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IN THE SUPREME COURT OF FLORIDA

ROBERT ERROL MARCOTT,

Petitioner,

v. CASE NO. 83,288

STATE OF FLORIDA,

Respondent.

______________________________/

ANSWER BRIEF OF RESPONDENT

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ISSUE (CERTIFIED QUESTION)

Should the language in State v. Obojes, 604 So. 2d 475 (Fla. 1992), limiting the court's holding exclusively to sexual offenses, be construed as permitting departure on the basis of heightened premeditation or calculation in sexual offenses generally, or should the holding be construed as limited strictly to the facts of that case, i.e., to sexual battery cases?

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IN THE SUPREME COURT OF FLORIDA

ROBERT ERROL MARCOTT,

Petitioner,

v. CASE NO. 83,288

STATE OF FLORIDA,

Respondent.

______________________________/

## PRELIMINARY STATEMENT

Petitioner, Robert Errol Marcott, appellant below and defendant at trial, will be referred to herein as "defendant." Respondent, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

The State accepts those portions of defendant's statement of the case and facts which are relevant to the issue on appeal as being generally supported by the record, subject to the addition of the following:

1. Ms. Susie Rowe testified that S.N.D. told her that the abuse during the camping trips did not occur until the camping trips had been going on for two years. (R 16). J.S.C. also testified that the abuse did not occur until the third year of the camping trips. (R 507-9).

2. J.S.C. testified that the abuse would occur when his grandmother, defendant's wife, was working. (R 520). J.L.D. testified that defendant would send her into the bedroom when he (defendant) abused S.N.D. (R 550-1). S.N.D. testified that defendant would abuse her when her grandmother, defendant's wife, was not around. (R 444).

## SUMMARY OF THE ARGUMENT

The answer to the certified question is that a departure sentence in any sexual case in which there is heightened premeditation or calculation is proper. Defendant was convicted of lewd or lascivious conduct in the presence of a child and lewd act upon a child. Both of these crimes are general intent crimes which do not have as inherent components premeditation or calculation. The facts in the instant case show that defendant would create favorable opportunities so that he could abuse the children. Consequently, defendant was properly given a departure sentence, and this Court should answer the certified question to permit departure sentences based on premeditation or calculation in sexual offenses generally.

## ARGUMENT

### ISSUE (CERTIFIED QUESTION)

> Should the language in State v. Obojes, 604 So. 2d 475 (Fla. 1992), limiting the court's holding exclusively to sexual offenses, be construed as permitting departure on the basis of heightened premeditation or calculation in sexual offenses generally, or should the holding be construed as limited strictly to the facts of that case, i.e., to sexual battery cases?

The answer to the certified question is that a departure sentence in any sexual offense case in which there is heightened premeditation or calculation is proper. The First District Court of Appeal was correct in holding that a departure sentence is permitted in more than just sexual battery cases. See Sp. Op. at 4. Consequently, this Court should affirm the First District Court of Appeal's decision.

It "is settled that a departure may not be based on any matter already factored into the guidelines' computations." Hernandez v. State, 575 So. 2d 640, 641 (Fla. 1991). Hence, "[a]n inherent component of the crime in question can never be used to justify a departure from the guideline." Id. at 642 (citation omitted). Obviously, if the conduct giving rise to the departure is not an inherent component of the crime then a sentence outside the guideline is proper. See, e.g., Casteel v. State, 498 So. 2d 1249, 1251-2 (Fla. 1986).

Premeditation or calculation is a valid reason for departure in sexual battery cases. See, e.g., Casteel, 498 So. 2d at 1252-

3; State v. Obojes, 604 So. 2d 474, 475 (Fla. 1992) ("[W]e hold that premeditation or calculation is a sufficient reason for departure in a sexual battery case only if it is of a heightened variety."). The rationale for permitting a departure sentence in a sexual battery case is that "[p]remeditation or calculation is not an inherent component of the crime of sexual battery." Casteel, 498 So. 2d at 1252-3 (quotation marks omitted).

This same rationale should apply to other sexual offenses as well. If premeditation or calculation is not an inherent component of the crime, then a departure sentence based on these factors is warranted, if supported by the evidence. In the instant case, defendant was found guilty of the crimes of lewd conduct in the presence of a child and lewd act upon a child. See (R 383-4). Consequently, in order to determine whether a departure sentence for these crimes based on premeditation or calculation is proper, it is necessary to determine whether premeditation or calculation is an inherent component of the crimes.

The crime of lewd or lascivious conduct in the presence of a child requires: (1) a child under the age of 16 years and (2) a person who knowingly commits a lewd or lascivious act in the presence of the child. §800.04(4), Fla. Stat. (1991); Werner v. State, 590 So. 2d 431, 435 (Fla. 4th DCA 1991), aff'd, 609 So. 2d 585 (Fla. 1992). The crime of lewd act upon a child requires: (1) a child under the age of 16 years and (2) a person who handles, fondles, or makes an assault upon the child in a lewd, lascivious, or indecent manner. §800.04(1).

The crime of lewd or lascivious conduct in the presence of child does not require specific intent. Bergen v. State, 552 So. 2d 262 (Fla. 2d DCA 1989), disapproved of on other grounds, State v. Hernandez, 596 So. 2d 671 (Fla. 1992). Similarly, the crime of lewd act upon a child requires no specific intent. See §800.04(1). These are general intent crimes that require no more thought or planning than that necessary to do the act itself.

Consequently, no particular length of time is required to form the intent necessary to commit these crimes, and no elaborate planning is necessary. Some offenders commit these crimes on the impulse of the moment when the opportunity presents itself. Other offenders create the opportunity to commit crimes on children by carefully planning and calculating a method to take advantage of children. Hence, all persons who commit these crimes are not similarly situated.

Clearly, these crimes are not the type of crime that will always have premeditation or calculation as an inherent component. See, e.g., Hernandez v. State, 575 So. 2d 640. Hernandez held that planning cannot support a departure sentence for the crimes of trafficking in cocaine and conspiracy to traffic in cocaine. Id. The court held that planning is a necessary component of the crimes. Id. at 642-3.

However, as discussed above, the crimes in the instant case do not have as a necessary component any planning. This Court has recognized that the crime of sexual battery does not have as an inherent component premeditation or planning. See, e.g.,

Obojes, 604 So. 2d at 475 (The court stressed "that heightened premeditation never can be a reason for departure in cases that inherently involve cold forethought."). The reasoning in Obojes applies equally to the crimes in the instant case and sexual offenses in general.

Sexual offenses must occur when opportunity presents a helpless victim. Sometimes the opportunity to commit a sexual offense occurs because external events happen to place a victim within an offender's grasp. However, other offenders create the opportunity to attack a helpless victim. Generally, the offender creates the opportunity through premeditation or calculation. Those sexual offenders who affirmatively create the opportunity to prey on a helpless victim are far more dangerous to society than those who simply act when fortuitous circumstances arise. They deserve, and society should logically impose, more severe punishment than those offenders who merely take advantage of an opportunity.

Consequently, a departure sentence because of premeditation or calculation in a sexual offense case is proper. Some sexual offenders are able to prey upon helpless victims because the offenders create the opportunity. These offenders deserve heightened punishment, and the facts in the instant demonstrate that defendant, through his premeditation, was properly given a departure sentence.

In sentencing defendant the trial court found the following:

> The Defendant was in the position of a trusted familial custodial authority over all three victims, including the victim in Count VI. This position was used by the Defendant to deceive the parents of the children and to prey on each of the children in a premeditated manner over a long period of time. Not only was he an authority figure to the children, but he cultivated "love" between them and himself in furtherance of his criminal purpose.

(R 405) (emphasis in original). The trial court's finding of premeditation is amply supported by the record.

Ms. Susie Rowe testified that S.N.D. told her that the abuse during the camping trips did not occur until the camping trips had been going on for two years. (R 16). J.S.C. also testified that while the camping trips occurred for three years the abuse did not occur until the third year. (R 507-9). This is important because the abuse during the camping trips occurred during a time when Lois Marcott, defendant's wife, was staying home because she was unemployed. (R 109-10). Hence, defendant premeditated to use the camping trips as an opportunity to abuse the children.

There was additional evidence of premeditated abuse. J.S.C. testified that the abuse would occur when his grandmother, defendant's wife, was working. (R 520). J.L.D. testified that defendant would send her into the bedroom when he (defendant) abused S.N.D. (R 550-1). S.N.D. testified that defendant would abuse her when her grandmother, defendant's wife, was not around. (R 444). All of this evidence shows that defendant operated with cold forethought when he committed his crimes.

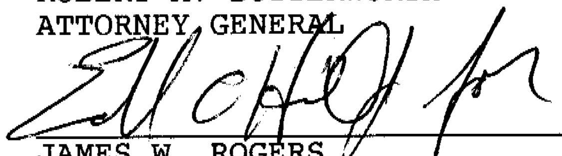
In sum, a departure sentence based upon premeditation and calculation is proper in more than just sexual battery cases. In the instant case, the record reveals that defendant would premeditate to get the victims away from their grandmother or each other so that he could abuse them. This premeditation is not an inherent component of the crimes defendant was convicted of. Consequently, defendant's departure sentence was proper, and this Court should affirm the First District's decision and should answer the certified question to allow departure sentences based on premeditation or calculation in sexual offenses generally.

## CONCLUSION

Based on the foregoing reasons, the State respectfully requests that this Court affirm the First District Court of Appeal's decision and answer the certified question to allow departure sentences based on premeditation or calculation in sexual offenses generally.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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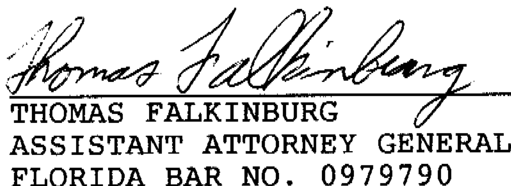

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to J. VICTOR AFRICANO, Esquire, P.O. Box 1450, Live Oak, Florida 32060, this 12 day of July, 1994.

Thomas Falkinburg
Assistant Attorney General

# APPENDIX

(Copy of First District's opinion in
Marcott v. State, No. 92-2045 (Fla.
1st DCA January 14, 1994))

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ROBERT ERROL MARCOTT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

92-111195-TCR

CASE NO. 92-2045

RECEIVED
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Division of General Legal Services

Opinion filed January 14, 1994.

An Appeal from the Circuit Court for Suwannee County, John Peach, Judge.

91-242-CF

J. Victor Africano, Live Oak, for Appellant.

Robert A. Butterworth, Attorney General, and Joseph Garwood and Charlie McCoy, Assistant Attorneys General, Tallahassee, for Appellee.

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1-18-94
Florida Attorney General

JOANOS, J.

Appellant, Robert Errol Marcott, seeks review of four issues arising from his bench trial and subsequent conviction of two counts of lewd conduct in the presence of a child, and one count of lewd act upon a child. We affirm as to the first three issues without further comment, confining our primary discussion to point four. As his fourth issue, appellant challenges the validity of the trial court's reasons for imposing a sentence which exceeds the recommended guidelines sentencing range. We affirm the trial court's sentencing

decision, but certify the question raised by this departure sentence as a question of great public importance.

Appellant was charged by information with the commission of eight sexual offenses involving children under twelve years of age. The victims of the alleged offenses are appellant's three step-grandchildren. The evidence presented to the trial court established that appellant was an involved grandparent, who enjoyed the affection of the child-victims. He routinely took the children on camping trips, and he and the children's grandmother often cared for them while their parents worked, supervising the children both before and after school. Several of the offenses at issue in this case allegedly occurred during appellant's camping trips with the children.

The record further reflects that through his work as a forest ranger, appellant had been involved with many young children over a twenty-year period of time, in environmental and fire prevention programs, including summer camping activities. A pre-sentence investigation report revealed that appellant had no prior criminal record of any kind. Indeed, some of the persons with whom appellant worked when they were children appeared on his behalf at his sentencing hearing.

After the bench trial, the trial court granted appellant's motion for judgment of acquittal with respect to two counts charged in the information, found appellant not guilty of three counts, and guilty of Counts III, VI, and VII. The scoresheet prepared for sentencing indicated a recommended sentencing range

of three and one-half to four and one-half years, and a permitted sentencing range of two and one-half to five and one-half years. The trial court imposed a fifteen-year sentence as to Count VI, to be followed by two consecutive fifteen-year periods of probation as to Counts III and VII, resulting in thirty years of probationary supervision.

As announced at sentencing, the trial court's reasons for imposing a sentence in excess of the guidelines range were appellant's abuse of his familial custodial authority as a step-grandparent, and what the court characterized as appellant's "long-standing, premeditated preying upon these children." The trial court concluded that appellant's camping trips with the children were conducted, in part, to gain the confidence of the parents of the children, making the children more vulnerable to his purposes. The written reasons for departure state:

> The Defendant was in the position of a trusted familial custodial authority over all three victims, including the victim in Count VI. This position was used by the Defendant to deceive the parents of the children and to prey on each of the children in a premeditated manner over a long period of time. Not only was he an authority figure to the children, but he cultivated "love" between them and himself in furtherance of his criminal purpose.

The trial court's first departure reason, abuse of trust in the exercise of custodial authority, was ruled invalid by the supreme court in Wilson v. State, 567 So. 2d 425 (Fla. 1990), and Cumbie v. State, 574 So. 2d 1074 (Fla. 1991). See also Middlebrook v. State, 617 So. 2d 1161 (Fla. 2d DCA 1993); Firkey

v. State, 593 So. 2d 1155 (Fla. 4th DCA 1992); Watson v. State, 579 So. 2d 900 (Fla. 4th DCA 1991).

The trial court's second departure reason, premeditation and planning over a long period of time, was approved by the supreme court in State v. Obojes, 604 So. 2d 474 (Fla. 1992), a sexual battery case. In that opinion, the court limited the Obojes holding exclusively to "sexual offenses." The state here contends the supreme court's use of the term "sexual offenses," as opposed to the more limiting term "sexual battery," should be construed to mean that, in appropriate circumstances, heightened premeditation may justify a departure sentence in sexual offense cases generally, and not just in cases dealing with sexual battery. We concur with that view of the Obojes holding.

Discretion is accorded "a sentencing court to consider all facts and circumstances surrounding the criminal conduct of the accused." Garcia v. State, 454 So. 2d 714, 716-717 (Fla. 1st DCA 1984). In this instance, we are persuaded that the trial court's opportunity to observe the witnesses at trial, particularly the child victims, is entitled to a large measure of deference in an evaluation of the court's determination of the "heightened premeditation" factor. Therefore, we affirm the departure sentence in this case, albeit with some concern as to the correctness of extending the rule announced in Obojes to sexual offenses other than sexual battery. As a reflection of

that concern, we certify the following to the Florida Supreme Court as a question of great public importance:

> Should the language in State v. Obojes, 604 So. 2d 475 (Fla. 1992), limiting the court's holding exclusively to sexual offenses, be construed as permitting departure on the basis of heightened premeditation or calculation in sexual offenses generally, or should the holding be construed as limited strictly to the facts of that case, i.e., to sexual battery cases?

Accordingly, the trial court's ruling is affirmed in all respects, but the question raised by the departure sentence imposed in this case is certified to the supreme court pursuant to Article V, Section 3(b)(4), Florida Constitution (1980).

WOLF, J., CONCURS. ERVIN, J., CONCURS AND DISSENTS WITH OPINION.

ERVIN, J., concurring and dissenting.

I concur with all aspects of the majority's opinion except that portion affirming the trial court's departure sentence on the ground that premeditation or planning over a long period of time constitutes a valid departure reason. In my judgment, the Florida Supreme Court's decision in State v. Obojes, 604 So. 2d 474 (Fla. 1992), approving such reason as valid, should be limited strictly to the facts of that case. There, Obojes had stalked his victim, a stranger, over a two-week period before the commission of the sexual batteries. In stark contrast to the facts in Obojes, the defendant in the case at bar had known the child victims (his step-grandchildren) all their lives and he had enjoyed a long and trusting relationship with them prior to the commission of the offenses, which were not sexual batteries.

A further reason for limiting Obojes to its facts is that the court, while approving premeditation or advanced planning as a valid departure reason in sexual battery cases, specifically distinguished the facts in Obojes from those in Hernandez v. State, 575 So. 2d 640 (Fla. 1991), a drug trafficking case wherein the court disapproved premeditation as a valid departure reason. In Hernandez, the supreme court observed: "[T]he facts relied upon in this case and 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. Furthermore, the court in Obojes relied on Casteel v. State, 498 So. 2d 1249 (Fla. 1986), and Lerma v. State, 497 So. 2d 736 (Fla. 1986), both of which involved sexual batteries -- not, as here, lewd and lascivious conduct. Finally, the court observed that "[p]remeditation or calculation is a sufficient reason for departure in a sexual battery case only if it is of a heightened variety." Obojes, 604 So. 2d at 475 (emphasis added).

In the case at bar, the evidence hardly reveals appellant's ability to accomplish his lewd acts upon the three children pursuant to either a careful plan or prearranged design formulated with cold forethought. Rather, it reveals simply a violation of a close, family tie between the defendant and his step-grandchildren, a circumstance which cannot be considered a valid reason for departure under Wilson v. State, 567 So. 2d 425 (Fla. 1990).

In my judgment, the facts in this case are governed by the rule stated in Hernandez. I would therefore reverse the departure sentence based upon premeditation and planning over a long period of time and remand the case for resentencing within the guidelines.