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IN THE SUPREME COURT OF THE STATE OF FLORIDA

VICTOR RAYMOND JORY,

Petitioner,

v. CASE NO. 85,146

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Pursuant to Florida Rule of Appellate Procedure 9.210(c) the State specifies those areas of disagreement with defendant's Statement of the Case and Facts in his Initial Brief:

On page one (1) of his Initial Brief, defendant states:

> All of the sexual acts underlying petitioner's convictions took place in a single episode of consensual activity between petitioner and the subject child which was videotaped. The child testified at trial that he was sixteen years old at the time of the sexual acts. (SR, v.IV, at 159, 165, and 179).

First, the defendant's use of the term "consensual" is improper. A child under 16 cannot legally consent to have sex with an adult.[1] The State notes that the defendant uses the term "consensual" repeatedly in his brief seemingly to justify his arguments before this Court.[2]

Second, this is an appeal only from the sentencing order of departure. Defendant's convictions were affirmed in Jory v. State, 596 So. 2d 1126 (Fla. 5th DCA 1992). Mandate issued on May 11, 1992 (SR Vol. II at 63). Therefore, defendant's judgments and the facts upon which they are based have become law of the case.

Third, this was not merely a "videotape" of a sexual act. As found by the trial court, "the defendant carefully planned, promoted and starred in the videotaping of child pornography... the defendant was in total control of the production and that each sexual act was

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[1]Except in circumstances not applicable to the instant case. See §741.0405, Fla. Stat. (1995).

[2] See Initial Brief at pages 1, 5, 9, 14 and 15.

carefully planned and choreographed by the defendant." (SR Vol. II at 73). The defendant had been convicted of 10 counts of lewd and lascivious assault on a child under 16, as well as one count of promoting a sexual performance by a child and one count of using a child in a sexual performance.

Last, the fact that the child-victim lied as to his age to protect the defendant, does not inure to the defendant's benefit, but rather demonstrates the power, control and influence the defendant exerted over the child-victim. The child-victim was 14-15 years of age at the time of the repeated acts of anal and oral intercourse (SR Vol. IV at 56-57, 79, 111, 129, 143, 165, 183-185). As previously stated, the defendant's judgment of convictions for lewd and lascivious acts on a child under 16 are law of the case.

In support of the trial court's reasons for departure, the State directs this Court's attention to the following statement by the trial judge:

> If there is any doubt as to the egregious nature of the defendant's acts, this Court invites any reviewing authority to take approximately twenty-four minutes from its busy schedule and watch the tape. The point will become self-evident.

(SR Vol. II at 74).

SUMMARY OF ARGUMENT

Points 1 & 2: The trial court did not issue a departure sentence based on alleged inferences derived from defendant's continuing assertion of his innocence or lack of remorse. Rather, the record demonstrates that the trial court departed based on the defendant's comments and evidence adduced at trial and on the videotape which establish that the defendant poses a future danger to society.

Point 3: The record affirmatively shows that the trial court did not prepare its written departure order prior to the sentencing hearing. Rather, the record affirmatively shows that the trial court fully comported with the procedures outlined in Ree v. State.

Point 4: The issue of whether the defendant's sentence constitutes cruel or unusual punishment is waived from appellate review by defendant's failing to contemporaneously object to his sentence on that ground or lay a proper predicate below. In the alternative, the trial court's individual 15-year sentences do not constitute cruel or unusual punishment while the extent of the trial court's departure (by making the sentences consecutive) is not properly the subject of appellate review.

Point 5: The trial court orally pronounced the special conditions of defendant's probation in a manner sufficient for the defendant to know of these conditions and to have an opportunity to object to them. This claim is spurious.

Point 6: The trial court's order of departure should be upheld on any one of the four other reasons listed by the trial court for

departure, especially "heightened premeditation and calculation."

ARGUMENT

POINT 1

THE TRIAL COURT PROPERLY DEPARTED FROM THE SENTENCING GUIDELINES; THE TRIAL COURT DID NOT DEPART BECAUSE OF ALLEGED "INFERENCES" DERIVED FROM THE DEFENDANT'S CONTINUING ASSERTION OF INNOCENCE OR OPINIONS CONCERNING THE CRIMINAL JUSTICE SYSTEM.

Defendant argues that "future danger to society" does not constitute a valid reason for departure in the instant case because it was based on "inferences derived from defendant's continuing assertions of innocence or opinions concerning the criminal justice system." See Jory v. State, 647 So. 2d 152, 157-159 (Fla. 5th DCA 1994)(Sharp, J., dissenting). The State responds that a review of defendant's comments and the trial court's interpretation of these comments do not support this argument.

Defendant's comments at the initial sentencing hearing do not support the claim that he was merely reasserting his innocence on his claim that the child-victim was 16. In fact, at no time during his comment did the defendant opine his innocence on this ground. Rather, defendant was unequivocally stating that it is not a crime for an adult to engage in "consensual" sexual activity with a child. The distinction between asserting innocence in a specific factual situation and refusing to acknowledge that under any circumstances such conduct is a crime, is apparent. The defendant's comments, in conjunction with his complete control of the child-victim as reflected on the videotape and the testimony adduced at trial, established beyond a reasonable doubt that the defendant posed a

future danger to society.

When the defendant was invited to address the court in regard to mitigation of his sentence, he claimed that the State had fraudulently and falsely prosecuted the defendant and that he was a victim of homophobic persecution (SR Vol. III at 542-545). This is underscored by defendant's statement: "True victims of sexual abuse and assault, both women and children, should be outraged at the gross abuse of judicial resources squandered on a case where the alleged victim says he is not a victim and says this was not a crime." (SR Vol. III at 545). Defendant was not asserting his innocence, but was expressing his unalterable belief that "consensual" sex with a child can never be a crime.

This interpretation of defendant's comments is supported by the trial judge's response thereto, the trial court's written reason for departure, and the Fifth District's majority opinion. Specifically, the trial judge rejected defendant's complaint that he was the victim of a lifestyle persecution prompted by homophobia, explaining to the defendant:

> As far as some sort of inherent prejudice, I would like to respond to that. I believe that the only way that I see prejudice coming in this particular case is that society is, in fact, prejudiced against child molestation and, therefore, the legislature has for a long time had in full force and effect statutes that are against this type of conduct and they are prescribed as second degree felonies and this is precisely what the jury found that you were involved with and that you did violate. So the prejudice is one against child molestation and not against anything else, as I see it.

(SR. Vol. III at 554). Thus, the trial court responded to the

defendant's comments in the manner that they were made, i.e., that defendant's prosecution was prompted by the State's long-recognized interest in protecting minors from harmful sexual conduct. See Jones v. State, 640 So. 2d 1084, 1085-86 (Fla. 1994).

In that portion of its written order finding that the defendant posed a danger to society in the future beyond a reasonable doubt, the trial court stated in pertinent part:

> The defendant's comments before this Court clearly show that the defendant sees nothing wrong with his conduct in this case. He is unable to perceive any reason to change. The defendant views his conduct to be lawful and blames a system that is "prejudicial against homosexuals" for his plight.

(SR Vol. II at 75).

The trial court's interpretation was succinctly expounded upon by Judge Goshorn in the Fifth District's majority opinion wherein he stated:

> Jory's recorded statements make clear his belief that because the minor male does not feel victimized, there was no victim and thus no crime. Unfortunately for Jory, the victim's feelings or consent to the acts are not affirmative defenses to the criminal offenses of which Jory was convicted, at least under the current law of this state. Jory's persecution argument also misses the point. It is his illegal involvement with a minor that is targeted, nothing more.
>
> * * *
>
> Jory's own comments allow a distinction to be made between this case and those cases holding that departure is invalid if based on the mere speculation or conjecture that the defendant will engage in criminal conduct...[citations omitted]...Jory is clearly a threat to our young people and he has an avowed intention not to be rehabilitated

> because he perceives his actions to be proper and legal.

Jory v. State, 647 So. 2d at 153-154.

The trial court did not erroneously interpret the defendant's comments. Defendant was not merely asserting his innocence or failing to express remorse. Defendant was expressing his view that consensual sexual activity with a child was not unlawful.

In addition, the trial judge did not base its finding that the defendant posed a future danger to society solely from the defendant's comments. The circumstances surrounding the lewd and lascivious acts reflect that the defendant had seduced the child-victim by appearing as a father-image and had showered the child-victim with gifts and money. In addition, the display, direction and control exercised by the defendant over the child-victim on the videotape, and as reflected in the child-victim's testimony, established beyond a reasonable doubt that the defendant would continue to commit such heinous acts on children in the future.

The State can find no record support for the dissent's finding that "the sole reason for this gross departure sentence...is because the statutory rape was homosexual rather than heterosexual." Jory, 647 So. 2d at 154 (Sharp, J., dissenting). The trial judge expressly declared this not to be the case.

The dissent states that the videotape shows "no force or violence" was used by the defendant. Jory, 647 So. 2d at 155. However, the Legislature and this Court have repeatedly and consistently stated and/or held that sexual acts against children under 16 are in and of itself damaging and harmful. See B.B. v.

State, 20 Fla. L. Weekly S306, S307 (Fla. June 29, 1995)("[S]exual exploitation of children is a particularly pernicious evil...")(quoting from Jones, 640 So. 2d at 1086, quoting from Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991); Jones, 640 So. 2d at 1086 ("We are of the opinion that sexual activity with a child opens the door to sexual exploitation, physical harm and sometimes psychological damage, regardless of the child's maturity or lack of chastity.").

Curiously, in Jones, this Court approvingly quoted from Judge Sharp's then concurring opinion in another case: "We agree with Judge Sharp and the Legislature that Florida has an obligation and a compelling interest in protecting children from 'sexual activity and exploitation before their minds and bodies have sufficiently matured to make it appropriate, safe, and healthy for them.'". Jones, 640 So. 2d at 1087 (quoting from Judge Sharp's concurring opinion in Jones v. State, 619 So. 2d 418, 424 (Fla. 5th DCA 1993).

The dissent notwithstanding:

> Florida clearly has not been inconsistent in preventing sexual exploitation of unemancipated minors under the age of sixteen. Indeed, the vast array of child abuse, neglect, and exploitation statutes, as well as the strict criminal penalties for child pornography, show consistency of high magnitude.

Jones, 640 So. 2d at 1088 (Kogan, J., concurring). Accordingly, the trial court properly departed from the sentencing guidelines.

POINT 2

FUTURE DANGER TO SOCIETY IS A VALID REASON FOR DEPARTURE WHERE THE DEFENDANT'S ACTIONS AND COMMENTS ESTABLISH BEYOND A REASONABLE DOUBT THAT THE DEFENDANT POSES A DANGER TO SOCIETY IN THE FUTURE.

Defendant concedes that Florida law allows departure from the sentencing guidelines where the evidence "establishes beyond a reasonable doubt that the defendant poses a danger to society in the future..." Whitehead v. State, 498 So. 2d 863, 865 (Fla. 1986). See also State v. Sachs, 526 So. 2d 48, 50 (Fla. 1988)(expressly reaffirming above language in Whitehead, and holding that evidence to contrary may be used for downward departure). Instead, defendant argues that the trial court's finding that the defendant poses a future danger to society is based on "mere speculation" derived from the defendant's comments at the initial sentencing hearing. The State responds that, neither the trial court nor the Fifth District relied solely on the defendant's comments at his initial sentencing hearing. Rather, a combination of factors including defendant's comments, the evidence adduced at trial, and the evidence and inferences adduced from the videotape (showing defendant's display, direction, and control) fully support the trial court's finding and subsequent affirmance by the Fifth District Court of Appeals.

Initially, the State points out that the function of an appellate court in reviewing a sentencing guidelines departure is to review the reasons given to support the departure and determine whether the trial court abused its discretion. Davis v. State, 517 So. 2d 670, 672 (Fla. 1987); State v. Mischler, 488 So. 2d 523, 525

(Fla. 1986). Review of the evidence reflects that the trial court did not abuse its discretion.

Defendant's comments to the trial court clearly show that the defendant does not believe, under any circumstances, that "consensual sex" with a child under 16 is a crime. This is underscored by defendant's statement: "True victims of sexual abuse and assault, both women and children, should be outraged at the gross abuse of judicial resources squandered on a case where the alleged victim says he is not a victim and says this was not a crime." (SR Vol. III at 545). Defendant is asserting his unalterable belief that "consensual" sex with a child can never be a crime.

The trial judge was in the best position to interpret the defendant's comments, as well as the defendant's demeanor. The trial judge's interpretation is reflected in his response to the defendant which was:

> As far as some sort of inherent prejudice, I would like to respond to that. I believe that the only way that I see prejudice coming in this particular case is that society is, in fact, prejudiced against child molestation and therefore, the legislature has for a long time had in full force and effect statutes that are against this type of conduct and they are prescribed as second degree felonies and this is precisely what the jury found that you were involved with and that you did violate. So the prejudice is one against child molestation and not against anything else, as I see it.

(SR. Vol. III at 554). This interpretation was understood by Judge Goshorn in the Fifth District's majority opinion, wherein he cogently explained:

> Here, Jory's statements clearly indicate that he does pose a real future danger to society. No other conclusion can be reached after considering Jory's own philosophy that oral and anal intercourse with a minor is not "wrong" and should not be prosecuted as a criminal offense as long as the minor does not come away from the encounter feeling victimized.

Jory, 647 So. 2d at 154. No other reasoned interpretation can be made of defendant's comments, as he states "true victims of sexual abuse and assault" do not occur when the sexual activity is "consensual." Judge Goshorn has not usurped the factfinding role of the trial judge.

In addition to his finding with respect to the defendant's comments, the trial judge relied upon the evidence adduced at trial and the volume of evidence from viewing the videotape. The evidence adduced at trial showed that the defendant preyed upon a young boy from a broken home, who lacked a father figure in his life. The defendant ingratiated himself in the boy's life by showering him with attention, money and promises of cars.

The videotape did not just show the defendant having sex with a 14-15 year old child. As carefully explained by the trial judge, the evidence shows that this was not just a simple home video of single intercourse, but that the defendant carefully planned, controlled, directed and starred in a child pornography film for subsequent commercial distribution, i.e., for his own financial gain (SR Vol. IV: 146, 151-152). The fact that the defendant was engaged in a course of heinous criminal conduct for personal financial gain cannot be ignored. Just as a "snuff movie" is more than just a

homicide, none of the defendant's convictions take into account the elements of financial gain through distribution of the movie, let alone the conduct demonstrated therein.

Contrary to the dissent, evidence of defendant's future danger to society has not been factored in the sentencing guidelines by defendant's conviction for promotion of a sexual performance by a child or use of a child in a sexual performance. Those offenses merely factor in limited elements of inducing a child to commit a sexual performance or promoting the sexual performance. They do not consider the "quality" "nature" and "content" of the evidence on the video establishing that the defendant poses a future danger to society.

The evidence of defendant's posing a danger to society in the future could not be more self-evident than if the defendant swore before the trial judge that he would sexually abuse children upon his release. The adage "actions speak louder than words" is especially applicable to what is reflected on the videotape and defendant's demeanor and comments before the trial court at the original sentencing hearing.

This court has repeatedly acknowledged the unquestionably strong policy interest in protecting minors from harmful sexual conduct. As stated in Jones v. State, 640 So. 2d at 1084-1085 (Fla. 1994):

> As evidenced by the number and breadth of the statutes concerning minors and sexual exploitation, the Florida Legislature has established an unquestionably strong policy interest in protecting minors from harmful sexual conduct. As we stated in Schmitt v.

> State, 590 So. 2d 404 (Fla. 1991), cert denied, ___ U.S. ___, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992), "any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents... [S]ociety has a compelling interest in intervening to stop such misconduct." Id. at 410-11.
>
> * * *
>
> We are of the opinion that sexual activity with a child opens the door to sexual exploitation, physical harm, and sometimes psychological damage, regardless of the child's maturity or lack of chastity.

See also B.B. v. State, 20 Fla. L. Weekly at S307 (reaffirming the above-quoted language).

The trial judge did not abuse its discretion in finding the evidence established beyond a reasonable doubt that the defendant poses a future danger to society.

POINT 3

THE TRIAL COURT DID NOT PREPARE ITS WRITTEN DEPARTURE ORDER IN ADVANCE OF THE SENTENCING HEARING

Defendant argues that the trial court prepared its written departure order prior to the resentencing hearing. The State responds that there is absolutely no support for this allegation.

The record reflects that resentencing was initially scheduled for June 30, 1992 (R 51-62). The State requested a continuance because it was not able to obtain the trial transcripts so as to argue in favor of a departure order (R 54-56). The defendant personally objected to the State's request for a continuance and requested the court to proceed to sentencing since "I am sure that the Court is more than familiar enough with this particular case and the case law involved and what is permissible for the departure in a case like this for the Court to argue." (R 59). The trial court properly refused to sentence the defendant, and granted a one week continuance to allow both counsel opportunity to adequately prepare for sentencing (R 59-60). In addition, the trial court specifically directed the prosecutor to provide defense counsel with the grounds on which it sought a departure sentence (R 60).

On July 7, 1992, the second resentencing proceeding was held (R 1-50). The trial court delayed resentencing another half-hour to allow defense counsel time to review the State's case law (R 2-5). After this recess, the trial court provided the defendant with the opportunity to offer additional matters in mitigation (R 7-9). The State sought a departure sentence on various grounds (R 9-25).

Defense counsel was provided the opportunity to present rebuttal (R 25-33). The trial court then asked defendant whether he had anything further to say (R 33). The defendant responded that he did not.

The trial court then imposed a departure sentence (R 33-42). Neither defense counsel nor defendant objected on the ground that the trial court had prepared its written order of departure prior to sentencing. Therefore, the issue is not even preserved for appellate review. In addition, this issue was not even raised below in the Fifth District Court of Appeals. Even if this Court were to find that an objection was not necessary below in the trial court, the lack of such an objection, combined with the evidence at the resentencing proceedings, does not support the claim that the trial court prepared its written order of departure in advance of the resentencing hearing or without allowing the defendant to present additional matters in mitigation or legal argument. Rather, the record shows just the opposite.

The record affirmatively demonstrates that the trial court did not decide a sentence before giving counsel an opportunity to make argument. Ree v. State, 565 So. 2d 1329, 1332 (Fla. 1990). The trial court fully comported with due process by giving "due consideration to any argument and evidence that are proper." Id.

Finally, the cases cited by defendant are distinguishable. See Ree (trial court did not sign a written departure until five days after the sentencing hearing); Elkins v. State, 489 So. 2d 1222 (Fla. 5th DCA 1986)(written order entered five weeks after

sentencing hearing); Griffin v. State, 517 So. 2d 669 (Fla. 1987)(trial court failed to hold a resentencing hearing, but merely issued an order in chambers confirming that the departure sentence would have been imposed solely based on the valid written reasons); Williams v. State, 614 So. 2d 642 (Fla. 2d DCA 1993)(trial court prepared two orders, one of which predated the actual sentencing); Williams v. State, 559 So. 2d 372 (Fla. 1st DCA 1990)(written reasons for departure was signed the same day as sentencing hearing but was filed two days later), quashed in State v. Williams, 576 So. 2d 281 (Fla. 1991). In the instant case, the written order of departure was signed and filed in open court on the same day of the resentencing hearing.

As an aside, the State notes the conflict between departure and death sentences. In death sentences, "all written orders imposing a death sentence must be prepared prior to oral pronouncement of sentence for filing concurrent with the pronouncement." Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988), cert denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). The stated purpose of this requirement is to reinforce the trial court's obligation to think through its sentencing decision and ensure that written reasons are not merely an after-the-fact rationalization for a hastily reasoned initial decision imposing death. Perez v. State, 648 So. 2d 715, 720 (Fla. 1995).

This same rationale should, to some degree, apply to sentencing departures. This is especially so where the record indicates, as it does in the instant case, that the trial court gave the defendant,

his counsel and the State the opportunity to be heard; afforded both the State and defendant the opportunity to present additional mitigation; allowed both sides to comment on or rebut the other side, afforded the defendant the opportunity to be heard in person. Compare Armstrong v. State, 642 So. 2d 730, 737 (Fla. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995).

POINT 4

THE TEN CONSECUTIVE 15 YEAR SENTENCES DO NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Defendant argues that his ten consecutive fifteen year sentences constitute cruel and/or unusual punishment under Article I, section 17 of the Florida Constitution. The State responds that this issue is waived from appellate review by the defendant's failure to make this argument or lay a sufficient predicate for this argument in the trial court below. Jory v. State, 647 So. 2d at 153, n.5. Even alleged constitutional errors do not necessarily rise to the level of "fundamental error" capable of excusing the lack of an objection. Clark v. State, 363 So. 2d 331 (Fla. 1978), overruled on other grounds, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Furthermore, the defendant failed to create a record in the lower court which demonstrates a gross disparity between the sentence received in comparison to sentences received by other criminals in the State of Florida for like crimes, committed under similar circumstances, and a similar comparison for other states.

In addition to the issue being waived from appellate review, it is pointed out that Florida law expressly precludes appellate review of the extent of departure. See § 921.001(5), Fla. Stat. (1987)("The extent of departure from a guideline sentence shall not be subject to appellate review."). After experience with appeals that challenged the extent of departure, the Florida Legislature removed this entire area from the ambit of appellate review in

Chapter 86-273, Laws of Fla. (1987).[3] This statute has not been held to be unconstitutional, nor has any argument been made before this court. It is the function of the legislature to prescribe punishment. See State v. Coban, 520 So.2d 40, 41 (Fla. 1988); Banks v. State, 342 So. 2d 469, 470 (Fla. 1976) (while totality of circumstances indicated that a reevaluation of the sentence might be in order, "this Court has long been committed to the proposition that if the sentence is within the limits prescribed by the Legislature, we have no jurisdiction to interfere. Therefore, any request for consideration of that question would be properly lodged with the Governor under Section 8, Art. IV, Florida Constitution."). In the instant case, defendant did not receive a 150 year sentence. Rather, he received ten 15-year sentences for each of his ten convictions, to be served consecutively. Each one of those 15 year terms is within the statutory maximum. Accordingly, none of the sentences constitute cruel or unusual punishment, and the trial court's decision to make the sentences consecutive for departure should not be reviewed by this Court.

The length of a sentence imposed is a matter of legislative prerogative, and not a matter falling under the purview of Article I, Section 17, of the Florida Constitution. Thus the trial court did not abuse its discretion in making the sentences consecutive.

Finally, case law does not support defendant's argument that his sentence constituted cruel or unusual punishment in light of: (1) the facts of this case; (2) the State's strong interest in

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[3]The crime was committed on July 11, 1987.

protecting children. For a review of sentences on child sex crimes See Stamper v. State, 576 So. 2d 425 (Fla. 4th DCA 1991)(consecutive life sentences with 25-year minimum mandatory terms, upon conviction of sexual battery, did not constitute cruel and unusual punishment); Golden v. State, 509 So. 2d 1149 (Fla. 1987)(300 year sentence with jurisdiction retained over first 100 years for sexual battery was not cruel or unusual).

POINT 5

THE TRIAL COURT ORALLY PRONOUNCED DEFENDANT'S SPECIAL CONDITIONS OF PROBATION AT HIS ORIGINAL SENTENCING.

The defendant contends that he was denied due process because the trial court did not orally pronounce the special conditions of defendant's probation in open court in a manner sufficient for the defendant to know of these conditions and to have an opportunity to object to them. This claim is spurious.

The trial court orally pronounced the defendant's special conditions of probation in their entirety at his original sentencing (SR Vol. III at 556-559). On direct appeal, the Fifth District affirmed the convictions but reversed for resentencing in accordance with Flowers v. State, 586 So. 2d 1058 (Fla. 1991)(addressing legal constraint points) and Karchesky v. State, 591 So. 2d 930 (Fla. 1992)(addressing victim injury points). See Jory v. State, 596 So. 2d 1126 (Fla. 5th DCA 1992)(specifically citing above two cases with their respective parentheticals). The Fifth District did not reverse any aspect of the special conditions of probation. Therefore, they became law of the case and were not subject to subsequent attack unless they were illegal.

At resentencing the trial judge stated: "The same terms and conditions are imposed for this probation as were previously imposed and explained in detail to the defendant at the prior sentencing. They are by this reference reaffirmed and realleged today." (R 41). Therefore, it is improper for defendant to argue that he had no knowledge of these conditions.

In fact the record reflects that the defendant was fully aware of the special conditions of probation in that he personally and specifically objected to conditions "M" and "N" at his resentencing. In response to the defendant's objection, the trial court amended those special conditions to delete any restriction as it related to bars and liquor lounges; and explained the other condition prohibiting contact between the victim and the defendant in that it prohibited him from contacting the child-victim in the case, but not the reverse (R 42-45).

This exchange clearly shows that the defendant fully understood the terms of probation and had the opportunity to object to them. Finally, it is pointed out that the defendant did not object to the trial court's reaffirmation of the original special conditions of probation.

POINT 6

THE SENTENCING DEPARTURE SHOULD BE UPHELD ON ANY OF THE OTHER FOUR GROUNDS PROVIDED FOR DEPARTURE.

The trial court provided five separate grounds for departure and specifically provided that the departure sentence would remain the same if any one of the above stated grounds is affirmed on appeal (R 75). In addition, the Fifth District Court of Appeal did not expressly reject any of the other grounds for departure. The State submits that the order of departure may be affirmed on any one of the other four reasons provided for departure, specifically the trial court's finding of heightened premeditation and calculation.

In Marcott v. State, 650 So. 2d 977 (Fla. 1995) this Court ruled that heightened premeditation and calculation is a valid reason for departure in sentencing a defendant for lewd and lascivious conduct in violation of section 800.04, Florida Statutes (1991).

In its written order of departure, the trial court stated:

> **1) Premeditation and Calculation:**
>
> This reason for departure is not an inherent component of the crimes charged in counts I through X of the Information. The defendant was convicted of ten counts of Lewd and Lascivious Acts Upon a Child under section 800.04(2), Florida Statutes (1987) which read "any person who commits an act defined as sexual battery under section 794.011(1)(h) upon a child under age of sixteen..." In Lerman v. State, 487 So. 2d 736 (Fla. 1986) the Florida Supreme Court held that calculation or premeditation is not an inherent component of the crime of sexual battery.
>
> Therefore the crimes of lewd and lascivious acts upon a child, as alleged and proven in this case, do not include calculation

> or premeditation as an inherent component.
>
> In the instant case, the evidence showed that the defendant carefully planned, promoted and starred in the video taping of child pornography. He clearly intended to use the final product in connection with a perverse plan to sell or distribute the same in the corrupt world of child pornography.
>
> A view of the subject video tape shows that the defendant was in total control of the production and that each sexual act was carefully planned and choreographed by the defendant. Such acts show heightened premeditation, planning and calculation that sets this crime apart from ordinary criminal conduct. See Hallman v. State, 560 So. 2d 223 (Fla. 1990).

(R 73).

In her dissent, Judge Sharp criticized "heightened premeditation and calculation" as a reason for departure because "the premeditation and design factors used by the trial judge to enhance the sexual battery crimes duplicate elements of the performance crimes." Jory, 647 So. 2d at 157. However, this analysis is not correct.

The statutory definitions of "promoting a sexual performance by a child" and "using a child in a sexual performance" do not include the "mens rea" required to show "heightened premeditation or calculation" to justify a departure sentence. This also is apparent from reading the plain language of the statute and the relevant subsections, in which elements are written in the disjunctive not the conjunctive.

In regards to his conviction under § 827.071(3), promoting a sexual performance by a child, defendant did not just produce or direct or promote the performance of sexual conduct by the child-

victim. Rather, as found by the trial court, the defendant produced and directed and promoted the performance of sexual conduct by the child victim.

Similarly, in regards to defendant's conviction for using a child in a sexual performance under § 827.071(3), the defendant did not merely employ or authorize or induce the child-victim to engage in a sexual performance. Rather the defendant employed (with gifts of cars and money) and authorized (father-figure) and induced the child victim to engage in the sexual performance.

Additional factors of heightened premeditation and calculation were, as found by the trial judge, the fact that the defendant choreographed and planned and directed (both the child and cameraman), and starred and directly participated in no less than 10 acts of oral and anal intercourse with the child-victim in this 24 minute "feature" film. As stated by the trial court, "If there is any doubt as to the egregious nature of the defendant's acts, this Court invites any reviewing authority to take approximately twenty-four minutes from its busy schedule and watch the tape. The point will become self-evident." (SR Vol. II at 74).

If there is any case that falls within the rule set forth by Marcott, this is the case. Accordingly, the trial court's sentencing order should be affirmed.

CONCLUSION

The decision of the Fifth District Court of Appeal in Jory v. State, 647 So. 2d 152 (Fla. 5th DCA 1994) should be affirmed in all respects. In the alternative, this Honorable Court should affirm the departure sentence on any of the other four reasons provided by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished by U.S. Mail to counsel for petitioner, Jeffrey G. Thompson, Klayman, Thompson & Kontos, Suntree Station, Suite 104, 7025 North Wickham Road, Melbourne, Florida 32940, this 11th day of July, 1995.

Steven J. Guardiano

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Of Counsel