IN THE SUPREME COURT OF FLORIDA

JIMMY DONALD CAPERS,

Petitioner,

v.

CASE NO. 87,200

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF
FLORIDA BAR NO. 325791

TRISHA E. MEGGS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0045489

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES — PAGE(S)

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

Petitioner, Jimmy Donald Capers, was the defendant in the trial court; this brief will refer to Petitioner as such, as Defendant, or by proper name. Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, as the prosecution, or as the State.

The symbol "R" followed by the appropriate page number will refer to the record on appeal and the transcript of trial court proceedings.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

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

The State accepts petitioner's statement of the case and facts as being generally accepted by the record subject to the following additions:

1. Petitioner stated that "[t]he trial court was apparently unhappy with the sentencing but for the trial court's convenience, went ahead and accepted the plea." Initial brief at 2. To clarify, the trial court did not accept the plea agreement; rather, the trial court accepted the voluntariness of the plea and set the case for sentencing on a later date. (R-33-36).

2. Petitioner stated that "[t]he trial court appeared to be concerned that . . . 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.'" Initial brief at 2. The full statement by the trial court was the following:

> But again my concern is he has done it and already been to state prison. Gets out and does the exact same thing again to stepchildren and people who should know that a person in his position would love and respect and care for. And then as horrible, recognized by society up until recently as something that you should be put to death for. And in many countries in this world it is still something subject to the death penalty.

(R-46-47).

3. During the August 23, 1994, hearing the trial court questioned petitioner's contact with and custody of his natural daughter, who was the same daughter petitioner was convicted of sexually abusing in 1989. (R-58). Testimony revealed that petitioner had obtained a default divorce in Escambia County awarding him custody of the child, even though the court in the Santa Rosa County criminal case ordered that he have no physical contact with her. (R-59-62). The following colloquy occurred with respect to this matter:

> THE COURT: Did you disclose to the Escambia court when you got custody of your child through that order that you were previously convicted and sentenced to state prison for sexually abusing your daughter?
>
> [Petitioner]: No. But after that Judge Gillam [the sentencing judge in the 1989 case] said I could have permission to write my daughter. And it was court ordered that I could.

(R-61). Petitioner also filed for permission to leave the state to bring his daughter back to Florida because he had been granted custody. (R-59). However, the Santa Rosa County Court never granted him permission to leave and he had no physical contact with the daughter. (R-59-60).

4. Petitioner indicates that after the trial court suggested it might be happy with a forty year sentence, the trial court again changed its mind and indicated to petitioner that the plea

agreement was unacceptable. Initial brief at 2. The trial court initially believed that a forty-year sentence might be acceptable, but after the inquiry into petitioner's attempt to gain custody of his natural daughter, the trial court stated the following:

> 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.
>
> [Petitioner]: I did not do it - -
>
> THE COURT: And not disclose it to that 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 [sic] 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, and you have to go to trial and I'll schedule it for trial October 17.

(R-63-64).

SUMMARY OF ARGUMENT

Petitioner contends that the trial court erred in imposing an upward departure sentence based on the victim's vulnerability due to age because the victim's age was an inherent component of the crime for which he was convicted. However, petitioner was sentenced pursuant to the 1994 Sentencing Guidelines, in which the Legislature expressly provided that a victim's vulnerability due to age is a proper aggravating factor to justify an upward departure from the sentencing guidelines. See Section 921.0016(3)(j), Fla. Stat. (1993). Thus, because the 1994 guidelines supersede case law which conflicts with the new guidelines, petitioner's reliance on pre-1994 guidelines cases to support his claim is misplaced. Furthermore, although the Legislature in Section 921.0016(3)(h), Fla. Stat. (1993), expressly prohibited departures based on the victim's being a law enforcement officer when the victim's status as an officer is an inherent component of the offense, the Legislature did **not** create a similar prohibition against departing based on a victim's vulnerability due to age when the victim's age is an inherent component of the offense. The Legislature therefore intended to permit trial courts to impose upward departure sentences based on the victim's vulnerability due to age **regardless**

of whether the victim's age is an element of the charged offense, and petitioner's argument to the contrary must fail.

ARGUMENT

ISSUE I

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.

Petitioner pled guilty and was adjudicated guilty of three counts of attempted capital sexual battery and two counts of performance of a lewd and lascivious act upon a child under sixteen. (R-12). The two victims were petitioner's step-daughters, ages seven and ten. (R-1-4). The trial court departed from the sentencing guidelines because the victims were vulnerable due to their ages, and because petitioner was not amenable to rehabilitation. (R-8-11). The First District upheld the trial court's departure in circuit court case numbers 94-217 and 94-219 based on the victim's vulnerability, but vacated the departure sentence in circuit court case number 94-218 because that case was not subject to the 1994 Sentencing Guidelines. Capers v. State, 21 Fla. L. Weekly D17 (Fla. 1st DCA December 19, 1995). With respect to case numbers 94-217 and 94-219, the First District affirmed the departure sentences based on its determination that the

Legislature, by enacting Section 921.0016(3)(j), Fla. Stat. (1994), intended to permit departures based on the victim's age even in cases where the victim's age was inherent in the crimes for which the defendant was convicted.

Petitioner argues that the victims' vulnerability was an improper reason for departure because it was an inherent component of attempted sexual battery and lewd and lascivious assault. However, the 1994 guidelines, under which petitioner was charged and sentenced, list the victim's vulnerability as a proper reason to depart from the guidelines. See Section 921.0016(3)(j). Because the statutory criteria supersede case law in conflict with the 1994 guidelines, the trial court's upward departure was proper.

Sentencing guidelines were not intended to usurp judicial discretion, but to aid the trial court in sentencing. See Fla. R. Crim. P. 3.701(b)(6). When factors and circumstances justify a departure from the sentencing guidelines, the trial court must state the reasons in writing. Fla. R. Crim P. 3.702(d)(18)(a). Further, the revisions to the 1994 sentencing guidelines were "designed to emphasize incarceration in the state prison system for violent offenders and nonviolent offenders who have repeatedly committed criminal offenses and have demonstrated an inability to

comply with less restrictive penalties previously imposed." Ch. 93-406, § 1, at 2912, Laws of Fla.

Furthermore, under the 1994 Sentencing Guidelines, Fla. R. Crim. P. 3.702(b), states that:

> 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**.

(Emphasis added). Simply put, this rule means that any statutory modification of the guidelines procedure supersedes any contrary prior case law. Indeed, this Court stated that the 1994 guidelines "reflect a different structure and a shift in public policy, and, therefore, existing case law that is in conflict with the new statutes and rules of procedure will by superseded." Amendments to Florida Rules of Criminal Procedure Re Sentencing Guidelines, 628 So. 2d 1084 (Fla. 1993).

In the 1994 Guidelines, the Legislature provided a nonexclusive list of aggravating and mitigating circumstances which may justify a departure from the sentencing guidelines. See § 921.0016, Fla. Stat. (1993); see also Fla. R. Crim. P. 3.702(d)(18). Within this list, the Legislature has expressly determined that it is proper to depart from the guidelines if the "victim was especially vulnerable

due to age or physical or mental disability." § 921.0016(3)(j), Fla. Stat. (1993). Consequently, pursuant to Rule 3.702(b), petitioner's reliance on Wemett v. State, 567 So. 2d 882, 886-887 (Fla. 1990); Firkey v. State, 593 So. 2d 1155 (Fla. 4th DCA 1992); Trimble v. State, 591 So. 2d 663 (Fla. 2d DCA 1991); and Boomer v. State, 564 So. 2d 1232 (Fla. 2d DCA 1990), appeal after remand, 596 So.2d 730 (Fla. 1992), approved 616 So. 2d 991 (Fla. 1993) (all holding that the victims' vulnerability due to age was an inherent component of the crime and could not be used as a reason to depart), is misplaced because they were decided prior to the enactment of the 1994 Guidelines. Because the Legislature included a victim's vulnerability due to age as a circumstance which justifies an upward departure, it makes no difference under the 1994 guidelines whether or not the victim's vulnerability due to age is an inherent component of attempted capital sexual battery. Accordingly, the trial court in this case properly departed based on the victims' vulnerability due to age regardless of whether the victims' ages were an "inherent component" of the crimes for which petitioner was convicted.

Further, in Section 921.0016(3), Florida Statutes (1993), the Legislature expressly stated instances when a departure is not justified because it is based on an "inherent component" of the

crime charged. For example, Section 921.0016(3)(h), Florida Statutes (1993), states that a departure is justified if "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." Id. (emphasis added). Hence, the Legislature expressly prohibited departures based on the victim's status as a law enforcement officer when the victim's status as a law enforcement officer is an inherent element of the offense. Therefore, if the Legislature intended to prohibit an upward departure based on a victim's vulnerability due to age when the victim's age is an inherent component of the crime, then Legislature would have expressly prohibited it by enacting a clause similar to that set forth in the subsection dealing with departures where the victim is a law enforcement officer. See Rooney v. Leisure Resorts, 624 So. 2d 773 (Fla. 4th DCA 1993) ("When the legislature has carefully employed a term in one section of the statute, but omits it in another section of the same act, it should not be implied where it is excluded."); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) ("It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another."); Cook v. State, 381 So. 2d 1368, 1369 (Fla. 1980) ("According to a longstanding principle of statutory

construction, this list should be presumed to be exclusive and any omissions to be deliberate."). Thus, because the Legislature did not include the "inherent component" language in subsection (3)(j), a departure under that subsection is proper even if the victim's age is an inherent component of the charged crime.

Nevertheless, Petitioner states that:

> Most likely, whoever wrote the language in section 921.0016(3)(h), realized that it was improper not to double 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.

Initial brief at 8. However, "[i]t 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, 1984 (Fla. 1984). The Legislature therefore was presumed to know the case law, in cases such as Wemett, supra ("Vulnerability is not a clear and convincing reason to depart from the guidelines when the victims' helplessness is common to nearly all similar crimes."); Firkey, supra ("The victims's extreme vulnerability does not provide a valid reasons for departure because petitioner's crime, attempted sexual battery of a child eleven years of age or

younger, contemplates the victims' tender years and vulnerability"); Trimble, supra (The court reversed the departure sentence finding that the victims' vulnerability was directly related to her age, which was a component of the crime of lewd and lascivious assault for which Trimble was charged.); and Boomer, supra ("The departure element of vulnerability was based upon the fact that the victims were children. Victim age, however, is an element of Boomer's crimes and the circumstances present in this matter do not fall within an exception permitting departure for a reason inherent in the crime."). Nevertheless, when it enacted Section 921.0016(3)(j), the Legislature expressly authorized trial courts to depart based on the victim's vulnerability due to age, and it did not place **any** limitations on the circumstances or offenses to which that reason could be applied. Thus, because the Legislature declined to include language prohibiting departures based on vulnerability due to age when age is a component of the charged offense, even though it was aware that the courts previously had reversed such departures, it is clear that the Legislature intended for Section 921.0016(3)(j) to supersede the prior case law on the subject. See Fla. R. Crim. P. 3.702(b); Amendments to Florida Rules of Criminal Procedure Re Sentencing Guidelines, supra, at 1084. Again, this is particularly true given

the fact that the Legislature included such "prohibiting" language in the subsection permitting departure based on the victim's status as a law enforcement officer. Accordingly, a trial court may indeed properly depart from the guidelines based on the victim's vulnerability due to age even in cases where the victim's age is an inherent component of the crime for which the defendant is being sentenced.

Petitioner further argues that because the Legislature expressly allowed "double counting" in Section 921.001(7), Fla. Stat. (1993), by stating that departures are not barred because the victim's injury was used in the calculation of the guidelines sentence;[1] and because the Legislature expressly prohibited "double counting" by stating in Section 921.0016(3)(h), that the victim's status as a law enforcement officer could not be used as a departure reason if

---

[1]Section 921.001(7), Florida Statutes (1993), provides that:

> 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 demonstrated 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.

that status was inherent in the offense, then nothing should be read into the Legislature's silence in other parts of the statute. Initial brief at 8. However, Section 921.001(7) was enacted in 1987, and is in a different section of the statute than Sections 921.0016(3)(h) and 921.0016(3)(j). See Ch. 87-109, § 2, at 962, Laws of Fla. By contrast, both Sections 921.0016(3)(h) and 921.0016(3)(j) were created together in the "Safe Streets Initiative of 1994." Ch. 93-406, § 13, at 2941-2944, Laws of Fla. Because Sections 921.0016(3)(h) and 921.0016(3)(j) were created together in the same section, this Court can conclude that the Legislature, by omitting the "inherent component" language from the statute while at the same time including such language in Section 921.0016(3)(h), intended that the vulnerability of victim due to age be a proper departure reason even where age is an inherent component of the crime.

Finally, petitioner agues that the Legislature has already taken the victim's age into consideration because the Legislature has chosen to place attempted sexual batteries on children under twelve in a more severe guidelines category than sexual battery on a person twelve years old or older. Petitioner therefore argues that a departure based on age is patently unreasonable when the departure reason has already been taken into account in the

guidelines category level. Initial Brief at 7. However, the mere fact that the Legislature chose to use age as a factor in determining the category so as to punish the offender more severely, did **not** preclude the Legislature from further permitting a trial court, in its discretion, to use age as a reason for a departure from the sentence recommended by even the more "severe" guidelines category level. See Missouri v. Hunter, 459 U.S. 359, 368, 103 S.Ct. 673, 679 74 L.Ed.2d 535 (1983) ("Legislatures, not courts, prescribe the scope of punishments.").

To summarize, Section 921.0016(3)(j) expressly includes the victim's vulnerability due to age as a factor which reasonably justifies a departure from the sentencing guidelines. Moreover, Section 921.0016(3)(j) does not prohibit such departures when age is an inherent component of the charged offense, even though the Legislature expressly prohibited departures based on inherent components of the offense in another subsection of section 921.0016(3). Therefore, a departure based on the victim's vulnerability due to age is appropriate even when age is an inherent component of the offense, and this Court should answer the certified question in the affirmative.

CONCLUSION

For the reasons set forth herein, the State respectfully request that this Court answer the certified question in the affirmative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF
FLORIDA BAR NO. 325791

TRISHA E. MEGGS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0045489

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT
[AGO# 96-110174]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to U.S. Mail to David P. Gauldin, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 27th day of February, 1996.

Trisha E. Meggs
Assistant Attorney General

[A:\CAPERS.BA --- 2/27/96,1:20 pm]

Appendix

Copy

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

---

> 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]

---

[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

---

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:

---

[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

---

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.