IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 79,261

ANDREAS OBOJES, ETC.,

Respondent.

_____/

MERITS BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The respondent, Andreas Obojes, was charged with and convicted of armed burglary of a dwelling, armed robbery, armed kidnapping, and three counts of sexual battery, all occurring between the dates of May 14 and 15, 1989. (R. 41-42, 119-122, 130-138) The crimes occurred in a townhouse located on the end unit of the Silver Springs Apartment complex. (T. 33-34) In his personal diary, respondent wrote that he drove to the Silver Springs Apartment complex on May 2, 3, 11, and 12, 1989, and on one of these dates (May 3), he drove there twice. On all but the last date, he wrote that while at the complex, he "observ[ed]," and "look[ed]" about." On May 2, he wrote, "I observe and see a couple of possibilities, but things just won't go right for me," and on the next day, May 3, he wrote, "She is there," and "I want to do it, but there are people all about." On May 12, respondent wrote that he was without money and gas and had to borrow a total of $30 from two people. (T. 245, 261-263)[1] Two days later, respondent committed the crimes in the instant case.

The victim first encountered respondent as she was taking out her trash approximately two weeks prior to the date the crimes were committed. Respondent approached her on the sidewalk, leaned right up against her body, and repeatedly insisted on using her telephone. He pointed to her apartment and stated, "That's where you live." (T. 38, 82) She refused his

---

[1] There are two pages numbered 261 in the trial transcript.

request but did direct him to the pay telephone in the manager's office. Respondent never went to use the pay telephone. (T. 38-39, 82)

After respondent had violently forced his way into the victim's apartment on the night the crimes occurred, he asked her if she remembered him. (T. 48) The victim asked respondent why he had selected her. He responded that "it was either [her] or the girl who lived upstairs" and that "he couldn't go upstairs because he didn't know what door to use." He further stated that he chose her because she "looked really nice," "lived by [herself]," and "dressed nice." (T. 41) Respondent came to the victim's apartment equipped with a firearm and a duffel bag containing tranquilizers, two pairs of handcuffs, string, a pair of gloves, and a big knife. (T. 36, 44-45, 48, 56-57)

The guidelines permitted sentencing range was 12 - 27 years' incarceration (R. 141), and after a lengthy sentencing hearing (T. 563-579), the trial court imposed a departure sentence of 40 years' imprisonment (R. 133-138). As justification for the departure sentence, the trial court stated:

> 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.

(R. 139-140)

On appeal, respondent challenged both his conviction and sentence. The First District Court of Appeal affirmed the conviction but reversed the sentence on the ground that both of the departure reasons were invalid. The Court was of the opinion that Hernandez v. State, 575 So.2d 640 (Fla. 1991) implicitly had overruled Casteel and Lerma on which the trial court had relied to support the departure sentence. The First District 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?

Thereafter, the State sought timely review of the certified question in this Court.

SUMMARY OF ARGUMENT

The District Court of Appeal erred as a matter of law when it reversed the trial court's sentencing order on the ground that the departure reasons were invalid. On three occasions, this Court has held that heightened premeditation in the commission of sexual battery is a valid departure reason. This Court has further held that aggravating circumstances supporting the death penalty also justify upward departure sentences under the guidelines. Heightened premeditation is an aggravating factor to be used to justify a death sentence. Therefore, the answer to the certified question is, "Yes."

In the instant case, respondent stalked his victim for at least two weeks, waiting for just the right opportunity. He made two attempts two weeks apart to gain entry to the victim's apartment. The second time, he caught the victim off guard and forced his way into her apartment. He came equipped with a firearm, tranquilizers, handcuffs, string, gloves, and a big knife. These facts demonstrate beyond dispute that respondent arrived on the scene already possessed of a calmly planned and calculated intent to rape the victim. Based on these facts, the trial court was justified in imposing an upward departure sentence based on heightened premeditation.

ARGUMENT

CERTIFIED QUESTION

> 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?

On two occasions, this Court has held that a defendant who commits sexual battery with the culpable mental state of premeditation and calculation is subject to enhanced sentencing under the sentencing guidelines. Lerma v. State, 497 So.2d 736 (Fla. 1986), receded from on other grounds, Rousseau v. State, 509 So.2d 281 (Fla. 1987); Casteel v. State, 498 So.2d 1249 (Fla. 1986).

The defendant in Lerma waited for a convenience store clerk to open up the store and to serve a customer before raping her. He then informed her of his plan to abduct her and to sell her for $50,000, which plan was aborted by the victim's escape. The trial court imposed a departure sentence, in pertinent part, because the defendant had "intentionally and consciously premeditated his crime . . . ." Id., at 738. In upholding the departure reason, this Court stated:

> Premeditation or calculation is not an inherent component of the crime of sexual battery. Thus, premeditation or calculation may support a departure sentence if the facts supporting premeditation or calculation are proven beyond a reasonable doubt. The testimony of Detective Rose, as set forth, in part, in the sentencing order, supports a finding of premeditation. As a result, the trial court did not abuse its discretion in

> basing its departure on a finding that the sexual battery was premeditated. [citation omitted]

Id., at 739.

The defendant in Casteel knocked on the victim's door shortly after 10:00 p.m. ostensibly to find out whether she was attending a party. She responded negatively, locked the door, and dozed off. She awoke to a knock at the door. When she opened it, the defendant forcefully and violently entered the house and raped her. 481 So.2d 72, 74, fn 3 (Fla. 1st DCA 1986). The trial court imposed a departure sentence, in pertinent part, because the defendant committed the rape "in a calculated manner without pretense of moral or legal justification." 498 So.2d at 1251. Citing to Lerma, this Court held that "[r]eason number two, the calculated manner of commission, is a clear and convincing reason for departure" because "[p]remeditation or calculation is not an inherent component of the crime of sexual battery." Id., at 1252-1253.

The decisions in Lerma and Casteel are eminently correct. Common to all persons who commit sexual battery is the intent to engage in prohibited sexual activity with the victim. However, no particular length of time is required to form the intent to commit this crime, and neither does it require any elaborate planning activity. Some rapists commit the crime on impulse (during commission of another crime or in a social or family setting, or while under the influence of drugs or alcohol), and some plan it well in advance. Those falling into the latter

category have had the opportunity for further thought and a turning over in the mind. Thus, all persons who commit this crime are not similarly situated, although they all are morally depraved. Those who rape according to a preconceived design deserve more severe punishment than those who act on impulse, if they are apprehended. This serves to deter the serial rapist. Since the defendant in Lerma and Casteel possessed a calmly planned and calculated intent to rape, they deserved enhanced punishment.

In Hallman v. State, 560 So.2d 223 (Fla. 1990), this Court reaffirmed its holdings in Lerma and Casteel. The defendant in Hallman committed murder, robbery, two kidnappings, and grand theft. The evidence admitted at trial showed that the defendant took a taxi to a bank, ordered the taxi driver to accompany him inside the bank, robbed the bank, exited the bank by himself, shot and killed a security guard outside the bank, commandeered a passing car and forced the driver to take him from the scene, forced the driver to exit the vehicle, and then drove the vehicle to a relative's house. The defendant was sentenced under the guidelines on all of his offenses except murder. The trial court departed upward, in pertinent part, because the offenses were committed in a "premeditated, calculated and preplanned manner without pretense of moral or legal justification." Id., at 227. This Court rejected the departure reason, not because the reason was invalid but because the circumstances of the case did not support a finding of premeditation. It stated:

> 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. This Court upheld a departure in two cases in which the records disclosed an unusually high degree of premeditation. Casteel v. State, 498 So.2d 1249 (Fla. 1986); Lerma v. State, 497 So.2d 736 (Fla. 1986), receded from on other grounds, Rousseau v. State, 509 So.2d 281 (Fla. 1987). The evidence in the instant case falls far short of justifying a departure for premeditation. A mere recitation of the facts illustrates Hallman's lack of foresight in perpetrating these crimes.

Id., at 227. The departure sentence was ultimately upheld on a different ground, which will be discussed later.

The law relating to capital punishment is analogous. The death penalty is authorized where the "homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Section 921.141(5)(i), Florida Statutes (1990 Supp.) Calculation "consists of a careful plan or prearranged design." Rogers v. State, 511 So.2d 526, 533 (Fla. 1987) See, e.g., the following cases in which the death penalty was affirmed, at least in part, based on this aggravating factor: Mills v. State, 462 So.2d 1075, 1081 (Fla. 1985) (defendant took a shotgun and stalked the victim through the underbrush until he found and executed him); Williamson v. State, 511 So.2d 289, 292-293 (Fla. 1987) (defendant first suggested the killing, formulated the plan and recruited a person as the lookout, and actually committed the murder); Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987) (defendant lured victim from his home under

false pretenses, obtained a weapon, violently abducted the victim, and executed him in an isolated area); and Rutherford v. State, 545 So.2d 853, 856 (Fla. 1989) (defendant planned for weeks in advance to force victim to write him a check and to kill her in a manner to look like an accidental drowning).

This Court has held that aggravating circumstances supporting imposition of the death penalty also justify upward departure sentences under the guidelines. Hallman, supra. There, this Court stated:

> The legislature has determined that avoiding arrest is an aggravating factor to be considered in imposing a sentence for first-degree murder. § 921.141(5)(e), Fla. Stat. (1989). We see no reason why it should not also be a valid reason for departure from the sentencing guidelines. Further, the fact that the second kidnapping and the car theft were committed to effect an escape is a valid basis for departure where, as here, Hallman was never in custody and, therefore, did not commit a separate crime of escape.

Id., at 227-228.

In its departure order in the instant case, the trial court stated, "[T]he offenses for which the Defendant is to be sentenced were committed in a calculated manner without pretense of moral or legal justification." (R. 139) The court went on to state that "[p]remeditation or calculation is not an inherent component of the crime of sexual battery." Id. The operative language in the trial court's order is almost identical to that contained in the death-penalty statute previously discussed. This similarity indicates that the trial court had in mind a

heightened premeditation beyond that necessary to prove a particular element of a crime. This is made abundantly clear by the trial court's comments to the defendant, "[Y]ou undoubtedly stalked that woman a long period of time," and "You picked her out and followed her until you felt the time was right." (T. 578)

The trial court's departure reason is amply supported by the record. Respondent stalked his victim for at least two weeks, waiting for just the right opportunity. He made two attempts two weeks apart to gain entry to the victim's apartment. The second time he was successful by catching the victim off guard and then pointing a gun at her. In addition to the firearm, respondent came to the victim's apartment equipped with tranquilizers, two pairs of handcuffs, string, a pair of gloves, and a big knife. (T. 33-57, 82, 261-263, 377) Beyond dispute, these facts demonstrate that respondent arrived on the scene already possessed of a calmly planned and calculated intent to rape the victim. The passage of two weeks' time gave him ample opportunity to reflect on the consequences of his intended depraved conduct. Therefore, even if premeditation had been an element of the crime, as it is with the offense of first-degree premeditated murder, a departure sentence would still be appropriate because of the heightened premeditation involved.

The First District Court of Appeal interpreted Hernandez v. State, 575 So.2d 640 (Fla. 1991) as implicitly overruling the

decisions in Lerma and Casteel. The State respectfully disagrees.[2]

The defendant in Hernandez was convicted of trafficking in cocaine in excess of 400 grams and of conspiracy to traffic in cocaine in excess of 400 grams. The trial court imposed a departure sentence on the grounds that (1) the crime was committed in a professional manner, and (2) the drug transaction involved a large amount of cocaine. The District Court of Appeal upheld the first reason. However, this Court found the reason to be invalid because "'professionalism' is an aspect of a defendant's background that is computed in the presumptive

---

[2] The reason for departure was explicitly approved in Lerma and Casteel. Nevertheless, on the basis of a perceived "implicit" overrule, the District Court departed from these controlling cases and certified a question seeking approval. This is clearly contrary to Hoffman v. Jones, 281 So.2d 431 (Fla. 1973), where this Court held that lower courts should follow this Court's controlling cases and certify any disagreement. There are any number of reasons why that procedure should be followed, in addition to the obvious principle that lower courts should not depart from the law. Hoffman itself points out that it takes more than a certified question to vest this Court with jurisdiction. One of the parties must petition for review and this Court must be given an opportunity to either exercise, or decline to excercise, discretionary jurisdiction. Where, for example, this Court chooses not to recede from its controlling case law, and assuming the lower court followed the case law pursuant to Hoffman, this Court could simply decline review. Under the procedure followed by the district court here, this Court surrenders the control of its jurisdiction to the lower court. In the interest of the orderly administration of justice, the State urges the Court to reaffirm the procedure in Hoffman. In its motion for rehearing in the instant case, the State urged the District Court, on authority of Hoffman, to affirm the trial court's sentencing order, but its motion was denied.

guidelines' sentence by means of a defendant's prior criminal history." Id., at 642.

This Court then proceeded to discuss the cases that had been cited in support of the departure reason (professionalism of the crime), reaching the conclusion that many of these cases, as well as Hernandez, actually involved "planning on the part of each defendant, not skillfulness." Id., at 642. This Court then stated, at least partially, if not entirely, in dicta, that "[t]his type of planning is common to most crimes and thus cannot constitute a valid reason for departure. Id., at 642.

The crimes in Hernandez involved the distribution of cocaine. That type of crime necessarily involves planning, successive communication, and cooperation with cohorts. By contrast, at issue in Lerma and Casteel was a violent crime against the person, sexual battery, Aiken v. State, 390 So.2d 1186, 1187 (Fla. 1980), which is "one of the most personally humiliating of all crimes," Neil v. Biggers, 409 U.S. 188, 200 (1972). In general no advance planning is required to commit violent crimes against the person. All that is needed is a depraved mind and a vulnerable victim.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to quash the decision of the First District Court of Appeal vacating the trial court's sentencing order. Irrespective of the outcome of this case on the merits, the State would urge this court to reaffirm its decision in Hoffman that lower courts must follow this Court's controlling cases and certify any disagreement.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to Nancy L. Showalter, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 24th day of February, 1992.

Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 79,261

ANDREAS OBOJES, ETC.,

Respondent.

_____/

APPENDIX

Copy of Opinion of First District Court of Appeal

90-1120 TCR

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

resentencing within the guidelines. Hernandez, 575 So.2d at 643. Nevertheless, because Hernandez did not explicitly address the offense of sexual battery but rather certain drug offenses, nor did it expressly recede from certain language in Casteel and Lerma, we certify the following question to the Florida Supreme Court 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?

The appellant's convictions are AFFIRMED; the sentences are vacated and the case REMANDED for resentencing in accordance with this opinion.

SHIVERS AND WIGGINTON, JJ., CONCUR.