IN THE SUPREME COURT OF THE
STATE OF FLORIDA

ROBERT ERROL MARCOTT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO.: 83-288

DISTRICT COURT OF APPEAL,
FIRST DISTRICT NO.: 92-2045

INITIAL BRIEF OF APPELLANT

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Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATEMENT OF THE CASE

This is an appeal from the decision of the First District Court of Appeal which certified to this Court, a question of great public importance. On March 1, 1994, Appellant filed his Notice To Invoke The Discretionary Jurisdiction of this Court. On March 11, 1994, this Court entered its Order postponing decision on jurisdiction and briefing schedule.

The Parties will be referred to as the Appellant and the State. The following symbol will be used:

R-Record On Appeal

STATEMENT OF THE FACTS

Appellant is the step-grandfather of the three victims involved in this case (R-97). The two girls, S. N. D. and J. L. D. lived with their parents, but spent a great deal of time at Appellant's home (R-214). J. S. C., the young man, lived with Appellant (R-215).

Appellant spent a great deal of time with these children. They especially enjoyed going on camping trips (R-216).

On November 21, 1992, J. L. D. was having dinner with her parents when she somewhat spontaneously stated "Grandpa has dirty things" (R-41). When pressed by her parents to explain, she stated he had nasty magazines and movies (R-41).

Appellant was ultimately charged in an eight (8) count Information with the following crimes:

I. Sexual Battery Upon a Child Under 12 Years of Age.
II. Sexual Battery Upon a Child Under 12 Years of Age.
III. Sexual Battery Upon a Child Under 12 Years of Age.
IV. Lewd Conduct in the Presence of a Child.
V. Sexual Battery Upon a Child Under 12 Years of Age.
VI. Lewd Act Upon a Child.
VII. Lewd Conduct in the Presence of a Child.
VIII. Lewd Conduct in the Presence of a Child (R-305).

Appellant proceeded to Non-Jury Trial. At the conclusion of the State's case-in-chief, Appellant moved for a Judgment of Acquittal as to Counts II, III, and VIII (R-125). The Trial Court granted the Motion as to Count VIII, denied the Motion as to Count

III, and reserved ruling on the Motion as to Count II (R-129).

Count III charged Appellant with Committing a Lewd and Lascivious Act in the presence of J. L. D. (female, 6 years of age), by playing pornographic videotapes in her presence and pressuring her to watch them (R-305).

J. L. D. testified that she watched movies at her grandma's house showing grownup men and women doing nasty things with their private parts (R-545). S. N. D. testified that she has seen a movie in which naked people were doing nasty things to each other and putting their lips on each other's privates (R-442). S. N. D. also testified that, although Appellant told J. L. D. to watch a movie, J. L. D. wasn't watching it (R-442).

When Appellant testified, he candidly admitted that he had movies in his home that were sexually explicit (R-242). Although Appellant denied having deliberately shown either child these movies (R-282), he was nonetheless found guilty on Count III by the Trial Court (R-383).

Appellant was also convicted to Count VI which charged that he committed a Lewd and Lascivious Act upon S. N. D. (female, 9 years of age), by having her touch his penis and play with it (R-306).

Although S. N. D. testified that Appellant touched her mouth, chest and leg with his private (R-432), she never testified that he had her touch his penis and play with it.

Appellant was also convicted of Count VII which charged that he committed a Lewd and Lascivious Act in the Presence of J. S. C. (male, 12 years of age), by committing sexual acts upon J. L. D. and S. N. D. in his (J. S. C.'s) presence (R-306). J. S. C. did, in fact, testify that he observed J. L. D. and S. N. D. swim between Appellant's legs and play with his private parts (R-501), and put their mouths on his privates (R-501).

On June 8, 1992, the Trial Court adjudicated the Appellant guilty, and notwithstanding the fact that the Appellant's guideline sentence provided for a 3 1/2 - 4 1/2 year recommended sentence and a 2 1/2 - 5 1/2 year permitted sentence, the Trial Court exceeded the sentencing guidelines and sentenced the Appellant to a 15 year sentence on Count VI, 15 years probation for Count III to run consecutive to the sentence for Count VI and 15 years probation for Count VII to run consecutive to the sentence for Count III (R-298).

The Trial Court's written reasons for exceeding the guidelines were:

> "The Defendant was in a position of a trusted familial custodial authority over <u>all</u> three victim, including the victim in Count VI. The 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).

After oral argument, the First District Court of Appeal

rendered its decision, one judge dissenting. The majority, including the dissent, affirmed the Appellant's first three points on appeal. By a two-one decision that Court affirmed the fourth point on appeal, which dealt with the validity of the two reasons the Trial Court relied upon to upwardly depart from the sentencing guidelines. The First District held that the Trial Court's reliance on the first reason, i.e., the abuse of trust in the exercise of custodial authority was invalid under this Court's holdings in Wilson vs. State, 567 So. 2d 425 (Fla. 1990); Cumbie vs. State, 574 So. 2d 1074 (Fla. 1991).

As to the Trial Court's second reason for upward departure, i.e., premeditation over a long period of time, the First District affirmed, with a dissent, and certified the following question to this Court:

> Should the language in State vs. Obejes, 604 So. 2d 475 (Fla. 1992), limiting the Court's holding solely 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?

POINT INVOLVED ON APPEAL

Whether the language in State vs. Obojes, 604 So. 2d 475 (Fla. 1992), limiting the Court's holding solely 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., sexual battery cases?

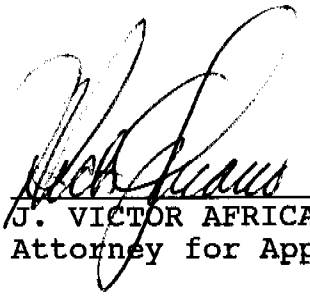
ARGUMENT

Appellant's research has revealed that, other than being cited by the First District Court of Appeal, in this case, Obejes, supra has not been discussed or cited any other Appellate decision. Appellant would be hard pressed to author an argument, in support of his position, any more compelling than the one set forth in the dissenting opinion of Judge Ervin. Appellant therefore adopts, as his argument, the dissenting opinion of Judge Ervin set forth in the decision rendered by the First District Court of Appeal dated January 14, 1994.

CONCLUSION

For the reasons set forth herein, the Appellant respectfully submits that the dissenting opinion of Judge Ervin be adopted by this Court as the correct interpretation of State vs. Obejes, 604 So. 2d 475 (Fla. 1992).

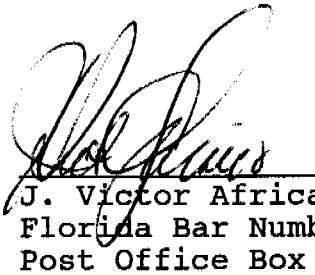
Respectfully submitted,



J. VICTOR AFRICANO
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the HONORABLE JOE S. GARWOOD, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, by United States Mail on this 4th day of March, 1994.



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