IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. TRAVIS McCALL, Respondent.	)	CASE NO. 70,345

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as set forth in Petitioner's Brief on the Merits with the following additions:

In departing from the recommended guidelines sentence of 12-17 years in prison, the trial court set forth four reasons for departure:

> 1) The defendant McCall used excessive force causing the victim to die a lingering death - crushing the victims [sic] head 3 or 4 times with concrete blocks and hitting the victim in the face with a board.
>
> 2) After the victim was dead or near death, the defendant, McCall, committed sexual battery on the victim by penetrating the victims [sic] anus with a metal pipe.
>
> 3) After the victim was dead, or near death, the defendant robbed or took from the body of th victim, the victims [sic] pants and the victims [sic] wallet and over $100.00 in cash from the victim.
>
> 4) The defendant McCall fled the State of Florida to avoid prosecution and attempted to elude authorities in Kentucky prior to his capture.

(R1647-1648) On appeal, the Fifth District Court of Appeal ruled that none of the reasons for departure were valid and remanded with instructions to sentence Respondent within the guidelines. McCall v. State, 503 So.2d 1306 (Fla. 5th DCA 1987).

STATEMENT OF THE FACTS

Respondent generally accepts the Statement of Facts as set forth by Petitioner with the following clarifications:

The medical examiner, Dr. Winter, testified that the victim suffered three major lacerations to his head and several other lacerations to his face and head. (R961-962) These were consistent with blows from concrete blocks and wooden two-by-fours. (R968-969) The cause of death was multiple injuries to the head resulting in skull fractures and brain injuries. (R969) The victim died immediately. (R981) The victim had a five inch perforation of the anus consistent with having been sodomized with a mop handle. (R970,972) This occurred while the victim was near death or, more probably, after death. (R971,989)

Petitioner has taken part of the medical examiner's testimony completely out of context. Dr. Winter did testify as follows: ". . . I do not recall ever having seen this severe degree of fracture of the skull from a skull falling onto a hard object. This is a tremendous impact force." (R980) This statement, however, was a direct response to a question by defense counsel which suggested that the injury to the back of the victim's skull was caused when he fell to the ground and struck his head on a rock. (R980) When reviewed in the proper context, the medical examiner is stating only that the impact of the blow was greater than that caused by a mere falling, thereby ruling out the possibility that the injury may have been accidental.

SUMMARY OF ARGUMENT

In the context of a homicide case, where the object of the defendant's actions is to effect the death of the victim, the use of excessive force may never be a valid reason for departure from the recommended guidelines sanction. This is so because all murders involve the use of excessive force. Additionally excessive force virtually always results in victim injury which is already scored on the guidelines scoresheet.

If excessive force can be a reason for departure, guidelines must be established. This Court must rule that before such a reason may be upheld, the state has the burden of showing additional acts accompanying the murder or occurring prior to the actual infliction of the death blows which serve to set that murder apart from the norm of all homicides. Such additional acts cannot include acts which occur after the death of the victim.

The decision of the Fifth District Court of Appeal sub judice is a correct statement of law and must be approved in all respects.

ARGUMENT

EXCESSIVE FORCE IN THE INSTANT CASE IS AN IMPROPER REASON FOR DEPARTURE.

It must first be noted that the reason stated by the trial court for departure is as follows:

> 1. The defendant McCall used excessive force causing the victim to die a lingering death - crushing the victims [sic] head 3 or 4 times with concrete blocks and hitting the victim in the face with a board. (R1647)

Petitioner has altered the trial court's reason and now characterizes it as "excessive brutality". (Brief of Petitioner, page 6) Respondent asserts that these terms are not interchangeable. Brutality implies torture or conditions precedent to the actual infliction of the death-causing blows. It is clear from the trial judge's order of departure, that the "excessive force" to which he referred was nothing more than "weapons" used to effect the victim's death. Respondent contends that Petitioner's subtle mischaracterization of the court's reason for departure cannot be overlooked.

Turning to the merits of the issue, Petitioner argues that the holding of the Fifth District that "excessive use of force cannot be a valid reason for departure where death is the result of the criminal act for which the defendant was convicted" is incorrect. Respondent asserts that this holding is indeed correct. Every murder necessarily implies that excessive force is going to be used. In the instant case, Respondent utilized an "unusual" weapon to effect the victim's death. However, the victim is no more dead from these three of four blows to the head

than he would have been had Respondent used a more conventional weapon. Therefore, no showing of "excessive" force was made. Rather, Respondent utilized only that much force necessary to effect the death of the victim.

By adopting such a "bright-line" rule as the Fifth District has done sub judice creates no conflict with any of the cases relied upon by Petitioner. Even under such a rule, departure would still be possible if the murder was preceded by certain acts over and above the actual act of inflicting the killing blows. Such additional acts are those which were present in Harrington v. State, 455 So.2d 1317 (Fla. 2d DCA 1984) which showed that the defendant conducted a "reign of terror" on the victim which lasted over a five to six hour period during which he savagely beat and eventually killed the victim. In the instant case, as the District Court noted, the victim was rendered unconscious, if not killed, by the first blow to his head.

In Scurry v. State, 489 So.2d 25 (Fla. 1986) the defendant was convicted of second degree murder and appealed his departure sentence. This Court found none of the reasons given to be clear and convincing, one of which was the great personal pain and injury suffered by the victim, which presumably can be equated to excessive force used. This Court stated:

> Reason five, that the victim lived and suffered for more than thirty hours before dying would imply that a defendant should make sure he does a thorough job and effects death as soon as possible in order to be sentenced within the guidelines. We find no logic here. Moreover, victim injury is a factor already taken into account by the guidelines.

Id. at 29. Clearly any murder is reprehensible whether caused by a single gunshot to the head or beating a person with a concrete block. One should not be "rewarded" with a guidelines sentence merely because he chose a "cleaner" method of execution.

Petitioner's reliance on Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) is misplaced. In Hansbrough, the defendant was convicted of first degree murder and armed robbery. As reasons for departure on the robbery count the trial court stated inter alia:

> 2. Excessive force in the homicide which occurred during this armed robbery.
>
> 3. Cruelty established by infliction of 31 stab wounds, pain and anguish of victim.

In reviewing the propriety of these reasons, this Court held:

> Insofar as the third reason, cruelty established by thirty-one stab wounds, boils down to the severe injury and death suffered by this victim, it is also valid because victim injury is not a component of armed robbery.
>
> Excessive force, reason two, has been upheld as a valid reason for departure. Jefferson v. State, 489 So.2d 860 (Fla. 1st DCA 1986); Harris v. State, 482 So.2d 548 (Fla. 4th DCA 1986); Sabb v. State, 479 So.2d 845 (Fla. 1st DCA 1985). Excessive force, however, will, virtually always, result in victim injury. Upholding this reason in this case, therefore, would be duplicitous because we have upheld reason three as a valid ground for departure.

Id. at 1087-1088. In upholding excessive force, this Court made it clear that it was permissible because it referred to victim injury which was not scored on the scoresheet. Applying this

rationale to the instant case, excessive force cannot be used as a reason for departure since Respondent was assessed points for the death of the victim on the scoresheet. (R1645-1646) To allow departure for this reason violates Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

Respondent further submits that if "excessive force" can be used as a reason for departure in the context of murder convictions, this Court must set clear guidelines. A good starting point is this Court's rulings in death cases. To allow excessive force to be considered as a clear and convincing reason for departure can be compared to a finding that a murder is heinous, atrocious and cruel as provided in Section 921.141(5)(h), Florida Statutes (1985). To be sustained, this finding must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908 (Fla. 1975) this Court refined its interpretation that this aggravating circumstance only apply to crimes especially heinous, atrocious and cruel. In Herzog v. State, 439 So.2d 1372 (Fla. 1983) this Court held the evidence insufficient to prove beyond a reasonable doubt that the murder was heinous atrocious and cruel in a situation where the female victim had been induced by the defendant to take drugs, then beaten and gagged, placed on a bed and smothered with a pillow and ultimately dragged into the living room where she was successfully strangled to death with a telephone cord. This Court stated:

> As to the manner by which death was imposed, we find that in this factual

> context the evidence is insufficient, standing alone, to justify the application of the section (5)(h) aggravating factor. We have previously stated that this factor is applicable "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim. [citations omitted]

Id. at 1380 (emphasis added).

In the instant case, there are absolutely no additional acts to set the instant case apart from all other homicides. Indeed, Petitioner points only to the actual weapon used, that being concrete blocks and a stick. However, it is important to note that the medical examiner testified that any one of the blows to the skull was sufficient to render the victim unconscious and that death occurred instantaneously. (R981,988) Therefore, the trial court's finding that the victim died a lingering death has no basis in the record. Even if it did, this would be insufficient to support a finding of excessive force. An enlightening case on point is Rembert v. State, 445 So.2d 337 (Fla. 1984). Rembert beat his victim with a stick between one and seven times. The victim did not immediately lose consciousness. In fact, the victim lingered several hours before dying of severe injuries to the brain. On appeal this Court held that while the murder was reprehensible, it did not meet the test for finding that it was heinous, atrocious and cruel.

In a search for "additional acts" to set the instant case apart from the norm of murders, Petitioner points to the fact that the victim was sodomized with a broomstick. Clearly,

if the victim was still alive when this occurred, a sexual battery was committed. Since Respondent was never convicted of sexual battery, this act cannot be used as a reason for departure. Rule 3.701(d)(11), Florida Rules of Criminal Procedure. However, Petitioner points out that the medical examiner equivocated on this point and opined that the victim's anus was perforated after death. (Brief of Petitioner, page 10; R989) Acts done to a body after death, including mutilation cannot be used as a reason for departure. Phelps v. State, 490 So.2d 1284 (Fla. 5th DCA 1986) review denied 500 So.2d 545 (Fla. 1986). Again, it is helpful to look to this Court's decisions in death cases in this regard. In Halliwell v. State, 323 So.2d 557 (Fla. 1975) the defendant dismembered the victim's body several hours after the homicide. The trial court considered this action in determining that the murder was especially heinous, atrocious and cruel. However this Court disagreed and pointed out that once the victim dies, the crime of murder was completed and therefore the mutilation of the body many hours later was not the kind of misconduct contemplated by the legislature in providing for the consideration of aggravating circumstances. Accord Simmons v. State, 419 So.2d 316 (Fla. 1982); Blair v. State, 406 So.2d 1103 (Fla. 1981); Jackson v. State, 451 So.2d 458 (Fla. 1984); and Scott v. State, 494 So.2d 1134 (Fla. 1986). Clearly, then, the sodomization of the victim, sub judice, however despicable or grotesque cannot be considered as a clear and convincing reason for departure.

In summary, Respondent urges this Court to affirm the decision of the Fifth District Court of Appeal. In so doing, this Court should approve the holding that excessive force may never be a clear and convincing reason for departure where death is the result of the criminal act for which the defendant is convicted. In the event this Court is unwilling to draw such a bright line, Respondent urges this Court to hold that for excessive force to be a valid reason for departure in homicide cases, there must exist additional acts preceding the actual infliction of the death blows so as to set the instant homicide apart from the norm of homicides. Should this Court rule this way, Respondent urges this Court to still affirm the Fifth District in the instant case, since such additional acts are not proven.

CONCLUSION

Based on the foregoing reasons and authorities, Respondent respectfully requests this Honorable Court to affirm the decision of the Fifth District Court of Appeal sub judice in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Ave., 4th Floor, Daytona Beach, FL 32014, in his basket at the Fifth District Court of Appeal and mailed to Travis McCall, #099810, Baker Correctional Institution, P.O. Box 500, Olustee, FL 32072, on this 13th day of October 1987.

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