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IN THE
SUPREME COURT OF FLORIDA

MARJORIE O. DAVIS, Petitioner,	)	
vs.	)	CASE NO.: 69,019
STATE OF FLORIDA, Respondent.	)	

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

This is an appeal from the Circuit Court of Clay County, Florida, from a "guideline" sentence of forty (40) years imprisonment based upon a plea of guilty to the charge of Second Degree Murder. References to the Record on Appeal will be by the designation "R" with further reference to each volume and page thereof. Emphasis is added unless otherwise indicated. All references to the parties will be by their name or by their position in the trial court. Also, Petitioner's MOTION FOR ENLARGEMENT OF RECORD filed with the District Court of Appeal and that Court's Order thereon dated September 9, 1985, is provided herewith as Appendix to the Brief. References to the Appendix will be by the designation "App." with further reference to the page thereof.

ARGUMENT

THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINE RANGE BY RELIANCE ON INVALID REASONS AND BY REASONS NOT SUPPORTED BY THE EVIDENCE.

The State's "Brief of Appellee" has taken substantial liberty with Petitioner's position before this Court. Inexplicably, the State argues that the first of Mrs. Davis' two "major points" is her effort "to persuade this Court that she was temporarily insane, and, therefore, not really guilty of anything". (Brief of Appellee at page 8.) Such statement wholly mischaracterizes Petitioner's "sanity/insanity" position before this Court.

The trial court's original narrative Order setting forth it's reasoning for going outside of sentencing guidelines is based in part upon the defendant's "sanity". Obviously, the mental capacity to commit the crime is an inherent element of the crime and cannot be used as a basis for departure.

State v. Mischler, 488 So.2d, 523 (Fla. 1986) has been construed by the First District Court of Appeal to create a per se reversible error rule with three categories of reasons for guideline departures, including the use of an inherent component of the crime. Rousseau v. State, 489 So.2d, 820 (1st DCA 1986).

If such construction is, indeed, correct, then independent of Petitioner's other arguments, reversal is mandated.

There has been no effort before this Court to

reinitiate debate over the Defendant's "legal" sanity. Rather, her position is and has been a challenge to the 23 year upward departure from the maximum penalty permitted under the guidelines.

In its selective statement of the case and facts, the State reports "in open Court, the State filed its written argument in support of a statutory sentence on April 30, 1985. (R., 293, 294). The defense never contended (in the First District) that it did not see this memorandum". (Brief of Appellee, page 5). Of course, this is simply inaccurate. The Petitioner has provided herewith as Appendix her Motion for Enlargement of Record filed with the First District where undersigned counsel notified that Court that he had found the above referenced pleading <u>for the first time</u> in the Record on Appeal. This Motion for Enlargement of Record was granted without opposition or response from the State. There was further reference to the State's failure to serve this pleading in the Petitioner's "Reply Brief of the Appellant (at page 4) filed with the First District Court of Appeal. And, as previously noted, there was no signature or Certificate of Service shown on this two-page pleading. Though the arguments presented by this pleading roughly correlate with the trial court's written Order, the Defendant had no notice of such pleading or opportunity to respond to the positions advanced thereby.

Further, in the State's "Brief of Appellee" (at page 5) it is reported that "the Court imposed a sentence of 40

years, listing four grounds for departure:

1. The cold blooded nature of the offense;

2. The abuse of trust;

3. The presence of the victim's young son; and

4. The Defendant's sanity."

The trial court did not "list" or "delineate" the grounds for departure as required by the rule. Rather, the trial court offered a narrative or discursive statement of its reasons for departure, from which the District Court of Appeal gleaned or culled those four reasons listed by counsel for the State. Such form makes it difficult for this or any Court to determine what portions of the narrative are relied upon for departure and which portions are simply descriptive of the scenario. And, the previous criticism or disapproval of this practice (see e.g. Campos v. State, 488 So.2d, 677 (Fla. 4th D.C.A. 1986) may have now matured into an outright prohibition in light of the recently decided Casteel v. State, Case No. 68,260 (Fla. December 11, 1986). In Casteel, this Court amplified its previous holding in Albritton v. State, 476 So.2d, 158 (Fla. 1985) which imposed a harmless beyond a reasonable doubt standard on invalid reasons for departure. In so doing, this Court made clear that a reviewing Court "is not to substitute its judgment for that of the trial court. An appellate court must look only to the reasons for departure enumerated by the trial court and must not succumb to the temptation to formulate its own reasons to justify the departure sentence. Although a review of the record may reveal clear and convincing reasons for departure which were not

expressly cited by the trial court, such reasons should not be considered".

Here, because of the nature of the trial court's written order, the appellate court was necessarily required to comb through the sentencing order in an effort to decipher or formulate its own evaluation of the reasons to justify the departure sentence. And, if the reasons themselves must be deciphered, an assessment of their relative importance is made all the more difficult. According to Casteel, this assessment of relative importance is the fundamental process involved in applying the harmless beyond reasonable doubt standard to invalid reasons for departure.

Of those four reasons found by the First District Court of Appeal, the State apparently concedes that the Defendant's sanity is not a basis for guideline departure. The three other asserted reasons are discussed as follows:

A. Abuse of Trust. Though with some embellishment, the State's response acknowledges that the "abuse of trust" described by the trial court is nothing more or less than spousal homicide. And, contrary to the suggestion of the State, there is no acceptance of family violence implied by conviction and appropriate guideline sentence from Murder in the Second Degree.

B. Murder Cold-Blooded. The First District Court of Appeal recognized that to the extent that the trial court would base departure upon a finding of premeditation, such was in violation of Rule 3.701(d)(11) of the Florida Rules of Criminal

Procedure which prohibits departure based upon factors relating to the offense for which convictions were not obtained. However, in its Brief of Appellee, the State appears to want to re-visit this question. The plain language of that rule would seem conclusive on the issue.

In shotgun fashion and a style vaguely reminiscent of the National Enquirer or at least Mickey Spillane, the State describes a slaying for "the most absurd of reasons" and a victim who "staggered, bleeding all over his home-trying so desperately to cling to life that he died trying to call for help. We are talking about a man who not only died horribly, but did so knowing that his little boy was watching". (Brief of Appellee at page 14). It is argued that these circumstances "lend a cruel uniqueness to this offense which lets it stand apart from the "usual" second degree murder". (Brief of Appellee at page 15).

The reference to the "most absurd reasons" is apparent further instance of the State's ongoing efforts to characterize the homicide as prompted only by "money problems". It is frustrating that the State would continue to ignore the record evidence presented to the trial court both in the form of letters and live witness testimony which so totally refute and belie such characterization. Witnesses described the "Jeckyl and Hyde" nature of the decedent's personality, the recurrent pattern of emotional and quasi-sexual abuse of the Defendant by the decedent, and the submissive and giving nature of the Defendant who even the State's psychiatrist described as being the "opposite of a malingerer".

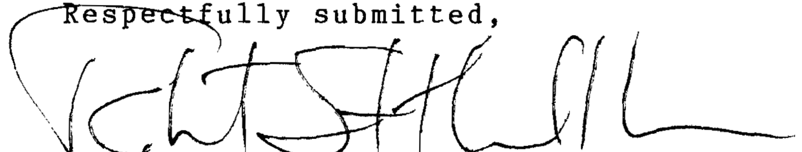
Similarly, the State radically expands and emotionalizes the facts by describing the victim as having "staggered, bleeding, all over his home", etc. And, more significantly, the description of a "man who not only died horribly, but did so knowing that his little boy was watching" is simply inconsistent with the record before this court. There is no indication that Petitioner's son even knew that the father was wounded. The record reveals only the hearsay statements of his son describing how "he saw his dad go in the kitchen and then he disappeared". (R., 4, page 533). This same distorted description is presented by the State as part of its statement of the case and facts. (Brief of Appellee at page 2).

c. Harm to Davis' Minor Son, [redacted]. This same sensationalistic expansion of the facts is offered by the State to support its arguments on the possible emotional trauma to the Davis' minor son, [redacted]. There is no evidence that [redacted] witnessed either the shooting of his father or his father's death. Indeed, even the trial court made no such finding. Rather, it described this area of concern as "wondering" aloud about the possible long-term impact there might be on this child. And, the District Court explicitly recognized that there was no evidence, let alone proof beyond a reasonable doubt, of long lasting traumatic effects on the son. In the absence of such evidence, this asserted reason cannot stand.

CONCLUSION

For the reasons expressed herein, this case should be remanded to the trial court for re-sentencing within the guidelines range.

Respectfully submitted,



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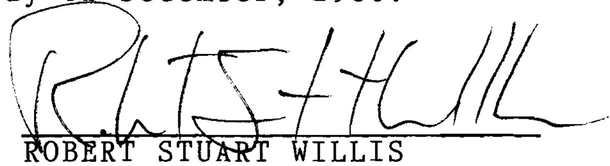
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has bben furnished to the Office of the Attorney General, State of Florida, Executive Branch, The Capitol, Tallahassee, Florida 32301, by U.S. Mail this 26 day of December, 1986.



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