IN THE SUPREME COURT OF THE
STATE OF FLORIDA

ROBERT EARL MARCOTT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO.: 83-288

REPLY BRIEF OF APPELLANT

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TABLE OF CITATIONS

CASES

State vs. Obojes,
604 So. 2d 475 (Fla. 1992) 2, 3, 4, & 5

Hernandez vs. State,
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Wilson vs. State,
567 So. 2d 425 (Fla. 1990) 4

STATEMENT OF THE CASE AND FACTS

Appellant would adopt the Statement of the Facts and Case as set forth in his Initial Brief.

SUMMARY OF THE ARGUMENT

Whether or not this Court extends it's ruling in State vs. Obojes, 604 So. 2d 475 (Fla. 1992), to allow heightened premeditation or calculation to justify a guideline sentence departure in all types of sex offenses, and not just sexual battery cases, the Appellant's departures sentence cannot be justified on the Record presented in this Appeal.

ARGUMENT

ISSUE (CERTIFIED QUESTION)

Should the language in State vs. 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?

Appellant respectfully submits that this Court's holding in Obojes, supra, was and should be limited to sexual battery cases only, at least as applied to the facts of this case. Appellant cannot, in all candor, argue that under the particular facts of some types of sexual offense cases, heightened premeditation and calculation would not justify a departure sentence. However, at the time Appellant was sentenced, Obejes, supra, limited such departure only in sexual battery cases and not less egregious sexual offense cases. Therefore, Appellant's departure sentences was not justified.

Assuming arguendo, that this Court, in Obojes, supra, did intend that holding to include all types of sexual offenses, and not just sexual battery cases, then Appellant submits that the facts of this case do not warrant a departure sentence, in any event.

The Appellee attempts to characterize Appellant's conduct as heightened premeditation and calculation solely on the basis that the acts occurred when his

wife, the children's grandmother, was not around. By their very nature, the types of acts of which Appellant was convicted, do not occur in the presence of others, much less grandmothers. This "type of planning" is common to most sexual offense crimes, and thus cannot constitute a valid reason for departure. Hernandez vs. State, 575 So. 2d 640 (Fla. 1991).

Nothing in this Record can support the conclusion that Appellant "stalked" these children, as was the case in Obojes, supra.

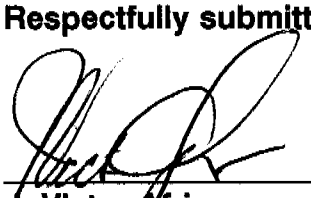
As observed in the dissenting opinion of Judge Ervin below:

> "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 of 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 vs. State, 567 So. 2d 425 (Fla. 1990)."

CONCLUSION

Based upon the arguments set forth before the Court, and notwithstanding this Court's expansion of it's holding in Obojes, supra, the Appellant's departure sentences should be set aside and this case remanded to the Trial Court for sentencing with the sentencing guidelines

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief Of Appellant has been served upon THOMAS FALKINBURG, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by United States Mail, this 1st day of August, 1994.

J. VICTOR AFRICANO