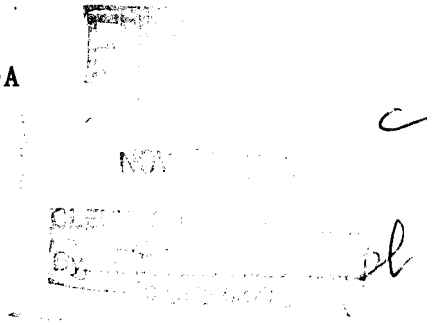
IN THE
SUPREME COURT OF FLORIDA



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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

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

BRIEF OF PETITIONER

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. By the Order of the First District Court of Appeal dated September 9, 1985, the Record On Appeal was enlarged to include the Defendant's sentencing memorandum provided to the trial court. Also, the original Opinion of the First District Court of Appeal and the subsequent Opinion which denied rehearing are provided as appendix to

this Brief. References to the appendix will be by the designation "App." with further reference to the page thereof.

STATEMENT OF THE CASE AND FACTS

On September 24, 1984, the Defendant, Marjorie Oertel Davis, aged thirty, was arrested on an "open" charge of Murder in connection with the shooting death of her husband on that date. She was subsequently indicted for Murder in the First Degree. As related by the Affidavit In Support Of Probable Cause (R., Vol. I, p. 4) the decedent, John Davis, was shot several times while asleep in his bed.

At the time of the shooting, the Defendant's minor son, Christopher, was asleep in his own bedroom, down the hall from the master bedroom where the shooting took place. (R., Vol. II, pp. 297, 319).

Following the shooting, the decedent moved from the bedroom to the kitchen where he died. After having been advised of her "Miranda" warning, Ms. Davis made a voluntary statement admitting her involvement in the death. Circumstances of the homicide and her statement are further described as part of the Presentence Investigation Report (R., Vol. II, pp. 297-301).

On November 9, 1984, the Defendant interposed her notice of intent to rely on the defense of Insanity. She was subsequently seen by Dr. Lois Veronen, a psychologist with extensive background in "battered spouse syndrome". Though Dr. Veronen found that Ms. Davis did

not meet the criteria for that syndrome, she did find that, in her opinion, Ms. Davis was legally insane at the time of the commission of the offense. (R., Vol. I, pp. 169, 176-178). Ms. Davis was also seen by Dr. Robert McDonald, a psychiatrist who practices in Atlanta, Georgia. He too found that Ms. Davis was legally insane at the time of the commission of the offense. (R., Vol. II, p. 210). And, in accord with revelations made by Ms. Davis after her arrest, each of these experts found substantial evidence of prior sexual abuse involving her husband. (R., Vol. II, p. 241, and Vol. I, p. 143).

At the request of the State, Ms. Davis was also seen by Drs. Barnard and Carrera, psychiatrists, and Dr. Russell Bauer, a psychologist. Drs. Barnard and Carrera each concluded that the Defendant was not legally insane. Dr. Bauer agreed with that finding, but, also found that the objective test results were very typical of persons with chronic marital and sexual difficulties. (R., Vol. I, p. 104). He also found these scores to reflect "a significant amount of familial tension, a tendency to perceive males as authorities who are met deferentially, and a personal sense of dissatisfaction and alienation manifested by a relatively strong need to 'get away' and 'think things over'". (R., Vol. I, pp. 105-106).

Significantly, he also found that Ms. Davis had a tendency to understate her problems, to be "the opposite of a malingerer". (App., p. 5).

On March 22, 1985, the State and the Defendant entered into a plea agreement providing generally that the Defendant would enter a plea of guilty to the charge of Second Degree Murder. And, as to a second Information to be filed, enter a plea of guilty to the Use Of A Firearm During The Commission Of A Felony in violation of Section 790.07(2) with a negotiated sentence to be imposed on this count of fifteen (15) years probation consecutive to any period of incarceration imposed as to the charge of Second Degree Murder. (R., Vol. II, p. 268).

A sentencing hearing was held on April 30, 1985. At this hearing, the State called the decedent's brother, Tom Davis, as the only witness in aggravation. Indeed, ostensibly, the State presented no argument seeking a sentence outside the guidelines saying only "we would at this point just defer to the Court for purposes of sentencing". (R., Vol. IV, p. 593). However, upon preparation of the Record On Appeal, the Defendant discovered for the first time a two page pleading styled STATE'S ARGUMENT FOR JUSTIFICATION OF THE COURT TO GO OUTSIDE OF SENTENCING GUIDELINES" which was apparently filed on April 30, 1985. This document bears no signature

or certificate of service inasmuch as it was never served on undersigned counsel. (R., Vol. II, pp. 293-294).

Ms. Davis called six witnesses on her behalf. The particulars of their testimony will be discussed in the context of the specific issues to which they relate. In addition to these witnesses, friends, neighbors, co-workers and other acquaintances submitted literally hundreds of letters attesting to the exemplary background, character, and disposition of the Defendant. Many of these letters are included in the Record On Appeal. (R., Vol. II, pp. 334-389; Vol. III, pp. 390-496). The court also received several letters from members of John Davis' family. (R., Vol. III, pp. 501-513).

The "guideline" sentencing range was twelve (12) to seventeen (17) years. The court imposed a sentence of forty (40) years imprisonment. In support of this twenty-three (23) year departure from the sentencing guidelines, the court filed its COURT'S REASONING FOR GOING OUTSIDE SENTENCING GUIDELINES AND IN ADDITION REMARKS CONTAINED IN THE RECORD AT TIME OF SENTENCING. (R., Vol. II, pp. 325-331). For ease of reference, this document is set forth as follows:

> "This defendant was indicted by the Grand Jury on 1st Degree Murder. A very simplified definition of this crime is the premeditated killing of a human being. This crime is not subject to the sentencing guidelines and is punishable by death or life without parole for twenty-five (25) years.

The State has allowed the defendant to enter a guilty plea to 2nd Degree Murder. A very simplified definition of 2nd Degree Murder is the unlawful killing of a human being by an act imminently dangerous to another and evincing a depraved mind regardless of human life.

This crime is subject to the sentencing guidelines. The range of punishment by statute is probation to life but of a term of years not to exceed 40 years.

In order to establish the proper score of this defendant on the sentencing guidelines score sheet and to develop the full background of the crime, the defendant, and the victim, a P.S.I. was ordered by the Court. The sentencing guidelines show a range of sentence from 12 years to 17 years. The Court has the option of going either under or over the guideline sentence, upon stating clear and convincing reasons for doing so in writing.

For this reason the Court has spent considerable time reviewing the P.S.I. The Court has also read thoroughly all psychiatric and psychological reports and depositions. In addition, the Court had available to it the summary investigation report of Investigator Tim Martin that the Court was required to read in order to rule on a pre-trial motion filed by the defendant. This report contains the statements and confessions of the defendant made to Lt. Derry Dedmon. In addition to the above, the Court has read the written facts submitted by the State at the time of the acceptance of the defendant's guilty plea.

A murder involving spouses is always a difficult crime to understand. Our society today is increasingly seeing violent crimes involving family members. There seems to be a certain acceptance within our society as this being a viable alternative to solving family problems. This is true even though the law has, within my time at the bar, responded to the increased family tensions displayed in society. Family law has been one of the fastest changing areas in the law within recent years. We have gone to no-fault divorce; proper person filing

for injunctions, with mandatory immediate hearings in domestic violence cases and increased crime and penalties in spouse abuse cases. So it cannot be said that the courts have not responded to family violence that has been ocurring in our society.

A main concern now has to be: 'Are we as a society going to accept family violence as a norm?'

Having devoted my entire adult life to the law, either by study, practice or service in the Judiciary, I cannot accept a YES answer. To do so would attack the very cornerstone of our society. It would say loud and clear, 'We are no longer a people under the law in our family relationships!'

With that background this has been an extremely difficult murder to understand. The facts of what happened between this husband and wife can be learned from the defendant only.

She relates in her statement to Lt. Dedmon that she has been considering divorce or something for a period of months. This was brought about by her husband's unhappiness with his job. This caused him to relate to his wife his unhappiness, by her account almost nightly. Then, finances became a problem. This is not unusual in family disintegration, in fact, it is true in most such situations. The financial problem was caused in part by the wife's business of distributing Shaklee Products. She evidently wasn't doing as well in sales of the product and had used the family savings for inventory.

Financial problems had reached a climax in that the husband had found out that the Visa card was overdrawn when he was refused service on it and he had begun to ask questions about the family's savings account which was supposed to be in the neighborhood of $12,000.00. Ms. Davis knew that this account had been drawn down to a little over $50.00. The Saturday before the murder, Sunday night or Monday morning, Ms. Davis stated she contemplated killing her husband that day but the opportunity did not arise. On Sunday, September 23, 1984, she

related they went to bed but she did not sleep. At 1:32 A.M. she decided she would get the gun from the sewing bag next to the refrigerator in the kitchen. At that time she could not get up the nerve to get it, went to the bathroom and went back to bed. At 1:42 A.M. she went into the kitchen and got the gun from her sewing bag where she had placed it. She then stood for a few minutes at the doorway of their son's bedroom, looking into the master bedroom from the doorway. Again, she relates that at 1:52 A.M. she began standing at the side of the bed with the gun in her hand and until 2:00 A.M., she stood there trying to think of a way not to kill him. But, and I quote,

> 'I could not think of any way to quickly pay off the debts and knew John would definitely call Burroughs Federal Credit Union and tell them to transfer funds from our savings account to pay the $1,600.00 Visa bill, and they would tell him we only have $58.00 in the account, not the $12,000.00 he thought we had and that I had been lying to him that we had, but didn't. These eight minutes were the longest, most terrible minutes ever.'

At 2:00 A.M. she fired a shot, her husband jerked up and screamed, 'Oh, my God!', several times. She then fired five additional shots. Even with this, she did not instantly kill her husband but he left the bedroom, wandered into the hallway and died in the kitchen trying to phone for help. At this time Ms. Davis was outside, sitting on the tailgate of a pick-up truck and could easily see her husband in need of assistance, had she desired that he not die.

From the above facts, this Court can reach no conclusion other than this murder was cold-blooded and abused the trust that must be exhibited by spouses to each other.

The Court can't help but wonder about the young boy in the next bedroom, who must have heard this volley of shots sounding out in his home in the middle of the night. Did this wake him up? Did he see his mother running out of

the house with the smoking gun in her hand? Did he come out in the hallway and see his father with blood gushing out of him, attempting to telephone for help? What scars will this child carry with him for the rest of his life any time he thinks of this fateful evening in his home?

The defendant's very able counsel had her examined by a psychiatrist and a psychologist and both have found that under the applicable legal rules, this defendant is not insane. In relating the events that led up to this to the five mental health specialists who examined her, the defendant undertakes to put forward a picture of verbal and sexual abuse. Her own expert witnesses testify that she does not present a consistent picture of a person who is subjected to sexual abuse. The most interesting comment by any of the mental health experts is found in the testimony of Dr. Lois J. Veronen on Page 55, which states as follows:

> 'Q: Okay. So you're basically saying that Marjorie could, put in the same circumstances, do the same thing again?
>
> A: In the circumstances, yes, Yes.'

Balanced against this is a flood of letters from people who have known Ms. Davis for varying periods of time. The theme of all of them is essentially the same, that she is a fine lady, extremely helpful to others and that they cannot understand the reasoning for her killing her husband. The Court has the same problem. The only way to reconcile the facts of this case and the impressions of Ms. Davis of those who knew her is to observe that we seldom know our fellow human beings. Throughout this ordeal, with all who she came in contact, her demeanor while presenting history of herself, her affect was shallow and interpersonal warmth was minimal. She was quite controlled and intellectualized. The only agitation and pressure that was reported by any of the professionals was when she spoke about her relationship with her mother and was associated with much angry affect.

For the above reasons, which to this Court are clear and convincing, the Court does not

feel that a sentencing guideline sentence is appropriate in this case."

From the sentence imposed, the Defendant has since timely filed and prosecuted her appeal.

SUMMARY OF ARGUMENT

The Defendant in this cause, Marjorie O. Davis, is thirty years old without prior history of violence or criminal activity of any kind. Moreover, very substantial evidence was offered demonstrating the extraordinarily positive nature of the Defendant's character. And, this homicide involving the shooting death of her husband was certainly not of an unusually cruel or heinous nature nor were there other factors justifying a sentence of forty (40) years as opposed to a presumptive guideline range of twelve (12) to seventeen (17) years.

Accordingly, the Defendant on appeal challenges the propriety of that sentence.

The reasons relied upon by the trial court for departure from the guideline sentencing range are not clear and convincing as required by Florida Rule of Criminal Procedure 3.701. Instead of an enumeration or "delineation" as required by the rules, the trial court offered a discussion or narrative statement of its justification for departure. Such narrative statement has been judicially disapproved at least in part because of the difficulty an appellate court has in determining the reasons for departure.

Here, both undersigned counsel and the District Court have attempted to cull from this generalized

statement the individual reasons for the trial court's departure. There apparently are four:

(a) Abuse of trust of the family relationship. This is nothing more or less than spousal homicide. The unlawful taking of a human life, including that of a spouse, is an inherent component of the charged crime.

(b) The cold-blooded nature of the offense. This alleged basis for departure illustrates the difficulties presented by narration rather than "delineation" of the basis for departure. The trial court's remarks seem to clearly indicate its finding that the homicide was "premeditated" though the charge was reduced from Murder in the First Degree to Murder in the Second Degree. The District Court agreed that using "premeditation" as a basis for departure would be prohibited. However, the court construed the trial court's remarks to be descriptive of "the cruelty with which this crime was committed". In support of this construction, the District Court relied upon factual circumstances of the crime that are clearly inherent components of the crime. As part of its finding of cruelty, the court also pointed out that the Defendant's young son was present in the home though not actually a witness to the crime. Each of these bases have been specifically disapproved in, respectively, State vs.

Mischler, 488 So.2d 523 (Fla. 1986), and Scurry vs. State, 489 So.2d 25 (Fla. 1986).

(c) Possible harm to Ms. Davis' son, Christopher. At the time of the shooting, the Defendant's five year old son was asleep in his own bedroom down the hall from the master bedroom where the shooting occurred. Though not a witness to the crime, the District Court approved this rationale because of the "possible long lasting traumatic effect" on the child. The only evidence before the sentencing court was that the child was doing well while living with his paternal grandparents. The sentencing court merely "wondered" out loud to what extent the child had witnessed the events of that night and/or suffered any long-term traumatic effect therefrom. Though the facts before the court belied such concerns and there was no proof, certainly not proof beyond a reasonable doubt that there was any long-term traumatic effect, the trial court asserted and the District Court approved this as a basis for departure.

(d) The trial court's fourth reason, the Defendant's sanity and absence of "abused spouse syndrome", was found invalid by the District Court. The legal capacity to commit a crime is an essential requisite to criminal responsibility for any crime, including this one. Thus, the trial court had attempted to use an

inherent component of the crime. Though the District Court recognized the invalidity of this reason, it failed to employ the per se reversible error rule this Court apparently has established in State vs. Mischler, 488 So.2d 523 (Fla. 1986), which appears to mandate reversal when such a reason has been used by the trial court as a basis for departure.

ARGUMENT

POINT I

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

Florida Rule of Criminal Procedure 3.701(d)(11) provides:

> "Departures from the guideline range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained."

Recently, in Hendrix vs. State, 475 So.2d 1218 (Fla. 1985), this Court reaffirmed the clear intent of the Rule:

> ". . . while the rule does not eliminate judicial discretion in sentencing, as respondent [State] argues, it does seek to discourage departures from the guidelines."

This Court also restated the basic premise underlying the adoption of a guideline approach to sentencing:

> ". . . the guidelines were adopted to establish a 'uniform set of standards to guide the sentencing judge' and 'to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific

> offense- and offender-related criteria and in defining the relative importance in the sentencing decision.'" [Citing to In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983)].

In the case at bar, the Defendant was originally indicted for Murder in the First Degree. However, by agreement with the State she offered a plea to the lesser charge of Murder in the Second Degree and, by agreement the presumptive guideline range was twelve (12) to seventeen (17) years imprisonment. (R., Vol. II, p. 326).

Prior to sentencing, the Defendant through her counsel submitted a letter sentencing memorandum summarizing the most prominent factors in mitigation and arguing for a sentence below the guideline range. Though the trial court apparently omitted this memorandum from the Record On Appeal, the District Court's Order of September 9, 1985, has enlarged the Record so as to allow consideration of that memorandum. It is provided herewith as an Appendix, 1-6.

The trial court also received an unusual volume of letters attesting to the truly exemplary character of the Defendant. Many of these letters were made part of the Record here. (R., Vol. II, pp. 334-389; Vol. III, pp. 390-496). These letters, most of them unsolicited, were testaments from friends, neighbors, and co-workers spanning virtually her entire lifetime both before and

during her eight year marriage to the decedent. Significantly, these letters were entirely consistent in their description of the selfless, caring and giving nature of the Defendant.

The Defendant's sentencing memorandum reviewed pre-trial discovery materials which produced very similar descriptions of the Defendant's character and demeanor. Obviously, she had no criminal record of any kind. The Presentence Investigation Report (R., Vol. II, pp. 295-319) confirmed that the Defendant had been a scholarship student in college, graduating with a degree in accounting.

There were numerous examples illustrating the extraordinary nature of the Defendant's character. She had volunteered her time to the patterning of a youngster with Cerebral Palsy. She regularly attended a class on Alzheimer's Disease so she would be better able to care for a neighbor's relative with that affliction. Conforming to her fundamental Christian beliefs, she was submissive and obedient to her husband, the decedent, even when publicly humbled by him. (App., p. 3; also see further discussion infra). The memorandum also discussed the revelations of sexual abuse which emerged after her arrest, the Jekyll and Hyde nature of the decedent's personality, and the Defendant's own inability to fully relate the nature and extent of the problems which led to

the shooting. It quoted from the pre-trial deposition of the psychologist retained by the State to examine the Defendant, Dr. Russell Bauer:

> "Q In other words, she tends to understate the degree of her own problems?
>
> A That is correct. There are other particular scales of the MMPI, which are somewhat related to that, but also give you an indication of the degree of sophistication, intelligence, the degree to which the person understands the task. And she was clearly well within normal limits on all of those. So, the only thing that I can say about a tendency to be inaccurate was, if anything, she erred in the direction of underreporting personal problems.
>
> Q Whatever the opposite of malingerer is, she's it?
>
> A Yes." (App., pp. 4-5).

The memorandum also reviewed the pre-trial psychological examinations where perhaps predictably, a psychologist and psychiatrist employed by the Defendant opined that she was insane and the State's psychiatrists and psychologist found her to be sane. Significantly, however, the State's psychologist tested her to have borderline personality disorder, embodying features of both neurosis and psychosis. The psychiatrists employed by the State limited their opinion to simply whether she met the legal criteria for insanity without offering any further insight as to possible diagnosis. (App., p. 5).

Testimony at the sentencing hearing confirmed and enlarged upon the memorandum:

Henry Cordes, a neighbor for the past five years and retired New York City police lieutenant (R., Vol. IV, p. 541) described Ms. Davis as a "quiet", "conservative person", "devoted to her husband", (R., Vol. IV, pp. 542-543) "a good wife" and "a doting mother". (R., Vol. IV, pp. 544-545). He said that he could "talk for hours" of her "good works". (R., Vol. IV, p. 543).

Joann Garrick, whose adopted son is a Cerebral Palsy victim, described the Defendant's help to her in regular weekly "patterning" sessions with the child. Asked to describe the Defendant's nature and character she replied: "To me for the years I have known her, she's a beautiful person. Unbelievable." (R., Vol. IV, pp. 548-549).

She also described her experience with Ms. Davis' husband, the decedent. Five days before the shooting, the Defendant was in Mrs. Garrick's home patterning her son when the decedent called her by phone:

> "A Right. At approximately ten o'clock, might have been a few minutes before or after. It wasn't a great time when he called but I answered the phone and he said 'Let me talk to Marjorie.'
>
> And I said, 'Can she call you back at a break?'

We were already in--we were already missing one volunteer.

He said, 'No, I want to talk to her now.'

I said, 'You can't wait?'

He said, 'No, tell her it's her GD husband.'

Q Did he swear at you?

A Yes.

Q Go ahead.

A So I called her to the phone. She talked. We didn't know what she was doing. We put Jacob on the floor and sat at the picnic table. We have a picnic table in the garage where we pattern.

A few minutes later she hung up and went in the bathroom. I went to see if she was okay. You could hear her vomiting.

She said, 'I have to go home. I'm sick.'

She was just white.

Q Prior to the time she received the phone call, did there appear to be anything wrong?

A No, she was bubbly.

Q She literally went in and--

A She was sick.

Q Did you ever see her again?

A No." (R., Vol. IV, pp. 550-551).

The next witness, Cheryl Sirmons, had been secretary to the decedent while he was employed with

Burroughs Corporation in 1982. She described how the decedent would appear to be pleasant and outgoing but would often reveal a petty and extremely vindictive side to his personality. Among his associates and co-workers, this two-sided nature to his personality earned him the nickname of "Dr. Jekyll and Mr. Hyde". (R., Vol. IV, pp. 554-558).

Asked to compare the decedent with other persons that she has known during her varied career, she replied in part ". . . I have never seen anything as near as uncomfortable as John Davis". (R., Vol. IV, p. 558).

The testimony of Beverly Stankevitc was similar. Mrs. Stankevitc is now a forestryman with the Division of Forestry. However, she had previously gotten to know Ms. Davis through the Clay County Civic Association and had also developed an interest in the Shaklee vitamin and cosmetic business in which Ms. Davis was active. (R., Vol. IV, pp. 562, 564-565).

She described how upon first meeting the decedent, she found him "very nice and gallant and considerate". (R., Vol. IV, p. 565).

However, that impression soon changed:

> "A John had two faces. He had a public face and a private face. For the outside world, he was charming and kind and considerate. But in his private life he was a totally different person and very demanding of Marjorie and [redacted] and anyone who would let him be demanding.

He had to be the sole control of every situation.

Q Did you ever in the course of either your Shaklee involvement or any other activities have occasion to witness any criticisms he offered or directed to Marjorie?

A On several occasions he would interrupt a meeting with a childish prank or criticize Marjorie or interrupt her train of thought. Sometimes she would leave the room in tears and compose herself and come back. He constantly criticized her work, how she delivered the business plan, and interrupted and got her confused and got her upset.

He constantly criticized her about the house and she couldn't control [redacted]. Just, no matter how hard Margie tried, it just wasn't good enough. She couldn't do enough to please him. She always tried and tried." (R., Vol. IV, pp. 565-566).

To further illustrate, she told of the time the Defendant had invited her over to try a new chicken soup mix that Shaklee was introducing:

"But Marjorie invited me over to try it and go over some, to show me how to do some of the business filing and things like that.

Anyway it got, it got to be around lunch time and she asked John did he want something to eat. She said she'd fix him a grilled cheese sandwich. He said no.

She came back in and talked for a while. She wanted to know if I wanted to try that soup. I told her that I would.

John came in and said, 'Where is my sandwich?'

She said, 'You said you didn't want any. You said you'd get one later.'

He said, 'No, I want one now.'

She got up and fixed him a sandwich. She came came back and she started boiling water for the soup. When it was ready, she asked John, 'Would you like to try some soup?'

He responded, 'No, I don't want any. I'm busy right now.'

She came back inside and it wasn't twenty minutes later when he came in, we had already eaten the soup, and he said, 'Where is my soup?'

She said, 'I didn't know you wanted any. I'll fix you some.'

She got up and fixed it.

Then he said, 'Oh, I don't want it now.'

So she asked [redacted] if he wanted the soup. He didn't really want it. He just wanted some juice. So she ate the soup.

Then he came back in, 'What did you do with my soup?'

And she told him, 'I didn't want to waste it so I ate it.'

'Well, you should have fixed me my lunch on time. It should have been here. I should have had it.'

You know, it was just altogether like that. Then he left. Then he called her from the garage. She got up and I heard them talking, not exactly talking, but like shouting or it was loud voices, he was using a loud voice to her.

She came back in and John had some things he wanted to do. So I said, 'Okay, I'll go on home now,' and I left.

Q Did you see that with some degree of regularity?

A Many, many times. He was demanding. Marjorie would do whatever he wanted. She would drop everything and do for him whatever he wanted done.

Then she would try to do more. Sometimes it wasn't enough. It was a constant thing. She had no real time of her own when John was in the house." (R., Vol. IV, pp. 566-568).

She also told of seeing somewhat bizarre physical/sexual conduct by the decedent:

"Q Mrs. Stankevitc, you have described events this morning to me of a sexual nature somewhat, but of a physical nature at least, that you and your husband witnessed on occasions. Would you describe those to the court?

A Yes, sir. John would come up behind Marjorie, and this was after several drinks, and we were leaving and we would be standing around talking in the living room a lot of times and this would happen before when we were ready to leave. He would come up behind Margie and pull her close to him with his arms, and he'd take his hands and grab her breasts so hard that flesh could be seen in the between his fingers and his fingers would turn white. She'd say--she would wince and say, 'John, don't do that.'

She'd try to get away from his embrace. He wouldn't let her move or go anywhere or do anything.

She would say, 'John, stop.'

Sometimes he would move his hands down into her pelvic area and just knead her stomach or just about where her pubic hairs are.

Q Was there a facial expression he had?

A He would stand behind her. He wouldn't look at her. But he would look at me and Rick standing there. He would just grin, but he'd have anger in his eyes or hate in his eyes. He would just grin at us. We would look away and get ready to leave and he'd quit. We would go home then.

Q Did that happen on more than one occasion?

A Yes, it did.

Q Can you describe how many times? Do you have any idea?

A I think about six or eight that I know that it happened or I witnessed it.

Q What was your reaction?

A I was stunned. I avoided his or her eyes. I'd look anywhere but right in front of me. I didn't say anything. I just left." (R., Vol. IV, pp. 568-570).

Mrs. Cynthia Cordes, the Defendant's neighbor and wife of Henry Cordes, also testified. She described Ms. Davis' volunteer participation in a neighborhood co-op nursery school. (R., Vol. IV, pp. 580-582). She also described the obvious emotional changes of both Ms. Davis and her son when the decedent began experiencing troubles with his job. (R., Vol. IV, pp. 582-586). She said she was offering her testimony because, "I know this kind, gentle girl and I know what she has done and I also know something terrible had to have happened on the other side of that door to make her make that decision. That's why I'm here." (R., Vol. IV, p. 586).

The final witness called was the Reverend Larry Wayne Shields, pastor of the Middleburg United Methodist Church. From his involvement with Ms. Davis both before and after the homicide, he offered his assessment of the Defendant's nature:

> "Q Reverend Shields, without--well, let me directly ask you, you offered me a comment or an assessment of Marjorie Davis so far as her faith and character one time. I don't know if you would care to offer that to the court.
>
> A If I were to pick out someone in the church that I would have thought of as being one of the finest Christians in the church, I would without hesitation feel that Margie would be such a person.
>
> Q You have counseled with Mrs. Davis and you're aware of the fact that she is, that she did in fact shoot and kill her husband?
>
> A That's correct." (R., Vol. IV, pp. 591-592).

Because of these matters, the Defendant argued that a sentence below the guideline range would be appropriate. See, State vs. Twelves, 463 So.2d 493 (Fla. 2nd D.C.A. 1985) (showing of support of relatives and friends for defendant's rehabilitation properly considered in mitigating sentences); State vs. Rice, 464 So.2d 684, 686 (Fla. 5th D.C.A. 1985) (defendant's age and complete lack of criminal record may be considered in mitigation of guideline sentence). See also, State vs. Rodriguez, 11 FLW 2272 (Fla. 3rd D.C.A., October 28, 1986).

However, following a brief ten minute recess, the trial court reconvened, read its type-written seven page COURT'S REASONING FOR GOING OUTSIDE SENTENCING GUIDELINES AND IN ADDITION REMARKS CONTAINED IN THE RECORD AT TIME OF SENTENCING (reproduced herein at pages 6 through 10 infra), and sentenced the Defendant to forty (40) years imprisonment, twenty-three (23) years in excess of the maximum sentence allowed under the guidelines.

The offense here was clearly a situational one. The Defendant had absolutely no record of violence or criminal activity of any kind. She was consistently and fairly characterized by persons who had known her throughout her entire life as a kind, sensitive, and caring human being. And, the psychological evaluations, at a minimum, provided substantial evidence of diminished responsibility. The trial court apparently took the view that a "guidelines" sentence would serve to condone or excuse the Defendant's conduct. That is not the law.

* * * * *

Though appellate review is facilitated by a "delineation" (as required by the rules) of those reasons for departure, the trial court here offered its rationale in a general discussion/narrative form. 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. Accordingly, the procedure has been disapproved. Campos vs. State, 488 So.2d 677 (Fla. 4th D.C.A. 1986); Echeverria vs. State, 492 So.2d 1146 (Fla. 3rd D.C.A. 1986).

The COURT'S REASONING FOR GOING OUTSIDE SENTENCING GUIDELINES AND IN ADDITION REMARKS CONTAINED IN THE RECORD AT TIME OF SENTENCING is set forth in full in the factual statement hereof. However, for purposes of the following analysis, counsel has attempted to distinguish and identify the apparent reasons for departure as they appear in the trial court's general discussion.

(A) Homicide involving a spouse--"abused the trust that must be exhibited by spouses to each other" (R., Vol. II, p. 330). As a predicate to its further statement, the trial court traced some of the evolution in the area of family law and its own experience with that area of practice. In that context, the court then rhetorically asked, "Are we as a society going to accept family violence as a norm?" The trial court then answered its own question, "Having devoted my entire adult life to the law, either by study, practice or service in the judiciary, I cannot accept a YES answer. To do so would attack the very cornerstone of our society. It would say

loud and clear, 'We are no longer a people under the law in our family relationships!'" (R., Vol. II, p. 327). Appellant would respectfully suggest that our circumstances here implicate neither the question nor the answer offered by the trial court. There is no acceptance of family violence implied by conviction and appropriate sentence for Murder in the Second Degree. Indeed, rather than a reason for aggravation, such spousal relationships have historically been a basis for mitigation. As is appropriate here, there has long been a recognition of the extreme emotional duress such relationships can engender.

And this is not a situation where a family member has exploited or abused the family relationship to commit a crime. [See, e.g., Williams v. State, 462 So.2d 36 (1st D.C.A. 1985), sexual assault by stepfather on minor daughter]. Rather, this offense was caused by such a relationship gone tragically awry.

In its original Opinion, the District Court of Appeal analyzed this issue in sylogistic fashion:

> "Florida recognizes breach of trust or abuse of a relationship as valid grounds for departure from guidelines sentences. Williams vs. State, 462 So.2d 36 (Fla. 1st D.C.A. 1985). Therefore, the trial judge's second reason for departure is valid."

The fallacy in such sylogism is that it is premised only upon the label provided by the trial court without examination of the circumstances to which the

label was affixed. While there is authority that supports "abuse of trust" as a valid basis for departure, the factual circumstances of that authority is readily and clearly distinguishable from the case at bar. Williams vs. State, supra, involved a stepfather's sexual assault on his minor child. In Gardner vs. State, 462 So.2d 874 (Fla. 2nd D.C.A. 1985), "abuse of trust" was approved as a basis for a departure sentence given a schoolteacher for exploiting his position by selling drugs to his students. Each of these cases have to do with the abuse of a child who has been entrusted to the care and protection of the defendant. In our case there is no such fiduciary relationship. Thus, though the trial court uttered the "catch phrase" or label of abuse of trust, the facts here do not square with the definition of that phrase by the cited authority. What is labeled here as abuse of trust is nothing more or less than "spousal homicide". The unlawful taking of a life by shooting is contemplated by Second Degree Murder With A Firearm and the guidelines relating thereto. Obviously, therefore, the taking of a life by shooting cannot be used as a basis for departure. Hendrix vs. State, supra. And, there is no separate category created for spousal homicide.

(B) "Murder cold-blooded". (R., Vol. II, p. 329). As recited by the trial court, after the Defendant

fired the fatal shots, her husband did not instantly die but left the bedroom, wandered into the hallway and died in the kitchen. Ms. Davis had run outside and was sitting on the tailgate of a pickup truck during that time. Though the court says that she could "easily see her husband in need of assistance", there is no support for this allegation in the record. More significantly, however, the court appears to use this as a basis for aggravation in suggesting that she could have easily assisted her husband, "had she desired that he not die". Such an intent is contemplated by a plea to Second Degree Murder and does not constitute additional basis for finding that the murder was "cold-blooded". See, Hendrix vs. State, supra.

To the degree that "cold-blooded" connotes or is synonymous with premeditation, such a reason is invalid as a matter of law. In a different context, "premeditation" has been specifically disproved. See, Carney v. State, 458 So.2d 13 (1st D.C.A. 1984); Knowlton v. State, 466 So.2d 278 (4th D.C.A. 1985).

Moreover, in our circumstance, the court's reliance on this alleged factor had the practical effect of finding guilt as to the greater crime of Murder in the First Degree which, of course, contemplates the element of premeditation. This charge had been specifically abandoned by the State and hence no conviction obtained.

Almost the identical situation was presented in Scurry vs. State, 11 FLW 254, Supreme Court of Florida, Case Number 67,589, June 5, 1986), where the trial court based departure on a finding of "premeditation" though the jury had returned a verdict of Second Degree Murder in preference to the original charge of Murder in the First Degree.

The Court there confirmed the clear implication of Florida Rule of Criminal Procedure 3.701(d)(11) which precludes consideration of crimes for which no conviction was obtained, viz:

> "Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained".

Indeed, the First District Court of Appeal agreed that "to the extent that "cold-blooded" might denote premeditation, it would be an invalid reason on which to base a guidelines deviation. A finding of premeditation would be the equivalent of "considering crimes for which no conviction were obtained" . . . "which is prohibited as a basis for exceeding guidelines sentences". (App., p. 8). However, the First District construed the comments of the trial court as:

> "contemplating the cruelty with which the crime was committed. Mrs. Davis fired five shots at her sleeping husband from point blank range, then left the house

> while he staggered to the phone in another room to call for help. We recently affirmed a thirty-year sentence imposed for Second Degree Murder where the offense was 'carried out with particular cruelty . . . in the presence of family members' in Scurry vs. State, 472 So.2d 779 (Fla. 1st DCA 1985).[1] The cold-bloodedness of Davis' offense is a valid reason for departure. It is valid consideration of 'circumstances surrounding the crime itself' specifically allowed by 3.701(d)(11), F.R.Crim.P." (Footnote added.)

It is difficult to understand how the District Court could have put this construction on the trial court's remarks. That portion of the trial court's reasoning for going outside the guidelines (R., Vol. II, pp. 325-331) specificaly premises such finding on a several page discussion of the factual circumstances suggesting premeditation. Those preceding several pages are largely summaries of the Defendant's post-arrest statement relating to the contemplation or premeditation of the homicide. There is reference to thoughts of this nature on the day preceding the actual homicide. This is

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1. Reversed, Scurry vs. State, 489 So.2d 25 (Fla. 1986).

detailed reference to the Defendant's activities and thought processes which immediately preceded the shooting itself. And most significantly, there is nothing in this recitation that refers to any special or unusual cruelty involved in the offense itself.

With the Defendant having been convicted of Second Degree Murder With A Firearm, it is clear that the shooting death, regardless of how many times or at what range, is an inherent component of the crime in question. As such, it may not be used as a basis for departure. State vs. Mischler, 488 So.2d 523 (Fla. 1986); Steiner vs. State, 469 So.2d 179 (Fla. 3rd D.C.A. 1985); Baker vs. State, 466 So.2d 1144 (Fla. 3rd D.C.A. 1985).

It could be persuasively argued that any homicide is inherently "cruel". Similarly, there is a certain callousness inherent in any reference to a homicide as being "routine" or not out of the norm. Yet, the law requires this kind of detached and unemotional evaluation in comparison of this crime with others of a similar nature. In the case at bar, the Defendant shot her husband whereafter he lingered for a short period and died. There is nothing in these circumstances that sets it apart from the "routine" crimes of this nature.

The reference to being carried out with particular cruelty " . . . in the presence of family

members" citing Scurry vs. State, 472 So.2d 779 (Fla. 1st D.C.A. 1985), is clearly no longer appropriate. In that case, like ours, the family member was present in the area but did not actually witness the shooting. The child involved here was in his own bedroom down the hall from the master bedroom where the shooting occurred. On these circumstances, this Court reversed the District Court as follows:

> "Reason one, even if we were to find it clear and convincing, is not proved. There is insufficient evidence in the record that family members actually witnesses the shooting although they were nearby." Scurry vs. State, 489 So.2d at 28-29.

(C) Possible harm to Ms. Davis' son, [redacted] As part of its justification, the court "wonders" aloud regarding possible affect on the Defendant's son who was in the home, in another bedroom, at he time of the shooting:

> "The Court can't help but wonder about the young boy in the next bedroom, who must have heard this volley of shots sounding out in his home in the middle of the night. Did this wake him up? Did he see his mother running out of the house with the smoking gun in her hand? Did he come out in the hallway and see his father with blood gushing out of him, attempting to telephone for help? What scars will this child carry with him for the rest of his life any time he thinks of this fateful evening in his home?" (R., Vol. II, p. 330).

Such speculation is belied by the lone witness presented by the State in aggravation, the decedent's brother, Tom Davis. He described [redacted] as doing fine and adjusting well to life with paternal grandparents. (R., Vol. IV. pp. 532-533).

The presentence investigation describes [redacted]'s status in much the same way. (R., Vol. II, p. 302). Indeed, the evidence before the trial court that the child was "doing well" with his paternal grandparents was the only evidence as to the boy's reaction to this event.

Thus, the trial court's "wondering" was truly speculation. And, speculation as to possible ramifications cannot be a basis for departure. Lindsey v. State, 453 So.2d 485 (2nd D.C.A. 1984); Davis v. State, 458 So.2d 42 (4th D.C.A. 1984).

Yet, in the original Opinion from the First District Court of Appeal, it approved this reason as a basis for departure:

> "It is clear that a possible long lasting traumatic effect on a child of the victim is a valid reason for departure from the guidelines. See Casteel vs. State, 11 FLW 128 (Fla. 1st D.C.A., January 3, 1986), and Scurry vs. State, supra. That the judge would be able to immediately ascertain whether or not there was such damage is inconceivable so testimony that Davis' son is doing well while living with his paternal grandparents is not dispositive. The Davis child was removed from the house by police officers after having been

> awakened during the murder of his father. Upon his mother's arrest he has been deprived of not only his father, but his mother too." (App., p. 9).

In effect, the District Court held that in the absence of definitive proof to the contrary, the trial court could base its departure on its unsupported concern that the child suffered long-term damage. The court's own statement implicitly recognized the fact that there was no evidence before the trial court to support a finding that the child suffered any long lasting traumatic effect.

The absence of such evidence was explicitly recognized in the First District's Opinion on rehearing:

> "The appellant then urges that the holding in Mischler vs. State, 11 FLW 139 (Florida Supreme Court, April 3, 1986) warrants reconsideration of our decision that the presence of the victim's son in the house at the time of the homicide constituted a clear and convincing reason to depart from the guidelines. Davis emphasizes, and with good reason, that the proof of long-lasting traumatic effect on the son is not proven beyond a reasonable doubt. But this argument misses the point. The point is that Mrs. Davis killed her husband and is subject to sanction. That she chose to do so in the presence of her (and the victim's) son is a factor considered by the judge as one making the commission of the crime more horrible, a factor which justified exceeding the sentence normally imposed for second degree murder." [Emphasis added]. (App., pp. 12-13).

This Opinion on rehearing appears to recognize that the trial court's speculation cannot be squared with State vs. Mischler, 488 So.2d 523 (Fla. 1986), which

imposed the proof beyond reasonable doubt standard on any asserted basis for guideline departure.

Similarly, the earlier discussion in Scurry vs. State, supra, makes clear that even assuming the presence of the minor child might be a valid reason if he had actually witnessed the crime, a departure is not justified where the family member was merely present in the area (here in another room of the house). Thus, if the mere presence of the child in the house is to form a basis for departure, it must be premised on proof of the long-term traumatic effect on the child. The record below and the Opinion of the First District Court of Appeal explicitly recognized that there was no proof of long lasting traumatic effect. Indeed the only proof before the trial court was to the contrary.

(D) Defendant's sanity and, in particular, psychologist's statement as to the Defendant's potential for recidivism. (R., Vol. II, p. 330). As part of its reasons for departure, the court said that the Defendant's counsel "had her examined by a psychiatrist and psychologist and both have found that under the applicable legal rules, the Defendant is not insane. As earlier noted, this would not be a correct statement if describing her state of mind at the time of the shooting. It would be a correct statement if interpreted to describe the Defendant's present competency to stand trial. Dr.

McDonald found that she was presently competent. And, in a much more qualified fashion, Dr. Veronen reached the same result. Dr. Veronen, however, expressed concern about the recurrent nature of her psychosis. (R., Vol. I, pp. 153, 169, 175).

A more fundamental question remains, how can the Defendant's present sanity or competency to stand trial, be construed as a clear and convincing reason for departure from the sentencing guidelines. Counsel has been unable to find any legal or logical support for such a position.

The legal mental capacity to commit a crime is an essential requisite to criminal responsibility. 21 Am.Jur.2d, Criminal Law, Section 26. Thus, the trial court used an inherent component of the crime, i.e., legal mental capacity to commit a crime, as a basis for guideline departure. Hendrix vs. State, supra.

As part of this same discussion, the court selected a single question and answer from the sixty-nine page deposition of Dr. Lois Veronen:

> "Q: Okay. So you're basically saying that Marjorie could, put in the same circumstances, do the same thing again?
>
> A: In the circumstances, yes, Yes." (R., Vol. II, p. 330).

A reading of that complete section of testimony so qualifies that statement as to foreclose any realistic prognosis for future violent behavior:

"Q. Okay. Do you feel that Marjorie is suffering from some sort of permanent insanity or a temporary insanity?

A. I think that Marjorie is presently suffering from bipolar disorder with kind of . . . at the present time she is not in a psychotic state, but she may rapidly go into a psychotic state and I can't say exactly what her status is right now.

Q. Okay. So you're basically saying that Marjorie could, put in the same circumstances, do the same thing again?

A. In the circumstances, yes. Yes.

Q. Well, would that be against anyone that would put her in a state of depression? I mean, I don't understand how she would get to that point where she would go out and do the same thing again.

A. Well, if . . . yeah, certainly you cannot replicate circumstances exactly but, you know, following her pattern of behavior and if we're assuming that, you know, she was psychotic . . . may alternate with psychotic features in both the depressive stage and the manic phase, that at time she may engage in activities that we regard as asocial.

Q. Well, I want to go to more than asocial. I want to go to the point of her picking up a gun and shooting someone.

A. In my opinion she, in a extremely depressed state, which I doubt would be replicated in another situation, she . . . but in an extremely depressed state with the loss of contact with reality, perhaps she could." (R., Vol. I, pp. 175-176).

In practical effect, Dr. Veronen stated the obvious. In the truly farfetched and unlikely event of an exact reproduction of these circumstances, then, "perhaps she could".

Dr. McDonald responded to the same question in like fashion:

"A I think the probability of that would be very, very slim. I think that this psychotic episode had been brewing over the extent of their marriage and I think for that to happen again she would have to get back into a similar marriage and for it to occur over a long period of time for that to occur again.

In other words, it would have to be a lot of hits in terms of, you know, certain probabilities falling together in a pattern for her to do that." (R., Vol. II, p. 240).

Thus, to the degree that the trial court's comments attempt to suggest some realistic potential for recidivism, such suggestion is not supported by the record.

The District court agreed with the Defendant that her sanity and related matters were not a valid basis for departure.

However, the question remains whether State vs. Mischler, supra, created a per se reversible error rule for three categories of reasons for guideline departure, including the use of an inherent component of the crime. This Court held that "if any of the reasons given by the trial court to justify departure fall into any of the three above-mentioned categories, an appellate court is obligated to find that the departure is improper". State vs. Mischler, 488 So.2d at 525.

This apparent "per se reversible error rule" has been recognized in Rousseau vs. State, 489 So.2d 828 (Fla. 1st D.C.A. 1986), which certified to this Court the question of the applicability of the harmless error rule to one of these three prohibited categories. If, indeed, Mischler did create such a per se rule, then independent of any other consideration the case must be remanded to the trial court for resentencing.

CONCLUSION

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

Respectfully submitted,

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