor which necessarily precedes the crime itself, it can never justify a departure sentence, no matter how much planning is involved.

Petitioner analogizes the instant reason for departure to the aggravating factor under Section 921.141(5)(i), Florida Statutes. This analogy, however, is illusory. Premeditation is an essential element of first degree murder, which must be established beyond a reasonable doubt. Because premeditation is an element of the offense, a heightened degree of premeditation must be shown to support a death sentence. In the sentencing guidelines context, premeditation of any degree can never be a valid reason for departure where it is either a statutory element or an inherent component of the offense charged because it is already embodied within the guidelines scheme. See, e.g., Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984), approved, 476 So.2d 165 (Fla. 1985).

Finally, Petitioner urges that since no advance planning is required to commit violent crimes against persons, such as rape, this reason should not be prohibited. Petitioner ignores the facts that Respondent was charged with, and convicted of, burglary of a dwelling with intent to commit sexual battery and kidnapping with intent to commit or facilitate a sexual battery (R 44-45). Premeditation is thus an inherent component of all

the crimes charged, even though it is not an essential element of sexual battery. As such, it cannot be a valid basis for departure.

Moreover, it is well recognized that premeditation is an inherent component of robbery, burglary and kidnapping, and as such, it is not a valid reason for departure. Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984); Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA 1985). Because premeditation is inherent in some of the scored offenses, it is already weighed in arriving at the presumptive guidelines sentence and cannot be used again in departing from the guidelines on any other scored offenses. To do so would constitute "double-dipping". Casteel v. State, 498 So.2d 1249, 1252 (Fla. 1987); Hendrix v. State, 475 So.2d 1218, 1220 (Fla. 1985). In Casteel, supra at 1252, this Court adopted Judge Zehmer's dissenting opinion, wherein he wrote:

> I do not agree that the first ground [for departure], reciting use of the knife, should be used to aggravate the burglary charge. Both the sexual battery and burglary charges grew out of the same act in a single episode. As the majority opinion notes, use of a knife is an element inherent in the charge of sexual battery with use of a deadly weapon. That charge was used as the primary offense at conviction for purposes of calculating the sentencing guidelines score. I find it difficult to comport permitting use of this ground with the now-accepted notion that there is `a lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the same factor is included in the guidelines for purposes of furthering the goal of uniformity'. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). To allow use of an essential element of the primary offense as an aggravating factor in a subordinate or 'other' offense amounts to

> allowing 'the trial judge to depart from the guidelines based upon a factor which has already been weighed in arriving at a presumptive sentence' and would be contrary to the intent and spirit of the guidelines.

Casteel v. State, 481 So.2d 72, 75 (Fla. 1st DCA 1986) (Zehmer, J., concurring in part and dissenting in part).

Under the rationale of Casteel, even if premeditation is not deemed an inherent component of sexual battery, because premeditation has already been calculated into the presumptive guidelines range for some of the scored offenses, it cannot be used as a reason to depart for any of the scored offenses.

Respondent's presumptive range of 12 to 27 years under the guidelines was based on all six of his offenses at conviction. Premeditation or advance planning was already factored into the guidelines computation in scoring the armed burglary, armed robbery and armed kidnapping convictions. To depart from the presumptive range based on this very same factor would amount to "double dipping," contrary to the spirit and intent of the guidelines. Hernandez v. State, supra; Casteel v. State, supra; Hendrix v. State, supra.

This Court should answer the certified question in the negative and affirm the decision of the District Court.

## VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Respondent respectfully requests that this Court answer the certified question in the negative and affirm the decision of the court below.

Respectfully submitted,

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Answer Brief on the Merits has been furnished by U.S. Mail to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to respondent, Andreas Obojes, DOC #121048, Tomoka Correctional Inst., 3950 Tiger Bay Road, Daytona Beach, Florida, 32124, on this 13th day of April, 1992.

Paula S. Saunders
PAULA S. SAUNDERS

IN THE SUPREME COURT OF FLORIDA

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|---|---|---|
| STATE OF FLORIDA, | : | |
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| ANDREAS OBOJES, ETC., | : | |
| Respondent. | : | |

_____/

A P P E N D I X

TO

RESPONDENT'S ANSWER BRIEF ON THE MERITS

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ANDREAS OBOJES, a/k/a ANDREAS REEVES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 90-3250



Opinion filed November 20, 1991.

An Appeal from the Circuit Court for Duval County.
Donald R. Moran, Jr., Judge.

Nancy A. Daniels, Public Defender; and Nancy L. Showalter, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

ERVIN, J.

Appellant, Andreas Obojes, a/k/a Andreas Reeves, appeals his convictions for one count each of armed burglary, armed robbery, and armed kidnapping, and three counts of sexual battery with a deadly weapon, and the departure sentences imposed therefor. He

contends that the trial court erred by denying his motion in limine to exclude portions of a diary read during trial[1] and by imposing departure sentences, because the general statement made in support of the reasons for departure lacked factual support, and because neither reason given is valid. We affirm the convictions, but reverse and remand for resentencing.

Addressing the evidentiary challenge first, we conclude that the diary excerpts admitted into evidence were relevant in that they tended to show appellant committed the crimes in question. § 90.401, Fla. Stat. (1987); Gibbs v. State, 394 So.2d 231 (Fla. 1st DCA), aff'd, 406 So.2d 1113 (Fla. 1981). Moreover, the probative value of that evidence was not "substantially outweighed by the danger of unfair prejudice," because the evidence was necessary to the prosecution's case, did not suggest an improper basis for the jury to resolve the matter, was supportive of inferences raised by the victim's testimony, and no limiting instruction was requested. See § 90.403, Fla. Stat. (1987); State v. Sawyer, 561 So.2d 278, 284 (Fla. 2d DCA 1990). Consequently, we hold that the trial court did not err by denying appellant's motion in limine.

In regard to the departure sentences, the trial court gave the following written reasons for imposition of those sentences:

---

[1]Appellant also seeks to challenge certain testimony relating to a statement he made to Detective Coxen. This issue was not preserved either by contemporaneous objection or motion in limine.

The justification for this Court's Departure from the sentencing guidelines is as follows:

> Numerous witnesses were called by the State during the course of the trial. In addition, the Defendant, Obojes took the witnesses' stand and testified on his own behalf. This testimony along with the physical evidence also introduced by the State, provides a record which supports that the offenses for which the Defendant is to be sentenced, were committed in a calculated manner without pretense of moral or legal justification. Premeditation or calculation is not an inherent component of the crime of sexual battery. Florida courts have clearly held that the calculated manner of the commission of a crime is a valid reason for an upward departure when premeditation is not an inherent component of that crime. Casteel v. State, 498 So.2d 1249 (Fla. 1986); Lerma v. State, 497 So.2d 736 (Fla. 1986).
>
> In addition, it is appropriate for this Court to take into consideration the professional manner in which the Defendant committed these crimes. The professional manner in which the Defendant carried out the offenses is also supported by the record and is a reason to exceed the sentencing guidelines. Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984).
>
> This Court finds that above outlined justifications are clear and convincing reasons for exceeding the recommended guideline sentence.

Appellant initially contends that the departure sentences imposed are illegal, because the trial court failed to refer to facts in the record in support of the two reasons given for departure. In support of his argument, appellant cites Davis v. State, 517 So.2d 670 (Fla. 1987). In that case, the trial judge imposed a departure sentence in connection with convictions for

second degree murder and use of a firearm during the commission of a felony. In finding the reasons given for the departure to be invalid, the court noted that the district court had found it "possible to extract" four reasons for departure "from the judge's lengthy written justification." Id. at 672. In regard to that statement, the court made the following comment in a footnote:

> Fla.R.Crim.P. 3.701(d)(11) provides: "Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure." (Emphasis added.) We again emphasize that the reasons supporting departure should be explicitly listed and then followed, if deemed necessary, by the relevant facts used to support the reason in order to facilitate appellate review. The form of narrative exposition presented in the instant case to justify departure makes it difficult for a reviewing court to determine which portions of the narrative are relied upon for departure and which portions are simply descriptive of the scenario. See Lerma v. State, 497 So.2d 736 (Fla. 1986).

Id. at n.1.

Appellant also cites Wilcoxson v. State, 577 So.2d 1388 (Fla. 1st DCA 1991) (on rehearing), in which the trial court imposed a departure sentence on a conviction for manslaughter with a firearm based on the "defendant's escalating pattern of criminal conduct during the past three and one-half decades." Id. at 1391. In considering that reason, this court stated:

> The trial court did not specify of what that conduct consisted, and such omission is erroneous. In Davis v. State, 517 So.2d 670, 672 n.1 (Fla. 1987), the court stated that Rule 3.701(d)(11), Florida Rules of Criminal

> Procedure, requires that departure sentences be accompanied by a written statement "delineating" the reasons for departure. The court emphasized that reasons supporting departure should be explicitly listed and then followed, if necessary, by the relevant facts used to support the reason in order to facilitate appellate review. Such an explicit statement with factual support was not provided in the instant case.

Id.

Appellant has argued that this court in Wilcoxson has interpreted Davis to mean that relevant facts used to support a departure reason must be explicitly set forth. No rule or statute explicitly requires the reciting of facts to support a departure reason, and in both Davis and Wilcoxson it was stated that the facts should be recited if "necessary." Moreover, the court in Davis was concerned with the fact that the reasons for departure were not even explicitly set forth and there was a question as to how many reasons were given, while in Wilcoxson, the stated reason, "escalating pattern of criminal conduct over three and a half decades," necessarily requires an explicit factual description. In the instant case, however, the reasons given, premeditation or calculation and professional manner, are not the kind of reasons which necessarily requires support by reference to relevant facts. Moreover, the facts relied on are apparent in the record: the statements in the diary, the wearing of gloves, the use of handcuffs, etc. Under the circumstances, Davis and Wilcoxson do not require reversal of the departure sentences imposed at bar.

Reversal is required, however, because neither reason given in support of the departure sentences is valid. See § 921.001(5), Fla. Stat. (Supp. 1988). Considering first the second reason given--professional manner--we note that reason was recently found to be an invalid reason for departure in any case. Hernandez v. State, 575 So.2d 640 (Fla. 1991).

As to the first reason stated--premeditation or planned calculation--the law is clearly established that if a trial court intends to impose a departure sentence for the offense of robbery, it may not rely upon premeditation or advance planning as a valid reason for departure, because it is an inherent component of the crime of robbery and is thus already embodied in the guidelines. Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984), approved, 476 So.2d 165 (Fla. 1985); Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA), review denied, 476 So.2d 675 (Fla. 1985). Consesquently, under Carney and Knowlton, the departure sentence imposed for the armed robbery charge must be reversed, because neither of the reasons cited therefor are valid.

Similarly, because the armed burglary and armed kidnapping charges were both alleged to have been committed with the intent to commit a sexual battery or robbery, premeditation or advance planning would likewise be included as an inherent component of those crimes. Thus, the departure sentences imposed for those convictions must likewise be reversed.

Premeditation or calculation has been found not to be an inherent component of the crime of sexual battery. Casteel v.

State, 498 So.2d 1249, 1252-53 (Fla. 1986); Lerma v. State, 497 So.2d 736, 739 (Fla. 1986). Nevertheless, we question the continued vitality of the holdings in the above cases in light of the supreme court's more recent decision in Hernandez in which it made the following comments regarding premeditation or advance planning:

> We believe there is little distinction between planning and premeditation and the professional manner in which a crime is committed. As we have stated, the facts relied upon in this case and in many of the district court cases cited above reveal planning on the part of each defendant, not skillfulness. This type of planning is common to most crimes and thus cannot constitute a valid reason for departure.

Hernandez, 575 So.2d at 642 (citation omitted). In so holding, the supreme court relied upon its earlier decision in State v. Fletcher, 530 So.2d 296 (Fla. 1988), wherein it held, as applied to departure sentences for the offenses of drug trafficking and conspiracy to traffic, that all such offenses "'inherently' involve calculated premeditation and planning." Id. at 297 (quoting Fletcher v. State, 508 So.2d 506, 507 (Fla. 4th DCA 1987)).

Thus it appears that the supreme court has now decided that premeditation or advance calculation is not a legitimate reason for departure for practically all crimes. Consequently, because neither reason given for departure in the sexual battery convictions constitutes a valid reason for departure, the sentences imposed must also be reversed and the case remanded for