IN THE SUPREME COURT OF FLORIDA

MICHAEL LEVANDOSKI, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.: SC17-962

INITIAL BRIEF ON THE MERITS

On Discretionary Review from the Fourth District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

Procedural Background

The State charged Levandoski in Count I with lewd computer solicitation of a child and in Count II with traveling to meet a minor for unlawful sexual activity. ER 18-19. In August of 2010, Levandoski entered a plea of no contest to both charges. ER 60-66. The trial court sentenced him to 48 months in prison followed by one year of sex offender probation for Count I. ER 73-75, 169-70. For Count II, the court ordered him to serve 15 years of sex offender probation consecutive to the probation term on Count I. ER 81, 169-70.

After serving his prison sentence, Levandoski moved to strike the conditions of sex offender probation on the ground that they constituted an illegal sentence as the conditions were neither mandatory under section 948.30, nor orally pronounced at sentencing. ER 184-89. The court denied his motion. ER 225, 275.

On appeal he again argued that the sex offender conditions imposed were illegal. He argued that the Fourth District should reverse and order the lower court to strike every condition of sex offender probation not orally pronounced at sentencing and that double jeopardy prevented the trial court from reimposing those conditions. The Fourth District affirmed, *Levandoski v. State*, 217 So. 3d 215 (Fla. 4th DCA 2017), holding that a trial court may impose sex offender probation as a special condition of probation without stating what those conditions

are. The court certified conflict with *Snow v. State*, 157 So. 3d 559 (Fla. 1st DCA 2015), *clarified on remand*, 193 So. 3d 1091 (Fla. 1st DCA 2016). *Id*.

Levandoski's Sentencing Hearing

Levandoski entered an open plea to the court. R 60-66. His plea form did not include the term "sex offender probation." R 60-66. At sentencing, Trial Counsel moved for a downward departure pursuant to section 921.0016(2)(j), Florida Statutes. SER 51. Trial Counsel stated, "We're asking the court to give him sex offender probation that will be very stringent and, if necessary, house arrest. We are asking you not to send him to prison." SER 52. Ultimately, the trial court denied the motion for downward departure, sentenced Levandoski to consecutive terms of sex offender probation and included 48 months in prison as part of the sentence. SER 56, 58-59.

In pronouncing his sentence, the court stated that "[t]his is an offense that is governed by the Jessica Lunsford Act, so all supervision will require electronic monitoring." ER 169-70. It also ordered payment of certain fines and costs as special conditions of probation. ER 169-70. The court then stated:

> Under the electronic monitoring requirement it will be subject to the conditions of sex offender probation whereby the supervisor and probation officer recommend and the court agrees, so that's still available, but it is not mandatory. … I will make it a special condition of his probation that he is prohibited from - - this is part of the sex offender probation anyway, but just to make the record clear, should there be any change in the law as of the time of his release, he's prohibited from accessing the internet, possessing a computer or any

> electronic device that can access the internet, and he's prohibited from having an email address or other similar type of address that allows him to participate in conversations with anyone over the internet by whatever name that may be known here or in the future until his probation is concluded.

ER 171. The written Order of Sex Offender Probation listed as special conditions of probation, the orally pronounced prohibition from accessing the internet, possessing a computer or any electronic device that can access the internet, having an email address or other similar type of address, and a requirement that he report to probation within 24 hours of release from DOC. ER 82. Immediately following the special conditions of probation is a three-page list of all standard conditions of sex offender probation. R 83-85.

Levandoski's Motion to Correct his Sentence

Levandoski moved to strike the conditions of sex offender probation on the ground that they constituted an illegal sentence as the conditions were neither mandatory under section 948.30, nor orally pronounced at sentencing. ER 184-89. He moved, in the alternative, to modify certain conditions of his probation if the court was unwilling to strike them all. ER 184-89.

Levandoski's Motion to Correct Hearing

At the hearing on his motion, Defense Counsel argued that the court must strike the sex offender conditions of probation not orally pronounced at sentencing. ER 241. It could not now impose sex offender conditions of probation as special conditions of probation because that would violate double jeopardy. ER 241.

The court twice stated that it was without authority to impose sex offender probation conditions:

> It seems apparent to me that, uh, that I did not have the authority to impose sex offender probation per se.
>
> ***
>
> I don't know that it's ripe for my determination, but it's very clear to me that I did not have the authority to impose sex offender probation per se in light of the fact that it was not one of the enumerated offenses being violated, uh, at the time I sentenced him.

ER 249, 252-53.

The court examined the prior plea colloquy it conducted with Levandoski and acknowledged that it never reviewed the standard conditions of sex offender probation with him. ER 256. It found, however, that at the time, it was the intent of all parties that the court would impose sex offender probation. ER 259.

According to the probation officer, the Department of Corrections was supervising Levandoski as a sex offender probationer with every conditions of sex offender probation. ER 262. She recited the specific conditions of probation she was enforcing and the court acknowledged that it was "essentially all of them" and that "they are supervising him as if he had been put on sex offender probation for 847.0135(5)." ER 262-63.

Ultimately, the court denied Levandoski's motion to strike the sex offender conditions from his probation. ER 225, 275.

SUMMARY OF THE ARGUMENT

POINT I

The Fourth District held that a trial court's oral pronouncement that it is imposing "sex offender probation" meets the due process notice requirement. However, pronouncing "sex offender probation," when the defendant is not convicted of one of the enumerated offenses in section 948.30, does not provide sufficient notice of which conditions apply. The holding is also in conflict with this Court's requirement that any special condition of probation must be orally pronounced in order to comport with due process.

With the exception of three orally pronounced special conditions of "sex offender" probation, the probation order here impermissibly required Levandoski to decipher which of the conditions apply to his circumstances. This does not give fair notice of what is expected of him. Those conditions imposed which were not orally pronounced at sentencing render his sentence illegal and must be struck.

POINT II

Double jeopardy prevents a trial court from imposing special conditions of probation on remand that were not pronounced at the defendant's initial sentencing. Thus, on remand, after striking the special conditions not orally pronounced, the trial court may not add any special conditions of probation.

ARGUMENT

POINT I

THIS COURT SHOULD FIND THAT ANY SEX OFFENDER CONDITION THE TRIAL COURT INTENDS TO IMPOSE AS A SPECIAL CONDITION OF PROBATION MUST BE ORALLY PRONOUNCED AT SENTENCING AND THEREFORE LEVANDOSKI'S SENTENCE IS ILLEGAL.

Background

Levandoski entered a no contest plea to lewd computer solicitation of a child (Count I) and travelling to meet a minor for unlawful sexual activity (Count II). The trial court sentenced him to 48 months in prison followed by one year of sex offender probation for Count I. For Count II, the court ordered him to serve 15 years of sex offender probation consecutive to the probation term on Count I. In pronouncing his sentence, the court stated:

> Under the electronic monitoring requirement it will be subject to the conditions of sex offender probation whereby the supervisor and probation officer recommend and the court agrees, so that's still available, but it is not mandatory. … I will make it a special condition of his probation that he is prohibited from - - this is part of the sex offender probation anyway, but just to make the record clear, should there be any change in the law as of the time of his release, he's prohibited from accessing the internet, possessing a computer or any electronic device that can access the internet, and he's prohibited from having an email address or other similar type of address that allows him to participate in conversations with anyone over the internet by whatever name that may be known here or in the future until his probation is concluded.

ER 171. The written Order of Sex Offender Probation listed as special conditions of probation, the orally pronounced prohibition from accessing the internet,

possessing a computer or any electronic device that can access the internet, having an email address or other similar type of address, and a requirement that he report to probation within 24 hours of release from DOC. Immediately following the special conditions of probation is a three-page list of all standard conditions of sex offender probation.

Levandoski moved to strike the conditions of sex offender probation on the ground that they constituted an illegal sentence as the conditions were neither mandatory under section 948.30, nor orally pronounced at sentencing. The court examined Levandoski's plea colloquy and acknowledged that it never reviewed the standard conditions of sex offender probation with him. It found, however, that at the time, it was the intent of all parties that the court would impose sex offender probation. The court denied the motion.

On appeal Levandoski argued that the Fourth District should reverse and order the lower court to strike every condition of sex offender probation not orally pronounced at sentencing. The Fourth District affirmed, holding that a trial court may impose sex offender probation as a special condition of probation without stating what those conditions are. It certified conflict with *Snow v. State*, 157 So. 3d 559 (Fla. 1st DCA 2015), *clarified on remand*, 193 So. 3d 1091 (Fla. 1st DCA 2016). *Id*.

This Court should find that a trial court is required to orally pronounce any sex offender probation term it intends to impose as a special condition of probation and quash the Fourth District's decision.

Standard of Review

A sentencing error resulting in a violation of a defendant's due process rights involves a pure issue of law. *See Norvil v. State*, 191 So. 3d 406, 408 (Fla. 2016). Therefore, this Court applies a *de novo* standard of review. *Id.* A sentence is illegal if it "patently fails to comport with statutory or constitutional limitations." *Plott v. State*, 148 So. 3d 90, 94 (Fla. 2014) (*quoting State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1998)).

Argument

1. *When Convicted of an Enumerated Offense in Section 948.30, Florida Statutes, Standard Conditions of Sex Offender Probation Apply Even if not Orally Pronounced*

Section 948.30, Florida Statutes (2009), states that the trial court is not required to orally pronounce the conditions imposed pursuant to this section as they are considered standard conditions for the offenders specified in the statute. The specified offenders are those convicted of a violation of chapter 794, or sections 800.04, 827.071, 847.0135(5) or 847.0145. § 948.30(1) & (2), Fla. Stats. (2009).

2. A Trial Court May Impose Sex Offender Probation Conditions as Special Conditions of Probation.

A trial court cannot order sex offender probation "pursuant to section 948.30" for a non-enumerated offense as sex offender probation is not mandatory. *Sturges v. State*, 980 So. 2d 1108, 1109 (Fla. 4th DCA 2008). However, the court can impose conditions of sex offender probation as special conditions of probation so long as the conditions reasonably relate to the circumstances of the committed offense. *Vilanueva v. State*, 200 So. 3d 47, 53 (Fla. 2016).

3. If the Trial Court Imposes Conditions of Sex Offender Probation as Special Conditions of Probation, it Must Orally Pronounce Each Special Condition.

This Court held that the trial court must orally pronounce special condition of probation: "Because a defendant is not on notice of special conditions of probation, these conditions must be pronounced orally at sentencing in order to be included in the written probation order." *State v. Williams*, 712 So. 2d 762, 764 (Fla. 1998) (*citing State v. Hart*, 668 So. 2d 589, 592 (Fla. 1996)). This requirement is necessary in order to provide notice as to the conditions of probation imposed and satisfy due process. *Williams*, at 764.

The First District held that the same notice requirement applies when imposing conditions of sex offender probation as special conditions of probation. *Snow v. State*, 157 So. 3d 559 (Fla. 1st DCA 2015) *clarified on remand*, 193 So. 3d 1091 (Fla. 1st DCA 2016). There, the defendant appealed the denial of his motion

to correct sentencing error. *Id*. at 560. He argued that his conviction for traveling to meet a minor to do unlawful acts was not an enumerated offense under section 948.03, Florida Statutes, and thus the trial court could not impose sex offender probation. *Id*. at 561. The appellate court agreed. *Id*.

In deciding the appropriate remedy, the *Snow* court acknowledged that a trial court is permitted to impose selected sex offender probation conditions as special conditions of probation as long as they reasonably relate to the defendant's conviction. *Id.* (*citing Villanueva v. State*, 118 So. 3d 999, 1002-04 (Fla. 3d DCA 2013)). However, if the court is going to do so, the law requires that it orally pronounce each special condition at sentencing. *Snow*, at 561. The *Snow* court noted that the trial court's written order contained all of the conditions of sex offender probation listed in the statute, but it only orally pronounced a few at sentencing. *Id*. Therefore, the First District determined that on remand, the trial court must strike the sex offender conditions it had not pronounced at sentencing. *Id*. at 562. Upon remand from this Court, the First District again dictated: "In addition, as explained in our original opinion, we reverse and remand with directions that the trial court strike those special conditions of sex offender probation not orally pronounced at sentencing." *Snow v. State*, 193 So. 3d 1091, 1091 (Fla. 1st DCA 2016).

4. The Fourth District Incorrectly Found that Pronouncing "Sex Offender Probation" at Sentencing, Where Sex Offender Probation is not Mandatory, Satisfies Due Process.

The *Levandoski* Court held that a trial court's oral pronouncement that it is imposing "sex offender probation" meets the due process notice requirement. 217 So. 3d 215, 219 (Fla. 4th DCA 2017). To the contrary, pronouncing "sex offender probation" does not provide sufficient notice of which conditions apply. The Fifth District recently addressed this lack of specificity in ordering "sex offender probation" for a defendant not convicted of any enumerated offense in section 948.30:

> The one-size-fits-all probation order at use here impermissibly required Appellant to decipher which of the conditions apply by, among other things, researching particular statutes to determine if they apply to his circumstances. This does not give fair notice of what is expected of Appellant. *See Lawson v. State*, 941 So. 2d 485, 489 (Fla. 5th DCA 2006) (probation order should give fair notice of conduct that might result in violation).

Nero v. State, 216 So. 3d 780, 780-81 (Fla. 5th DCA 2017).

A defendant convicted of a section 948.30 enumerated offense can read the statute and determine which conditions of probation apply. But probationers like Levandoski are left without such guidance.

Levandoski's probation paperwork includes:

SPECIAL CONDITIONS

(1) You will not own or possess any computer or other electronic device that provides access to the internet.

(2) You are prohibited from having an email address or any other similar address used to receive electronic mail.

(3) You will report in person to the probation office within twenty-four hours of you release.

R 82. Followed by:

AND, IF PLACED ON PROBATION OR COMMUNITY CONTROL FOR A SEX OFFENSE PROVIDED IN CHAPTER 794, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, COMMITTED ON OR AFTER OCTOBER 1, 1995 YOU WILL COMPLY WITH THE FOLLOWING STANDARD SEX OFFENDER CONDITIONS, IN ADDITION TO THE STANDARD CONDITIONS LISTED ABOVE AND ANY OTHER SPECIAL CONDITIONS ORDERED BY THE COURT:

EFFECTIVE FOR PROBATIONER OR COMMUNITY CONTROLLEE WHOSE CRIME WAS COMMITTED ON OR AFTER OCTOBER 1, 1997, AND WHO IS PLACED ON COMMUNITY CONTROL OR SEX OFFENDER PROBATION FOR A VIOLATION OF CHAPTER 794, s. 800.04, s. 827.071, s.847.0135(5)or s. 847.0145, IN ADDITION TO ANY OTHER PROVISION OF THIS SECTION, YOU MUST COMPLY WITH THE FOLLOWING CONDITIONS OF SUPERVISION:

(29) **Effective for an offender whose crime was committed on or after July 1, 2005, and who are placed on supervision for violation of chapter 794, s. 800.04, s. 827.071, or s. 847.0145,** a prohibition on accessing the Internet or other computer services until a qualified practitioner in the offender's sex offender treatment program, after a risk assessment is completed, approves and implements a safety plan for the offender's accessing or using the Internet or other computer services.

(30) **Effective for offenders whose crime was committed on or after September 1, 2005,** there is hereby imposed, in addition to any other provision in this section, mandatory electronic monitoring as a condition of supervision for those who:

- Are placed on supervision for a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older; or
- Are designated as a sexual predator pursuant to s. 775.21; or
- Has previously been convicted o f a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older.

(31) **Effective for offenders who are subject to supervision for a crime that was committed on or after May 26, 2010,** and who has been convicted at any time of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses listed in s.943.0435(1)(a)1.a.(I), or a similar offense in another jurisdiction, against a victim who was under the age of 18 at the time of the offense: the following conditions are imposed in addition to all other conditions.

R 83-85.

The Fourth District stated that "Levandoski was on notice that the court sentenced him to "sex offender probation." But the issue is not whether he knew he was on sex offender probation. The issue is whether he received sufficient notice of the conditions he was required to follow if he did not want to violate his probation. Other than for the three orally pronounced special conditions,

Levandoski would have to read the "sex offender probation" statute to determine what his conditions of probation are. But there is no statute called "sex offender probation." Section 948.30 is titled: "Additional terms and conditions of probation or community control for *certain* sex offenses" (emphasis added). The title indicates that not every condition applies to every sex offender.

Reviewing section 948.30 for statute-specific references would not provide Levandoski with notice of which conditions of probation he is required to follow. For example, reading 948.30(1), (2), and (5), Levandoski would see that it applies to those convicted of 847.0135(5) – not those convicted for a violation of a chapter 847 offense and not those convicted under section 847.0135 – only 847.0135(5). He was convicted of 847.0135(3) and (4). A reasonable reading of this statute would tell Levandoski that 948.30(1), (2), and (5), do not apply to him because they specifically exclude his offenses. Additionally, section 948.30(4) states that it applies to probationers that committed their crime on or after May 26, 2010. Levandoski's crimes occurred in 2009. He would reasonably believe that subsection (4) does not apply to him. At best, it would be unclear which subsections he is to comply with.

Additionally, reviewing section 948.30 for conduct or fact-specific references would not provide Levandoski with notice of which conditions of probation he is required to follow. Section 847.0135(3) and (4) punish conduct

where the offender believes the victim to be a child, even when the "victim," as was the case here, is an undercover police officer. But section 948.30(1), (3), and (4), have conditions that apply where the victim was under the age of 18 or 15. While the fact that Levandoski's victim was not actually 15 years old does not negate his guilt, does it prevent these age-specific conditions of probation from applying to him? A reasonable reading of these subsections would tell Levandoski that they do not apply to him because they do not include victims believed to be a child. At best it would be unclear whether he was to comply with these conditions.

With the exception of the three orally pronounced special conditions of "sex offender" probation, the probation order here impermissibly required Levandoski to decipher which of the conditions apply by researching statutes and making assumptions based on fact-specific conduct to determine if they apply to his circumstances. This does not give fair notice of what is expected of him if he wishes not to violate probation. The Fourth District's conclusion that announcing "sex offender probation" constitutes sufficient notice is wrong. The *Snow* court's holding that special conditions of sex offender probation must be orally pronounced is in line with this Court's requirement that any special condition of probation must be orally pronounced in order to comport with due process.

5. *The Portions of Levandoski's Sentence that Consist of Conditions of Sex Offender Probation not Orally Pronounced at Sentencing are Illegal*

Here, Levandoski does not qualify as one of the specified offenders in section 948.30, as his convictions were for violations of sections 847.0135(3)(a) and 847.0135(4), Florida Statutes (2009). Thus, if the trial court wanted to impose conditions of sex offender probation, it was required to orally pronounce each condition as a special condition of probation. Those conditions imposed which were not orally pronounced at sentencing render his sentence illegal.

POINT II

ON REMAND THE TRIAL COURT MUST STRIKE THE SPECIAL CONDITIONS OF PROBATION NOT ORALLY PRONOUNCED AND MAY NOT REIMPOSE THEM.

Background

Because the Fourth District Court of Appeal determined that announcing "sex offender probation" was sufficient to impose conditions of sex offender probation as special conditions of probation, it did not address Levandoski's argument that upon remand, the trial court must strike the conditions imposed that it did not orally pronounce. To reimpose any previously un-announced special conditions would violate double jeopardy.

Standard of Review

Whether imposing special conditions of sex offender probation on remand violates double jeopardy and due process rights involves a pure question of law. *See Trotter v. State*, 825 So. 2d 362, 365 (Fla. 2002). Therefore, the standard of review is *de novo. Id.*

Argument

Levandoski maintains that it would violate his double jeopardy rights to allow the trial court to impose any special condition of probation the court did not orally pronounce at sentencing. This Court held: "where a sentence is reversed because the trial court failed to orally pronounce certain special conditions of probation which later appeared in the written sentence, the court must strike the

unannounced conditions and cannot reimpose them upon resentencing." *Young v. State*, 699 So. 2d 624, 625 (Fla. 1997) (*quoting Justice v. State*, 674 So. 2d 123, 126 (Fla. 1996)).

This is the remedy the First District in *Snow v. State*, 157 So. 3d 559, 561 (Fla. 1st DCA 2015), imposed. After finding the defendant's sentence illegal as the trial court did not orally pronounce the special conditions of sex offender probation, it determined that on remand, the trial court must strike the sex offender conditions it had not pronounced at sentencing. *Id*. at 562. Double jeopardy principles prevented the court from imposing them at resentencing. *Id*. Upon remand from this Court, the First District again dictated: "In addition, as explained in our original opinion, we reverse and remand with directions that the trial court strike those special conditions of sex offender probation not orally pronounced at sentencing." *Snow v. State*, 193 So. 3d 1091, 1091 (Fla. 1st DCA 2016).

The Fourth District did the same in *Parkerson v. State*, 163 So. 3d 683, (Fla. 4th DCA 2015). There, the defendant's order of probation contained a handwritten notation that "sex offender conditions apply," which the trial court did not orally pronounce. *Id*. Because he was not convicted of an enumerated sex offense, any of the sex offender probation conditions were necessarily "special conditions" requiring oral pronouncement. *Id*. The court, found that the trial court was required to strike the special conditions not orally pronounced. *Id*.

More recently, the Fifth District in *Stapler v. State*, 190 So. 3d 162 (Fla. 5th DCA 2016), held that double jeopardy did not prevent the trial court from reimposing sex offender conditions of probation as special conditions of probation. At the defendant's initial sentencing hearing, the trial court imposed "'sex offender probation with all the standard conditions' under section 948.30" believing it was required to as it had designated him a sexual offender. *Id*. at 165. The trial court then granted his rule 3.800(b)(2) motion to strike the sex offender conditions of probation because he had not been convicted of one of the enumerated offenses that mandated the conditions. *Id*. However, the trial court then reimposed several of the sex offender conditions which were related to his conviction. *Id*. On appeal, the defendant argued that reimposing these conditions violated his double jeopardy rights. *Id*. The Fifth District concluded otherwise:

> We likewise find that there was no double-jeopardy violation because reimposing some of the previously imposed sex-offender conditions did not constitute an enhancement of the conditions of Stapler's probation. The trial court's order effectively struck several conditions already imposed and narrowed others to more properly relate to the convicted offense.

Id.

Similarly, in *Arias v. State*, 65 So. 3d 104, 105 (Fla. 5th DCA 2011), the Fifth District reversed the portion of the defendant's sentence that imposed the sex offender conditions set forth in 948.30. *Id*. The Fifth District stated that the trial

court, upon resentencing, could impose a term of probation with or without special conditions that relate the defendant's conviction. *Id*. at 104-05.

The facts in *Stapler* differ from those in Levandoski's case because there the court pronounced "sex offender probation *with all the standard conditions*" (emphasis added). Here, the trial court only stated "sex offender probation" and did not indicate that every standard condition under section 948.30, Florida Statutes, applied. Additionally, the trial court then went on to pronounce specific conditions of sex offender probation. The *Arias* opinion does not mention whether the trial court had orally pronounced any of the illegal sex offender probation conditions when it first imposed them. Double jeopardy prohibitions prevents the trial court from imposing on Levandoski additional special conditions of probation on remand.

CONCLUSION

This Court should find that any special condition of sex offender probation the trial court intends to impose must be orally pronounced at sentencing and quash the Fourth District's opinion holding that oral pronouncement of "sex offender probation" is sufficient notice as to the specific conditions imposed. Upon remand, this Court should direct the trial court to strike every special condition of probation not orally pronounced at sentencing, and that double jeopardy prohibits imposing any additional special conditions of probation.

CERTIFICATE OF SERVICE

I certify that this brief has been electronically filed with the Court and a copy of it has been served to Allen Geesey, Assistant Attorney General, office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 9th day of August, 2017.

/s/ Joshua LeRoy
Joshua LeRoy

CERTIFICATE OF FONT

I certify that this brief was prepared with 14 point Times New Roman type in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Joshua LeRoy
Joshua LeRoy