IN THE SUPREME COURT OF FLORIDA

JIMMY DONALD CAPERS, :

Petitioner, :

v. : CASE NO. 87,200

STATE OF FLORIDA, :

Respondent. :

_____/

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

The record on appeal is consecutively paginated and shall be referred by the letter "R" followed by the appropriate page number. This case passes upon a question certified to be of great public importance by the Florida First District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

By separate informations, Petitioner was charged with (capital) sexual battery, a lewd and lascivious assault, two more counts of capital sexual battery and another count of a lewd and lascivious assault. (R-1-7).

On August 8, 1994, Petitioner entered into a plea bargain whereby he agreed to plead nolo contendere to two counts of attempted capital sexual battery (case number 94-217) and one count of lewd and lascivious (case number 94-217); one count of attempted capital sexual battery (case number 94-218); one count of lewd and lascivious (case number 94-219); and a violation of probation in case number 89-408. (R-17). Petitioner was to receive a total sentence of 35 years in prison with the agreement and understanding that this sentence constituted an upward departure. (R-17). According to

Petitioner's scoresheet, his minimum prison time was 151.8 months and his maximum prison time 253 months. (R-20).

At Petitioner's plea proceedings, the trial court asked the state as to why it was entering into this agreement, and the assistant state attorney indicated that it was because Petitioner would receive 35 years in prison as opposed to a life sentence with a possibility of parole in 25 years. (R-30).

The trial court was apparently unhappy with the sentencing but for the trial court's convenience, went ahead and accepted the plea. (R-33-36). The trial court indicated that if it did not continue to accept the plea on the next sentencing date, it would allow Petitioner to withdraw from the plea agreement. (R-36).

On August 23, 1994, a sentencing hearing was held. The trial court apparently argued with counsel at that hearing that a life sentence with no chance for parole for 25 years was a more serious sentence than the 35-year sentence that the plea agreement called for. (R-40-41).

Defense counsel argued that Petitioner was 48 years of age on his sentencing date and that he would be around 70 years of age when released. (R-42).

The trial court appeared to be concerned that because the substantive crimes (not the lesser included offenses to which Petitioner pled) were crimes that the trial court believed that "...in many countries in this world it is something subject to the death penalty." (R-47). The trial court initially indicated that it would reject the plea. (R-48).

The trial court then suggested that it might be happy with 40 years.

However, the trial court again changed its mind and indicated to Petitioner that the plea agreement was unacceptable, and that Petitioner would be scheduled for trial on October 17. (R-64).

On October 6, 1994, another hearing was held. (R-67). At this hearing, the trial court agreed that it was bound by the plea agreement insofar as the lesser included

offenses were concerned. The trial court did not agree that it was bound by the sentencing portion of the plea agreement. (R-69). At the conclusion of this hearing, sentencing was set for November 23. (R-71-72).

On November 23, 1994, defense counsel objected to any sentence imposed by the trial court over the guidelines. (R-77). Defense counsel also objected to any sentence imposed that was over 35 years. (R-78; 81; 85; 95).

The trial court then imposed the following sentence: In case number 89-408, 5 ½ years in prison. In case number 94-217 (both counts of attempted capital sexual battery), 30 years in prison consecutive to the sentence imposed in case number 89-408. In case number 94-217 (lewd and lascivious assault), 15 years in prison concurrent to the first two counts in case number 94-217 but to run consecutively to the 5 ½-year prison sentence imposed in case number 89-408. In case number 94-218 (attempted capital sexual battery), 30 years in prison to run consecutively to the sentences imposed in case numbers 94-217 and 89-408. In case number 94-219 (lewd and lascivious assault), 15 years in prison to run consecutively to the sentences imposed in case numbers 94-217 and 94-218 as well as case number 89-408. (R-92-93).

The total of this sentence amounted to 80 ½ years. (R-92-93).

Notice of appeal was timely filed on or about December 8, 1994. (R-22).

On December 19, 1995, the Florida First District Court of Appeal issued its opinion (appendix) affirming Petitioner's sentences in case number 94-217 and 94-219 but remanding for resentencing Petitioner's sentence in 94-218.

The Florida First District Court of Appeal certified the following question to this Court as one of great public importance:

> WHETHER SECTION 921.0016(3)(J), FLORIDA STATUTES (1993), MAKES "VULNERABILITY DUE TO AGE," AN AGGRAVATING CIRCUMSTANCE JUSTIFYING DEPARTURE FROM THE

SENTENCING GUIDELINES WHERE THE DEFENDANT IS ADJUDICATED GUILTY OF ATTEMPTED CAPITAL SEXUAL BATTERY AND/OR LEWD AND LASCIVIOUS ASSAULT ON CHILDREN UNDER THE AGE OF SIXTEEN.

On or about January 16, 1996, Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction. On or about January 23, 1996, this Court issued its order postponing decision on jurisdiction and briefing schedule.

SUMMARY OF THE ARGUMENT

The certified question should be answered in the negative.

Although the legislature in its 1994 amendment to the sentencing guidelines added as a reason of departure the vulnerability of the victim due to age, this reason is inappropriate to crimes where the victim's age is an inherent component. Crimes are classified in the sentencing guidelines statute into categories with each succeeding category containing more serious crimes than the previous category and which are punished accordingly. For instance, the crime of sexual battery on a person over twelve years of age is a category eight. The crime of attempted sexual battery on a person under the age of twelve years has been classified a category nine. Thus, the age of the victim has already been used to punish more severely a person who commits attempted sexual battery upon a child under twelve than a person who commits sexual battery on a person twelve years of age or older.

The guidelines are inconsistent or silent as to whether an aggravating factor which is also an inherent component of the scored crime may be used to depart. For instance, the aggravating factor in Section 921.0016(3)(h), specifically prohibits "double counting." On the other hand, Section 921.001(7) does not bar a departure from the guidelines based on victim injury even though victim injury has been used in the

calculation of the guidelines sentence. The statute in all other instances appears to be silent on the issue of "double counting." As such, this criminal statute must be read in favor of the defendant, and "double counting" is not allowed.

ARGUMENT

ISSUE

WHETHER SECTION 921.0016(3)(J), FLORIDA STATUTES (1993), MAKES "VULNERABILITY DUE TO AGE," AN AGGRAVATING CIRCUMSTANCE JUSTIFYING DEPARTURE FROM THE SENTENCING GUIDELINES WHERE THE DEFENDANT IS ADJUDICATED GUILTY OF ATTEMPTED CAPITAL SEXUAL BATTERY AND/OR LEWD AND LASCIVIOUS ASSAULT ON CHILDREN UNDER THE AGE OF SIXTEEN.

In the Florida First District Court of Appeal's opinion in this case, it affirmed the departure sentences in case numbers 94-217 and 94-219 but vacated the sentence in case number 94-218 (because it was not subject to the 1994 guidelines).[1] The reason for departure at issue in this proceeding is whether Section 921.0016(3)(J), Florida Statutes (1993) (which makes "vulnerability due to age" an aggravating circumstance justifying departure from the sentencing guidelines) is a valid reason where the victim's age is an inherent component of the crimes of attempted capital sexual battery and/or lewd and lascivious assault on children under the age of sixteen.

As the District Court noted, the starting point for this discussion is this Court's pre-1994 sentencing guidelines decision in Wemett v. State, 567 So.2d 882, 886-887 (Fla. 1990). In Wemett, this Court recognized that age-related vulnerability is inappropriate as a departure sentence where it was a factor common to all victims of similar crimes (or

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[1]See footnote 5 of the District Court's opinion on page 6 of the slip opinion.

here, an inherent component of the crimes for which Petitioner was being punished). In a long line of previous cases, this Court has recognized that a court cannot use an inherent component of the crime in question to justify departure. State v. Mischler, 488 So.2d 523, 525 (Fla. 1986).

The Florida First District Court of Appeal did not argue with the notion that the age of the victim was an element of both the crime of attempted capital sexual battery and the crime of committing a lewd or lascivious assault on a child. Footnote 6, Florida First District Court of Appeal slip opinion at 6. Rather, the Florida First District Court of Appeal concluded that vulnerability was an appropriate reason for departure because the sentencing guidelines had been specifically amended by the laws of Florida for offenses committed after January 1, 1994, to allow the use of this as an aggravating reason for departure. See the Laws of Florida, Section 13, Chapter 93-406.

Initially, of course, it should be observed that just because "vulnerability due to age" is listed as an aggravating factor justifying departure, it may, for various reasons, be an inappropriate reason to justify departure. The most obvious inappropriate reason which invalidates its use as an aggravating factor to justify departure is the situation presented in this case, i.e., where it has already been factored in to the severity of the guideline sentence.

Section 921.0012(2) states:

> The offense severity ranking chart has ten offense levels, ranked from least severe to most severe, and each felony offense is assigned a level according to the severity of the offense. [Emphasis added].

Level eight includes the crime of sexual battery, where the victim is twelve years or over, and the offender does not use physical force likely to cause serious injury. Section 794.011(5), Florida Statutes.

Level nine, a more severe category, contains attempted sexual battery with the

victim less than twelve years of age, Section 794.011(2).

There are two differences between these crimes which are contained in level eight and level nine. First, Section 794.011(2) is an attempt. Section 794.011(5) is a completed crime. Attempts are generally punishable a degree lower than the completed crime. Section 774.04, Florida Statutes.

The other difference -- and the difference especially pertinent here -- is the age of the victim. Section 794.011(5) involves sexual battery of a victim twelve years or over; it is placed in the less severe category level eight for guidelines sentencing purposes. Section 794.011(2) is attempted sexual battery with the victim less than twelve years of age. It is placed in the more serious sentencing category of level nine.

Clearly, by virtue of the victim's age, the legislature has intended and has provided for more severe punishment to a person who commits sexual battery on a child under twelve than on a child twelve years of age or over even where, as here, the crime is merely an attempt.

Section 921.0016(1)(a), Florida Statutes (1993) provides that the recommended guidelines sentence is assumed to be appropriate for the offender. A departure from the recommended sentence "...is discouraged unless there are circumstances or factors which reasonably justify the departure." (Emphasis added). Double counting vulnerability for age where it has already been taken into account in the seriousness of the sentencing guideline level is patently unreasonable.

The Florida First District Court of Appeal in its opinion grasped the illusionary straw of Section 921.0016(3)(h), Florida Statutes (1993), which states a ground for departure is:

> The defendant knew the victim was a law enforcement officer at the time of the offense; the offense was a violent offense; and that status is not an element of the primary offense. [Quoted from footnote 7, Florida First District Court of

> Appeal's slip opinion at 7; emphasis in the District Court's opinion].

Whatever the legislature intended for this departure reason, it is irrelevant for the departure reason involving vulnerability of age where that is an inherent component of the crime. Most likely, whoever wrote the language in Section 921.0016(3)(h), realized that it was improper not to doubly punish under the guidelines for an already included element. Most likely it never occurred to the legislature that the departure reason for vulnerability of age would be used where it was an inherent component of the crime, such as in attempted capital sexual battery.

No one has ever accused the legislature of consistency, and the undersigned is not about to do so in the sentencing guidelines statute. For instance, the Court's attention is drawn to Section 921.001(7) where the following is found:

> A sentence may be imposed outside the guidelines based on credible facts, which may include an oral or written statement submitted by the victim or next of kin pursuant to s.921.143, proven by a preponderance of the evidence, which demonstrate that the victim suffered excessive physical or emotional trauma at the hands of the defendant; and such departure is not barred because victim injury has been utilized in the calculation of the guidelines sentence. [Emphasis added].

Thus, in the same statute, where the legislature intended that double counting be used, the legislature specifically stated that it would not be "barred" because it had already been used in the calculation of the guidelines sentence.

In this same sentencing statute, the legislature has been inconsistent. In one instance [Section 921.0016(3)(h)], the legislature has specified for one factor that double counting is disallowed. In another section of the same statute, Section 921.001(7), the legislature has specified that double counting is allowed. Elsewhere the statute is silent. Nothing should or can be read into this silence. Indeed, if anything is to be read into this silence, it is ambiguity. Ambiguity in a criminal sentencing statute must be decided in the

favor of the defendant. Section 775.021(1), Florida Statutes.

Finally, the District Court's reliance upon this Court's language in Amendments to Florida Rules of Criminal Procedure re Sentencing Guidelines, 628 So.2d 1084, 1089, App. B (Florida 1993); Florida Rule of Criminal Procedure 3.702(b) is misplaced:

> The purpose of the 1994 revised sentencing guidelines and the principles they embody are set out in subsection 921.001(4). Existing case law construing the application of sentencing guidelines that is in conflict with the provisions of this rule or the statement of purpose or the principles embodied by the 1994 sentencing guidelines set out in subsection 921.001(4) is superseded by the operation of this rule.

Prior case law is not in conflict. It violates due process and constitutional principles to double count an element of a crime as an aggravating circumstance.

As argued above, the legislature has already more severely punished these crimes by virtue of the age difference. There is no unambiguous expression of intent in the 1994 guidelines that requires previous case law on this issue to be overruled.[2]

CONCLUSION

Based on the foregoing arguments and authorities, the certified questioned should be answered in the negative.

CERTIFICATE OF SERVICE

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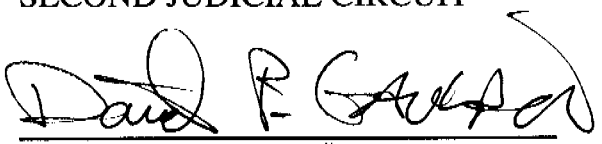
[2]Previous applicable case law includes but it not limited to these cases which hold that it is improper to depart from the guidelines because age is an inherent component of the scored crimes: Firkey v. State, 593 So.2d 1155 (Fla. 4th DCA 1992) [attempted sexual battery on a child eleven years of age or younger]; Trimble v. State, 591 So.2d 663 (Fla. 2d DCA 1991) [lewd and lascivious act on a child under the age of sixteen]; Boomer v. State, 564 So.2d 1232 (Fla. 2d DCA 1990) [attempted sexual battery and lewd assault on children under twelve] (appeal after remand 596 So.2d 730; jurisdiction accepted by the Florida Supreme Court 604 So.2d 486; approved 616 So.2d 991).

I certify that a copy of the foregoing has been forwarded by delivery to Trisha Meggs, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 16th day of February, 1996.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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IN THE SUPREME COURT OF FLORIDA

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vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,200

APPENDIX

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JIMMY DONALD CAPERS,

Appellant,

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

v.

STATE OF FLORIDA,

CASE NO. 94-4182

Appellee.

_____/

Opinion filed December 19, 1995.

An appeal from the Circuit Court for Santa Rosa County. Frank Bell, Judge.

Nancy A. Daniels, Public Defender; David P. Gauldin, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Trisha E. Meggs and Amelia L. Beisner, Assistant Attorneys General, Tallahassee, for Appellee.

PER CURIAM.

Convicted of three counts of attempted capital sexual battery on a person less than twelve years of age, and two counts of lewd and lascivious assault on a child under the age of sixteen,[1] Jimmy Donald Capers appeals the sentence imposed,

[1] On May 19, 1994, Capers was charged, by three separate informations, with two counts of capital sexual battery and one count of lewd and lascivious assault (No. 94-217), one count of

capital sexual battery (No. 94-218), and one count of lewd and lascivious assault (No. 94-219), on his two stepdaughters, then ages seven and ten, in violation of sections 794.011(2)(a) and 800.04, Florida Statutes.

Section 794.011(2)(a), Florida Statutes (1993) provides:

> A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in ss. 775.082 and 921.141.

Section 800.04, Florida Statutes (1993) provides in pertinent part:

> A person who:
> (1) Handles, fondles, or assaults any child under the age of 16 years in a lewd, lascivious, or indecent manner;
> . . .
> without committing the crime of sexual battery, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section. A mother's breast feeding of her baby does not under any circumstance violate this section.

On August 8, 1994, Capers entered into a written plea agreement with the state, pleading nolo contendere to three counts of attempted capital sexual battery and two counts of lewd and lascivious assault, in exchange for the state's agreement to recommend a thirty-five year sentence. The trial court accepted the plea as freely and voluntarily given, but stated that it would not accept the recommended sentence. Of particular concern to the trial court was that in July of 1989 Capers had been charged with capital sexual battery of his own four year old daughter, was sentenced pursuant to a plea agreement for lewd and lascivious assault and was ordered to have no contact with his daughter, but upon release from prison sought to obtain custody of his daughter in another court.

> THE COURT: I'm not, and I hate to be vacillating on this, but you know when you add the fact that this man would sexually abuse his own child and then seek custody of the court, go to court, not this court but a court that is not aware of the prior convictions.
> THE DEFENDANT: I did not do it --
> THE COURT: And not disclose it to that

arguing that the circuit court relied on impermissible grounds for departing from the sentencing guidelines. Except for the sentence imposed in Case No. 94-218, we affirm, but we certify a question to the Florida Supreme Court as a question of great public importance.

The trial court imposed the following departure sentence: thirty years for two counts of attempted capital sexual battery (No. 94-217); fifteen years for one count of lewd and lascivious assault (No. 94-217) to run concurrent with the two counts of attempted capital sexual battery in Case No. 94-217; thirty years for attempted capital sexual battery (No. 94-218) to run consecutive to the sentence imposed in Case No. 94-217; fifteen years for lewd and lascivious assault (No. 94-219) to run consecutive to the sentences in Cases Nos. 94-217 and 94-218. As reasons for departing from the guidelines, the trial court found that the victims were each vulnerable due to their age, § 921.0016(3)(j), Fla. Stat. (1993), that Capers had abused his

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> court, be ordered to go to treatment for a sexual abuse problem, not go to the treatment or be discharged because he says that he does [not] have a problem. And marries another woman and does the same thing with two other girls -- This man does not need to be anywhere but in prison for the rest of his life. And I'm not going to accept the plea agreement as it is, ...

Capers stated that he did not wish to withdraw his plea but objected to any sentence imposed outside the sentencing guidelines (151.8 to 253 months) or greater than the plea agreement.

familial authority,[2] and that Capers was "not amenable to rehabilitation or supervision as evidenced by an escalating pattern of criminal conduct as described in s. 921.001(8)." § 921.0016(3)(p), Fla. Stat. (1993).[3]

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[2] In the written reasons for departure, the trial court expressed its concern that Capers was in a position of familial authority over the victims.

> [Capers] has abused in the most horrible way his duties as a father and a stepfather. . . . This defendant has now forever damaged the lives of three small girls: one his own daughter and the other two his stepdaughters. Instead of using his custodial authority to nurture and protect these young children, he used the opportunity to indulge his sick appetites.

Our supreme court has held that a breach of familial authority, is an invalid reason for entering a departure sentence in child molestation cases. Cumbie v. State, 574 So. 2d 1074 (Fla. 1991); Wilson v. State, 567 So. 2d 425 (Fla. 1990). "'"[V]ulnerability" and "breach of trust" are factors common in child molestation cases.'" Wilson, 567 So. 2d at 427 quoting Laberge v. State, 508 So. 2d 416, 417 (Fla. 5th DCA 1987). The fact that this was an invalid reason for entering a departure sentence, however, does not end our analysis.

> When multiple reasons exist to support a departure from a guidelines sentence, the departure shall be upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify the departure.

§ 921.001(6), Fla. Stat. (1993).

[3] Lack of amenability to rehabilitation as evidenced by an escalating pattern of criminal conduct was not a valid reason for a departure sentence in the present case.

> The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent to violent crimes, a progression of increasingly violent crimes, or a pattern of increasingly serious criminal activity.

§ 921.001(8), Fla. Stat. (1993). In 1989 Capers was charged with capital sexual battery on his own four-year-old daughter which

Vulnerability of a victim due to age, the only viable ground for departure here, is not a valid reason for imposing a departure sentence for offenses committed prior to January 1, 1994 (the effective date of the 1994 Guidelines) even where age is not an element of the crime.[4]

> "It necessarily follows that a departure cannot be based on factors common to nearly all victims of similar crimes. Otherwise, the exception would swallow the rule.
>
> * * *
>
> Vulnerability is not a clear and convincing reason to depart from the guidelines when the victim's helplessness is common to nearly all similar crimes. Were we to allow the departure here based solely on the age-related vulnerability, virtually every defendant who assaults an elderly person or a child would qualify for a departure sentence regardless of the nature or severity of the offense."

Small v. State, 20 Fla. L. Weekly D2190 (Fla. 1st DCA September 22, 1995) (quoting Wemett v. State, 567 So. 2d 882, 886-87 (Fla. 1990)). We conclude, however, that the 1994 Guidelines have

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was reduced to lewd and lascivious assault in accordance with a written plea agreement. In 1993, Capers committed a battery on his new wife. In 1994, Capers was charged with the present offenses. Capers' criminal history does not constitute an escalating pattern of criminal conduct as defined by section 921.001(8), Florida Statutes.

[4] In general, "[f]actors already taken into account in calculating the guidelines score can never support departure," State v. Mischler, 488 So. 2d 523, 525 (Fla. 1986), and "[a] court cannot use an inherent component of the crime in question to justify departure." Id.

worked a change in the law as to offenses committed on or after January 1, 1994.[5]

Under the 1994 Guidelines, the Legislature has expressly provided that vulnerability of a victim due to age is a valid reason for departure. Section 921.0016(3), Florida Statutes (1993), provides in pertinent part:

> Aggravating circumstances under which a departure from the sentencing guidelines is reasonably justified include, but are not limited to:
>
> . . .
>
> (j) The victim was especially vulnerable due to age or physical or mental disability.

The Legislature clearly intended to overrule cases like Wemett, supra, and did not explicitly limit the applicability of section 921.0016(3)(j) to cases where the victim's age is not an element of the crime.[6] Our supreme court has stated:

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[5] Except in Case No. 94-218, appellant pleaded nolo contendere to offenses alleged to have occurred on or after January 2, 1994. In Case No. 94-218, the offense was alleged to have taken place "on or about October 1, 1993 to April 15, 1994." The 1994 sentencing guidelines do not apply to offenses committed prior to January 1, 1994. Cohen v. State, 656 So. 2d 525 (Fla. 5th DCA 1995); ch. 93-406, § 13 at 2941, Laws of Fla. See generally Ivey v. Chiles, 604 So. 2d 542 (Fla. 1st DCA 1992) (treating continuing offense as occurring on first date charged).

[6] The age of the victim is an element of both the crime of attempted capital sexual battery, § 794.011(2)(a), Fla. Stat. (1993), and the crime of committing a lewd or lascivious assault on a child. § 800.04, Fla. Stat. (1993). Vulnerability of the victim by virtue of tender age is common to child molestation cases. Wilson v. State, 567 So. 2d 425, 427 (Fla. 1990).

The Legislature expressly limited other grounds for entering a departure sentence when the ground was an element of the crime

> The purpose of the 1994 revised sentencing guidelines and the principles they embody are set out in subsection 921.001(4). Existing caselaw construing the application of sentencing guidelines that is in conflict with the provisions of this rule or the statement of purpose or the principles embodied by the 1994 sentencing guidelines set out in subsection 921.001(4) is superseded by the operation of this rule.

Amendments to Florida Rules of Criminal Procedure re Sentencing Guidelines, 628 So. 2d 1084, 1089, App. B (Fla. 1993); Fla. R. Crim. P. 3.702(b).[7] We therefore conclude that the victim's vulnerability on account of age justifies upward departure for

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charged. Section 921.0016(3)(h), Fla. Stat. (1993) states as grounds for entering a departure sentence:

> The defendant knew the victim was a law enforcement officer at the time of the offense; the offense was a violent offense; and that status is not an element of the primary offense.

(emphasis added). "It is an accepted rule of statutory construction that the legislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute." Ford v. Wainwright, 451 So. 2d 471 (Fla. 1984).

[7] The purpose of the sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decisionmaking process. The guidelines represent a synthesis of current sentencing theory, historical sentencing practices, and a rational approach to managing correctional resources. The sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining the relative importance of those criteria in the sentencing decision. § 921.001(4), Fla. Stat. (1993).

offenses committed after January 1, 1994, even in sentencing for an offense of which the victim's age is an element.

While we affirm the departure sentence predicated on the vulnerability of the victims due to age, except in Case No. 94-218, we certify the following question to the Florida Supreme Court as one of great public importance:

> WHETHER SECTION 921.0016(3)(J), FLORIDA STATUTES (1993), MAKES "VULNERABILITY DUE TO AGE," AN AGGRAVATING CIRCUMSTANCE JUSTIFYING DEPARTURE FROM THE SENTENCING GUIDELINES WHERE THE DEFENDANT IS ADJUDICATED GUILTY OF ATTEMPTED CAPITAL SEXUAL BATTERY AND/OR LEWD AND LASCIVIOUS ASSAULT ON CHILDREN UNDER THE AGE OF SIXTEEN.

The sentence in Case No. 94-218 is vacated, and Case No. 94-218 is remanded for resentencing. The sentences in Cases Nos. 94-217 and 94-219 are affirmed.

WOLF, LAWRENCE, and BENTON, JJ., CONCUR.