IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

TRAVIS GENE McCALL,

Respondent.

CASE NO. 70,345

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

Respondent McCall was charged by indictment with first degree murder of one Winston Bain (hereinafter referred to as the victim). (R 1398) A jury trial was conducted and the jury rendered a verdict finding respondent guilty of second degree murder. (R 1208, 1586)

The recommended guideline range was between twelve and seventeen years imprisonment. (R 1645-1646) The trial court promulgated four reasons for departure and sentenced respondent to thirty years imprisonment. (R 1641-1644) Appellant appealed the departure sentence challenging all four of the reasons. In the case under review, **McCall v. State**, ~~12 F.L.W. 578~~ 505 So.2d 1386 (Fla. 5th DCA Feb. 19, 1987), the appellate court found all four reasons invalid as a matter of law. (App. 1-2) Petitioner, the State of Florida, filed a motion for rehearing and a motion for rehearing en banc in the Fifth District Court of Appeal. (App. 3-6) The fifth district summarily denied the motion for rehearing and motion for rehearing en banc on March 20, 1987. (App. 7) Thereafter petitioner filed a timely notice to invoke this court's discretionary jurisdiction. (App. 8) This jurisdictional brief follows.

STATEMENT OF FACTS

The victim's brother, Michael Bain, went to sleep in the apartment he shared with his brother, the victim. He heard noises coming from the area of his brother's bedroom. (R 698) Michael looked through the curtains and observed respondent sitting at the table. (R 698, 700) Respondent was wearing a tan shirt. (R 699) He heard respondent ask the victim if he was ready to go. (R 701) The next morning when Michael woke up, he noticed that his brother (the victim) was gone. (R 701) Michael did find a wallet under the table which contained a Kentucky driver's license belonging to the respondent. (R 701, 704, 735) The victim's uncle attempted to find the victim at respondent's house but could locate no one. (R 796-797, 807) They did discover, lying on the outside of an air conditioner, a shirt with blood stains on it. (R 807) A search of respondent's home produced the tan shirt which had blood stains on it and cut-off jeans which also had blood stains. (R 901, 903)

On August 18, 1984, Edwin Adams was at a garbage dump and inadvertently discovered the body of the victim lying face down in a pool of blood with his shirt pulled up and no pants. (R 780, 781) The deputy, who responded to the scene described that the victim lay in a "pool of blood at his head." (R 785) Detective Fletcher, who also responded to the scene, found two blocks of wood near the body. (R 854-855) A splinter of wood was imbedded in the victim's forehead. (R 855) The detective also discovered two concrete blocks near the crime scene which apparently had blood stains on them. (R 856-857) In addition, a mop handle was

also found at the scene. (R 858) Deputy Haygood, testified that there were blood stains both on the wood pieces and the concrete blocks. (R 879-882)

Doctor William Winter, the medical examiner, did the autopsy. (R 957, 960-961) The face was badly lacerated with clotted blood. The eye was swollen purple and there was a large laceration on the forehead to the extent that the bone was actually uncovered. In addition, there was a laceration on the chin and a laceration on the back of the scalp. (R 961) Altogether, there were three lacerations and a fourth injury. The injuries were consistent with blunt instruments. (R 961-962) Describing the injury in more detail, the doctor explained that the facial injury was a "plate of bone [which] had been torn loose on that side." (R 962-963, 967) The doctor opined that there was a high degree of impact, that the injuries were consistent with wood or blocks, and that the death was caused by brain injuries. (R 963, 969) On cross-examination, pertaining to the force used the doctor responded: "...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." (R 981)

SUMMARY OF ARGUMENT

Point I

In **McCall v. State**, 12 F.L.W. 578 (Fla. 5th DCA Feb. 19, 1987), the holding was that the excessive use of force could not be a valid reason for departure where death was a result of a criminal act for which the defendant was convicted. The opinion held that the use of excessive force where the victim's head was crushed three or four times with concrete blocks and the victim was struck in the face with a board, was incorrect as a matter of law and not based upon lack of record support for the reason. This court in **Vanover v. State**, 498 So.2d 899 (Fla. 1986), and in **Lerma v. State**, 497 So.2d 736 (Fla. 1986), has declared that the use of excessive force is a proper reason to depart for non-homicide violent felonies. **Whistin v. State**, 500 So.2d 730 (Fla. 2d DCA 1987), allowed excessive use of force as a reason to depart based upon attempted first degree murder and other felonies. Three district decisions have permitted departures based upon the use of excessive force predicated upon homicides. **Lewis v. State**, 496 So.2d 211 (Fla. 1st DCA 1986); **Allen v. State**, ~~12 F.L.W. 334~~ 502 So.2d 950 (Fla. 2d DCA Jan. 21, 1987); and **Harrington v. State**, 455 So.2d 1317 (Fla. 2d DCA 1984). There is no way that the holding in **McCall**, supra, can be reconciled with the aforementioned cases and this court should, as a result, review **McCall** to harmonize it with the cases cited above.

Point II

In **McCall**, the appellate court declared, as a matter of law, that the second reason was impermissible, i.e., the respondent

committed a sexual battery on the victim by penetrating the victim's anus with a metal pipe when the victim was dead or near death. In **McGouirk v. State**, 470 So.2d 31 (Fla. 1st DCA 1985), it was held that it was proper to depart based upon an offense that was "grotesque" and where the defendant showed utter disregard for human life. Therefore, the Fifth District Court of Appeal, in invalidating the second reason for departure, has explicitly created a conflict with **McGouirk**.

ARGUMENT

POINT I

McCALL V. STATE, 12 F.L.W. 578 (FLA. 5TH DCA FEB. 19, 1987), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN **VANOVER V. STATE**, 498 SO.2D 899 (FLA. 1986); **LERMA V. STATE**, 497 SO.2D 736 (FLA. 1986); **WHISTIN V. STATE**, 500 SO.2D 730 (FLA. 2D DCA 1987); **HARRINGTON V. STATE**, 455 SO.2D 1317 (FLA. 2D DCA 1984); **ALLEN V. STATE**, 12 F.L.W. 334 (FLA. 2D DCA JAN. 21, 1987); AND **LEWIS V. STATE**, 496 SO.2D 211 (FLA. 1ST DCA 1986), BECAUSE THE LATTER CASES ALLOW THE EXCESSIVE USE OF FORCE AS A PROPER REASON TO DEPART UPWARDS FROM A PRESUMPTIVE GUIDELINES SENTENCE, WHILE **McCALL**, SUPRA, DISALLOWS SUCH A REASON AS A MATTER OF LAW.

The Fifth District Court of Appeal in **McCall v. State**, 12 F.L.W. 578 (Fla. 5th DCA Feb. 19, 1987), listed the four reasons utilized by the trial court to depart based upon the offense of second degree murder. The first reason noted that respondent used excessive force causing the victim to die a lingering death - crushing the victim's head three or four times with a concrete block and hitting the victim in the face with a board. (App. 2) Based upon **Holden v. State**, 487 So.2d 1199 (Fla. 5th DCA 1986), the fifth district in **McCall**, held that the first reason was invalid as a matter of law. Judge Sharpe, dissenting in part, believed that excessive cruelty and brutality was a permissible reason, as a matter of law, to depart based upon this court's decisions in **Vanover v. State**, 498 So.2d 899 (Fla. 1986); and **Lerma v. State**, 497 So.2d 736 (Fla. 1986). **Lerma**, indeed, expressly and directly conflicts with the decision in **McCall**,

supra, because **Lerma** explicitly approved an upward departure based upon excessive brutality.

Whistin v. State, 500 So.2d 730 (Fla. 3d DCA 1987), based upon convictions for attempted first degree murder, sexual battery, first degree arson, and grand theft, allowed an upward departure based upon the egregious nature of the circumstances surrounding the offense. **Fla. R. Crim. P. 3.701(b)(3).** In so doing, the district court set out the circumstances about the sexual battery acts, how the victim was gagged and tied to a bed and how the defendant ignited the bed and tried to tie a bed sheet into a bundle around the bed where the victim was tied up. In citing support for affirming this departure reason, the second district cited to this court's decision in **Vanover**, supra.

Moreover, this conflict of the decisions cannot be rationalized based upon the fact that **Vanover**, **Lerma**, and **Whistin**, supra, entailed violent criminal felonies other than homicides. In **Harrington v. State**, 455 So.2d 1317 (Fla. 2d DCA 1984), the second district allowed an upward departure based upon a manslaughter conviction. Harrington severely beat the victim over a period of five to six hours and thwarted any attempts by bystanders to interfer with his vicious beating. **Harrington**, also noted the severe injuries to the victim. **Allen v. State**, ~~12~~ 501 So.2d 950 ~~F.L.W.~~ 334 (Fla. 2d DCA Jan. 21, 1987), also entailed a manslaughter conviction and also supported an upward departure based upon excessive brutality. The second district noted that the record amply illustrated sufficient facts rendering the crime a highly extraordinary and extreme incidence of manslaughter.

Once again, the district court cited **Lerma**; and **Vanover**, supra, in support. In **Lewis v. State**, 496 So.2d 211 (Fla. 1st DCA 1986), the first district allowed an upward departure based upon the manner in which the murder was carried out. Petitioner would note that **Lewis**, involved a second degree murder, the same offense under review in **McCall**, supra.

The fifth district has adopted the rule of law that: "the excessive use of force cannot be a valid reason for departure where death is a result of the criminal act for which the defendant was convicted." (App. 2) No amount of technical rationalization could harmonize the latter rule of law with all the aforementioned cases cited, especially those cases which allow an upwards departure based upon a homicide conviction. The purpose of the guidelines is to maintain uniformity in sentencing. If this court does not take jurisdiction in this case, that goal will be severely circumscribed. As the law stands, in some districts, circuit court judges will be allowed to depart upwards where they find the homicide was committed in an excessively brutal manner, while other judges operating in the fourth and fifth districts will be precluded from doing so. Clearly there is express and direct conflict between **McCall**, supra, and the other cases cited by petitioner. Moreover, not to harmonize this conflict in some manner will have severe deletarious ramifications to the underlying principle of the guidelines.

POINT II

McCALL V. STATE, 12 F.L.W. 578 (FLA. 5TH DCA FEB. 19, 1987), DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION IN **McGOUIRK V. STATE**, 470 SO.2D 31 (FLA. 1ST DCA 1985), BECAUSE THE LATTER CASE HELD THAT IT IS PROPER TO DEPART UPWARDS BASED UPON AN OFFENSE THAT WAS GROTESQUE AND WHERE THE DEFENDANT SHOWED UTTER DISREGARD FOR LIFE AND THE DECISION IN **McCALL**, SUPRA, DISALLOWED SUCH A REASON AS A MATTER OF LAW.

McCall v. State, 12 F.L.W. 578 (Fla. 5th DCA Feb. 19, 1987), not only disallowed the first reason for departure discussed in Point I, but also held the following reason as invalid: "2. After the victim was dead or near death, the defendant, McCall, committed sexual battery on the victim by penetrating the victim's anus with a metal pipe." (App. 2) On the other hand, **McGouirk v. State**, 470 So.2d 31 (Fla. 1st DCA 1985), held that it was proper to depart based upon an offense that was "grotesque" and where the defendant showed utter disregard for human life.

Under **McGouirk**, the second reason would have been approved because it was a circumstance surrounding the offense, regardless of whether the victim was dead or near death. Moreover, the second reason would be valid under **McGouirk**, as well as the other cases cited in conflict to support petitioner's contention in Point II, i.e., the second reason would reinforce the first reason. Petitioner submits this court should take jurisdiction to reconcile the express and direct conflict between the decision in the case at bar and **McGouirk**.

CONCLUSION

WHEREFORE, petitioner prays that this honorable court take jurisdiction in this cause because **McCall v. State**, 12 F.L.W. 578 (Fla. 5th DCA Feb. 19, 1987), directly and expressly conflicts with all the decisions of this court and the other district courts of appeal cited herein, on the same question of law, pursuant to **Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv)**; and **Article V, section 3(b)(3) of the Florida Constitution.**

Respectfully submitted,

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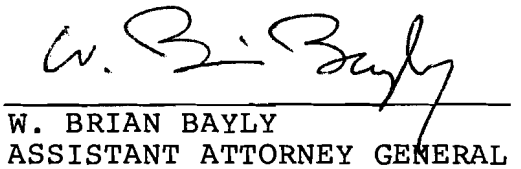

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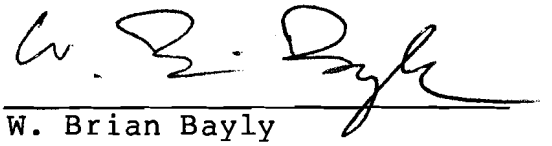
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief on Jurisdiction has been furnished, by mail, to Michael S. Becker, Assistant Public Defender for respondent, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 8th day of April, 1987.



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