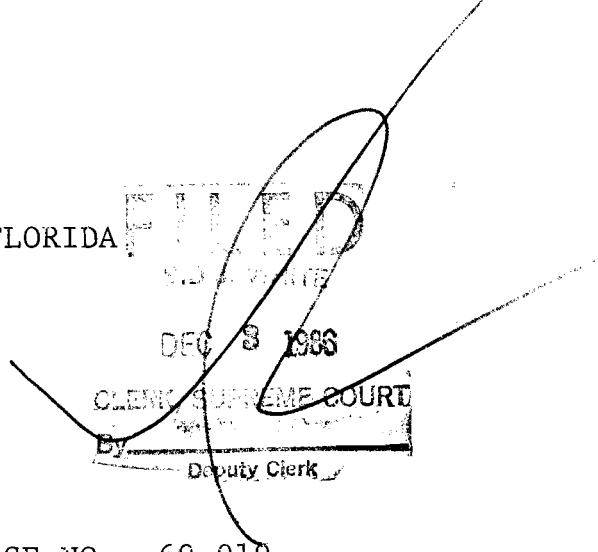
IN THE SUPREME COURT OF FLORIDA



MARJORIE O. DAVIS,

Petitioner,

v. . CASE NO. 69,019

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On September 24, 1984, the Petitioner, Marjorie Davis, murdered her husband. The details of the crime, as provided by Mrs. Davis, are as follows:

The Davis household's finances suffered a substantial decline due to debts incurred by Marjorie without her husband's knowledge. (R-265). Like any similarly plagued couple, the Davises began arguing over money and their personal relationship suffered. (R-265). As Marjorie began to contemplate divorce, she also began wishing John would die. (R-266). John, in turn, began sulking and immersing himself in television. (R-266). Although she later claimed "sexual abuse" during this period, Marjorie told her doctor of "heightened sexuality", even to the point of procuring books on sex and initiating the sex she later complained about. (R-174).

Finally, Mrs. Davis decided her husband would have to die. Marjorie began consulting periodicals to familiarize herself with guns and ammunition. (R-265). Marjorie procured a hand gun and, incredibly, some "wad cutters" that were certain to kill.

Marjorie had perfect recall of the circumstances surrounding the murder. She recalled waking up at precisely 1:32, A.M. on the morning of September 24, 1984. (R-266). Her nerve failing, she returned to bed until about 1:42, A.M., at which time she

retrieved and loaded the gun. She contemplated killing her husband until 2:00, A.M., at which time she opened fire. (R-266).

When John lept out of bed he yelled "oh my God". (R-266). Marjorie fled from the house, wiped off the gun and hid it under a whiskey barrel (flower pot). (R-267). Mrs. Davis planned her story for the police (the phantom burglar story). (R-267).

While the Petitioner was outside wiping off fingerprints and hiding the gun, John slowly bled to death. Blood smears on the bedroom light fixture (R-262) were followed by a trail of blood that led to the kitchen, where poor John died trying to telephone for help. (R-262).

The couple's young son, [redacted] woke up to see his bleeding father exit the bedroom, stagger to the kitchen, and die. (R-510, 533). He said no one came for him for a long time. (R-510).

Indicted for (capital) First Degree Murder, Mrs. Davis began to prepare her defense as she might if this were a divorce action (i.e., "my husband was a brute so I had to do something").

Davis tried to construct an insanity defense, but two psychiatrists and a psychologist found her perfectly sane. Davis procured a favorable assessment from an Atlanta based psychiatrist (Dr. McDonald) and a specialist on "abused spouses",

a Dr. Veronen.

Dr. Veronen's deposition revealed that the doctor had only once testified regarding "insanity", and that was for the defense in a spouse - murder case. (R-133). She had extensive experience with "battered spouse syndrome".

Dr. Veronen conceded she had little training or experience in the area of "legal insanity". (R-128-130). For example, she accepts the "irresistable impulse" concept (R-136) and believes that "forethought" for first degree murder requires "several minutes, at least" to be formed. (R-141).

Dr. Veronen performed on a limited study of this case. She performed the out-dated MMPI exam but never examined the raw data from the test. (R-147). Her review of case materials was limited to those provided by the defense. (R-145). She did not review all available expert reports. This deficiency in preparation became starkly apparent when, after opining that Davis was insane, Dr. Veronen was told (by the state) that Marjorie Davis had planned the murder and "studied" for it days in advance. (R-182).

Dr. Veronen concluded that Mrs. Davis suffered from some "temporary insanity", brought on by an abusive husband. The basis for this determination was unclear.

Dr. Veronen seemed to presume the underlying presence of an "abusive husband" simply because the family had financial problems. (R-152).

Curiously, while most battered, surviving spouses were nervous, guilt-ridden and remorseful, Davis was calm, logical and coherent. (R-155). Since Mrs. Davis did not act mentally disturbed, Dr. Veronen felt she must be mentally disturbed. (R-155).

While Veronen reported that Davis was somewhat depressed, (R-167) Davis:

(1) Was not suicidal, (R-167).

(2) Had no thought control problem, (R-167).

(3) Was not hallucinating, (R-167).

(4) Was not sociapathic, (R-168).

(5) Did not have an "inadequate personality", (R-168).

(6) Did not have schizophrenia, (R-168).

(7) Was not paranoid, (R-168).

(8) Was not suffering from any physiological mental disorder, (R-168).

Since Mrs. Davis did not demonstrate any actual mental problem, Dr. Veronen concluded that Davis had a "bi-polar" disorder which affected her at the time of the crime but was "gone now", (R-169) or at least could not be detected, though it could return. (R-175).

To support this diagnosis, which in turn led to a finding of insanity, Dr. Veronen cited other indicia of "insanity", such as:

> (1) The fact that Davis' grandmother was an alcoholic. (R-160).
>
> (2) Davis' father had several hobbies, and there fore must have been unstable. (R-161).

After this deposition, the State offered Davis a plea bargain involving an open plea to second degree murder, with the State free to seek the maximum statutory sentence. Davis accepted the plea.

In open court, the State filed it's 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.

The court considered the myriad of letters filed by Mrs. Davis as well as Dr. Veronen's opinion. The Court imposed a sentence of forty (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.
>
> (4) The defendant's sanity.

The First District Court of Appeals agreed with Mrs. Davis that reason (4) was inappropriate, but citing to Albritton v. State, 476 So.2d 158 (Fla. 1985), concluded:

> "The state has met its burden of showing beyond a reasonable doubt that the absence of the invalid reason would not have affected the departure sentence."

The lower court's sentence was upheld and this action ensued.

SUMMARY OF ARGUMENT

To obtain resentencing, Marjorie Davis must do more than express disagreement with the trial court's finding. She must demonstrate an abuse of discretion. This she has failed to do.

First, her vociferous defense of insanity cannot be seriously considered. If Davis was insane, she would (and should) have gone to trial. If she lacked faith in her defense, the trial court cannot be faulted for agreeing.

Second, the trial court properly found three "aggravating factors" justifying departure from the guidelines. Since there is no per se rule of reversal, the rejection of the court's fourth ground is irrelevant to this action.

ARGUMENT

THE PETITIONER IS NOT ENTITLED TO RESENTENCING

The Petitioner, Marjorie Davis, argues two major points in support of her request for resentencing. First, she seeks to persuade this Court that she was temporarily insane and, therefore, not really guilty of anything. Second, she challenges the trial court's stated reasons for departure from the guidelines. The State shall respond to these claims in order.

A. Insanity

If Marjorie Davis was indeed insane she had no business entering a plea of guilty. Naturally, there is a strong presumption of sanity which must attach in any situation where a defendant waives a defense and enters a "knowing and intelligent" plea of guilty. The ramifications of taking a plea from one who was not guilty, of course, are serious.

Mrs. Davis bases her claims of temporary insanity on the dubious opinion of Dr. Veronen. This "expert" based her opinion upon interviews with Mrs. Davis and her mother, Mrs. Kammer, and upon those portions of the record supplied by the defense. Naturally, there is a strong presumption that defendants seeking to establish some mental deficiency will conform their conduct while before experts. Strickland v. Francis, 738 F.2d 995 (5th Cir.) cert. denied, 444 U.S. 1084 (1979); United States v.

Makris, 535 F.2d 904 (5th Cir. 1976).

A wiley defendant is helped, of course, when she can procure an expert whose professionalism is limited by some perceptual bias. Dr. Veronen, unfortunately, seemed to bring such with her.

Dr. Veronen did not seem motivated to look into all of the facts of this crime above and beyond the limited details fed by the defense. Indeed, she was totally unaware of the fact that "insane Marjorie" studied periodicals to select the best ammunition as well as other facts indicating a well-planned murder as opposed to a spontaneous, hallucinatory reaction. When confronted with these details, Dr. Veronen tried to rationalize them by stating that Mrs. Davis "lapsed in and out of sanity".

Dr. Veronen's opinion became almost pathetic, however, by the time she opined that Marjorie could be deemed insane because her (Marjorie's) grandmother drank and her father had several hobbies. This stretching of sublime facts to ridiculous lengths can be understood, however, when we consider the results of the recent Rosenhan study, see On Being Sane In Insane Places, Science, Vol. 179 (1973). That study concluded that quite often psychiatrists and psychologists simply interpret facts to support either their own bias or the request of the person who hired them.

Every independant and fully informed expert found Davis sane

at the time of the offense and the time of trial (plea). A gratuitous restatement of selected facts should not alter that result. The simple truth is that Davis carefully planned and carried out this murder. She was fortunate to avoid the death penalty.

This brings us to her sentence.

B. Sentence

Mrs. Davis' sentence of forty (40) years was well within the statutory (legal) sentence for second degree murder. It was also a reasonable sentence given the cold and brutal nature of this murder and the emotional scars left on the child involved.

The Petitoner was sentenced on April 30, 1985. The guidelines were amended on April 11, 1985, but those amendments did not take effect until July 1, 1985. Therefore, in reviewing this case, we must rely on the guidelines as they were amended on May 8, 1984.

Given Mrs. Davis' reliance upon selected portions of the guidelines, as well as the nature of this appeal, the State would note the following portions of Fla.R.Crim.P. 3.701(b):

> "§§(1) The primary purpose of sentencing is to punish the offender".
>
> "§§(2) The penalty should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense".

Since justice, though due to the accused, is also due to the accuser, State v. Jones, 204 So.2d 515 (Fla. 1967); Snyder v. Massachusetts, 291 U.S. 97 (1934), and since the ostensible purpose of the guidelines is punishment, it is submitted that the trial court was justified in departing from the guidelines.

The trial court relied upon four grounds for departure, one of which was disallowed by the First District. The district court clearly found, however, that as to the three remaining grounds the state had clearly met its burden of showing beyond a reasonable doubt, that the stricken ground did not affect the sentencer's decision to depart. Albritton v. State, 476 So.2d 158 (Fla. 1985).

Davis alleges that the Albritton decision has been replaced by a "per se" reversal rule under State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). The State disagrees.

As this Court stated Mischler, at 525:

> "Both parties dispute the proper role of appellate courts in sentencing guidelines cases. In Albritton v. State, 476 So.2d 158 (Fla. 1985), we noted that the guidelines were not intended to usurp judicial discretion and that sentencing is still an individualized process. Therefore, we hold that an appellate court's function in a sentencing guidelines case is merely to review the reasons given to support departure and determine whether the trial court abused its discretion in finding those reasons "clear and convincing". [emphasis added]

In the next section of the opinion, however, the court states that reasons prohibited by the guidelines can never justify departure, and:

> "If any of the reasons given by the trial court to justify departure fall into any of the three above mentioned categories, and appellate court is obligated to find that departure is improper." id.

Mrs. Davis contends that virtually every reason given for departure that is subsequently rejected will fall within one of the three categories listed in Mischler, ergo, every time some reason is declared invalid, reversal is required.

In Scurry v. State, 472 So.2d 779 (Fla. 1st DCA 1985), the district court certified (to this court) the question of whether a reviewing court need examine all stated grounds for departure once one has been declared invalid. In response, this Court declined to answer, noting your prior decision in Albritton, see Scurry v. State, 489 So.2d 25 (Fla. 1986). This continued reference to Albritton rather than Mischler seems to answer our question. Indeed, the Albritton test has remained in use. Grant v. State, 11 F.L.W. 2084 (Fla. 4th DCA 1986); Kigar v. State, 11 F.L.W. 2098 (Fla. 5th DCA 1986); see The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311 (Fla. 1985).

Turning now to the reasons themselves, the question before us is whether the trial court abused it's discretion in departing from the "guidelines".

A. Abuse of Trust (familial)

Mrs. Davis contends that this factor is limited to situations where an adult abuses his position of authority to commit a crime against a child. Mrs. Davis also contends that no fiduciary relationship exists between spouses.

It is submitted that the trust which must exist in a marital relationship is worthy of guidelines recognition. This trust is already recognized, both by statute and case law, in the evidence code provisions which respect the confidentially of marital communications. It is perfectly logical to assume that those same, familial, trust-based, relations could extend to our case.

Married couples argue often, over money. Does this mean that the law requires spouses to "sleep with one eye open"? Of course not. Mr. Davis was entitled to enjoy the trust and security of his own home and bed with the same peace of mind as "Daniel in the lion's den". He did not, nor should he be expected to, anticipate a 2:00, A.M. sneak attack by the woman laying at his side.

B. Murder Cold-Blooded

Unlike Scurry, this is not a case where a jury rejected factual averments above and beyond "second degree murder". In the case at bar, the parties entered a plea bargain that included, as a stipulation of fact, the elements of Marjorie's

preparation, planning, research and later efforts to avoid detection as well as her cold, callous conduct in waiting for John to die.

There is a difference between a plea bargain and a jury verdict, especially when the plea bargain leaves open the possibility of sentence enhancement. Since no conviction was "obtained", (but rather, was "bargained") there exists no operative finding or rejection of any "fact" other than the one made by the sentencer. As such, there is no violation of Section §3.701(d)(11), Fla.R.Crim.P. (proscription against factors relating to the offense for which convictions were not obtained).

We are not, as Appellant suggests, simply dealing with a "routine" shooting (brief p. 35) wherein the husband was shot, "lingered awhile" (Davis' words) and died. We are talking about the brutal slaying of a human being for the most obsurd of reasons. We are not talking about "lingering awhile". Rather, we are talking about 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 who did so knowing that his little boy was watching.

Where was Marjorie during all this? Waiting outside.

These factors go far beyond "rescoring an element of the

crime", see State v. Mischler, supra; Steiner v. State, 469 So.2d 179 (Fla. 3d DCA 1985). These factors lend a cruel uniqueness to this offense which lets it stand apart from the "usual" second degree murder.

Were this still a capital case, the "cold, calculated and premeditated" nature of the murder would justify enhancement from life to a death sentence, see Mills v. State, 462 So.2d 1075 (Fla. 1985). Similarly, the victim's "helpless anticipation of death" could justify enhancement, see Lemon v. State, 456 So.2d 885 (Fla. 1984); Clark v State, 443 So.2d 973 (Fla. 1983).

Can it be said that these factors would let us kill Marjorie Davis but they would not let us simply enlarge her prison sentence?

While Section §3.701(d)(11), Fla.R.Crim.P. is designed to preclude sentencing for a crime other than the one for which Davis was convicted, nothing in that rule precludes a judge from looking at the circumstances of the crime itself. Murphy v. State, 459 So.2d 337 (Fla. 5th DCA 1984); Garcia and Wilson v. State, 454 So.2d 714 (Fla. 1st DCA 1984).

C. Possible Harm To Mr. and Mrs. Davis' Son, Christopher

Mrs. Davis contends that since the "full" impact of witnessing this murder cannot yet be assessed, any trauma to young Chris is to be ignored.

After receiving psychiatric attention, [redacted] passed into the care of relatives, to whom he has begun to "open-up". The trial judge was advised by [redacted] grandparents and his Uncle that [redacted] saw his father die. [redacted] is also scared of loud noises to the extent it warranted comment.

Just because this young child is not demonstrating "adult" responses does not mean he was totally unaffected by what he saw, nor does it mean that a murderer like Mrs. Davis should profit.

It may take time for the full impact to hit young [redacted] but there can be no denying that he will be affected as he carries his father's death in his mind's eye the rest of his life. The long term psychological effects of this crime on [redacted], as a surviving victim, can be considered. Hankey v. State, 458 So.2d 1143 (Fla. 5th DCA 1984); Casteel v. State, 11 F.L.W. 128 (Fla. 1st DCA 1986).

D. Defendant's Sanity

This factor was rejected by the First District and need not be rehashed.

While Davis labors mightily to raise the illusion of her own insanity and challenge the Court's findings of fact, she does not show any "abuse of discretion", see Booker v. State, 482 So.2d 414 (Fla. 2d DCA 1985); Canakeris v. Canakeris, 382 So.2d 1197 (Fla. 1980).

Delno v. Market Street Railway Co., 124 F.2d 965, 967 (9th Cir. 1942), defined "abuse" as follows:

> "Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused it's discretion".

Given the gravity of this offense, the facts stipulated to pursuant to the plea and the facial frivolity of the "insanity" contention, the court's imposition of a reasonable statutory sentence of forty (40) years was proper, understandable, and anything but an abuse of discretion.

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Robert Stuart Willis, Attorney for Appellant, 503 East Monroe Street, Jacksonville, Florida 32202, this 2 day of December, 1986.

MARK C. MENSER
Assistant Attorney General

OF COUNSEL