

IN THE SUPREME COURT OF FLORIDA

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JUN 14 1985
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THOMAS RAYMOND HANKEY,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 66,320

PETITIONER'S REPLY BRIEF
ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
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ATTORNEY FOR PETITIONER

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TABLE OF CITATIONS

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Mischler v. State
458 So.2d 37 (Fla. 4th DCA 1984)

1,2

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PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

POINT I

A TRIAL COURT CANNOT PROPERLY SUPPORT A DEPARTURE FROM THE GUIDELINES ON THE FACTOR OF ECONOMIC AND EMOTIONAL TRAUMA TO THE VICTIM WHERE NO EVIDENCE WAS PRESENT SHOWING THAT THE CRIME WAS COMMITTED IN A REPUGNANT OR ODIOS FASHION.

The respondent contends in the answer brief that the application of the standard adopted by the fourth district court in Mischler v. State, 458 So.2d 37, 38,40 (Fla. 4th DCA 1984), would promote emotionalism and should thus be avoided. (Respondent's Answer Brief on the Merits, pp. 3-4) Then, the state engages in the very emotionalism it decries on pages 5-6 of its brief in an attempt to justify the departure.

The petitioner submits that the standard announced in Mischler, supra, is very workable and would provide objectivity into the decision on whether the facts of the particular case warrant departure. The same type of standard has provided objectivity in the imposition and review of the death penalty. The Mischler Court itself used an analogy to death penalty cases in considering the departure issue. Mischler, supra at 38.

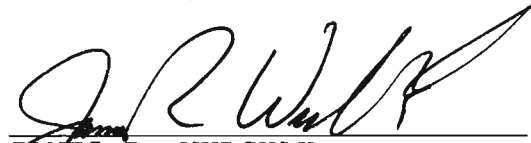
The respondent urges, as did the trial court, that the offense had a severe economic and emotional impact on the victim. (Respondent's brief, p. 6) As noted in the petitioner's initial brief, no evidence, aside from the amount of money taken, was presented to support any economic or emotional injury. The trial court's blanket assertion of emotional trauma is thus unsupported by the record and must, therefore, be stricken as a reason for departure.

CONCLUSION

BASED UPON the cases, authorities and policies cited herein and in the initial brief on the merits, the petitioner requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal in this cause and remand for resentencing with appropriate instructions.

Respectfully submitted,


JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, FL 32014 and Mr. Thomas R. Hankey, Inmate No. 092561-042, Putnam C. I., P. O. Box 278, E. Palatka, FL 32031 on this 12th day June, 1985.



JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
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