IN THE SUPREME COURT OF FLORIDA

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

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Respondent accepts the statement of the case as set forth in Petitioner's brief on jurisdiction.

STATEMENT OF THE FACTS

Respondent strongly objects to the statement of facts as contained in Petitioner's brief and urges this Court to grant the Motion to Strike filed by Respondent on April 28, 1987.

Respondent reiterates that none of the "facts" recited by Petitioner are contained in the Fifth District Court of Appeal's decision below. As such, inclusion of these facts in a jurisdictional brief is "pointless and misleading." Reaves v. State, 485 So.2d 829 (Fla. 1986).

The only relevant facts as recited by the Fifth District Court of Appeal is are follows:

Respondent was convicted of second degree murder. The victim was rendered unconscious, if not killed by the first blow to his head.

SUMMARY OF ARGUMENT

The case sub judice does not conflict with other cases which can either be distinguished on their facts or are totally devoid of facts as to render them inapplicable to the instant case. Absent this clear conflict, this Court is without jurisdiction to accept the instant case.

POINT I

THE DECISION SUB JUDICE DOES NOT CONFLICT WITH 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, 502 So.2d 950 (Fla. 2d DCA 1987); OR LEWIS V. STATE, 496 So.2d 211 (Fla. 1st DCA 1986).

In the decision below, the Fifth District Court of Appeal held invalid as a reason for departure, that Respondent used excessive force in effecting the victim's death by crushing his head three or four times with a concrete block. Relying on its prior decision in Holden v. State, 487 So.2d 1199 (Fla. 5th DCA 1986), the court reiterated that "the 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." The cases with which Petitioner alleges conflict are easily distinguishable.

1. Vanover v. State, 498 So.2d 899 (Fla. 1986)

This Court approved as a reason for departure the "particularly aggravated circumstances which sets this case far and above the average Aggravated Battery." Consequently, this case is easily distinguishable in that excessive force necessary to commit the crime of aggravated battery may be a valid reason to depart. In the instant case the object of the Respondent's actions was to effect the death of the victim. Consequently no force beyond that necessary to effect the death is present.

2. Lerma v. State, 497 So.2d 736 (Fla. 1986)

This Court held: "Excessive brutality may support a departure sentence against a defendant convicted of sexual battery by slight force if the facts supporting the finding of excessive brutality are proven beyond a reasonable doubt." Id. at 738-739 [emphasis supplied]. Thus, Lerma, supra, has no application to a murder situation.

3. Whistin v. State, 500 So.2d 730 (Fla. 2d DCA 1987)

This case involved a departure based in part on the egregious nature of the circumstances. However, this did not involve a murder conviction and thus is easily distinguishable.

4. Harrington v. State, 455 So.2d 1317 (Fla. 2d DCA 1984)

The court approved a departure sentence in a manslaughter conviction. However, the precedential value is questionable since the appellate court merely recited verbatim the trial court's order of departure which was set forth in narrative form. However, the facts indicate a "reign of terror" by the defendant 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, according to the District Court, the victim was rendered unconscious, if not killed by the first blow to his head. Thus, Harrington, supra is distinguishable.

5. Allen v. State, 502 So.2d 950 (Fla. 2d DCA 1987)

In an opinion totally devoid of any facts, the court approved a departure where the record "amply illustrates sufficient facts rendering the crime a highly extraordinary and

extreme incident of manslaughter." Id. Consequently its precedential value is questionable. Additionally, Respondent notes the very real distinction between a manslaughter and a murder, suggesting that in the context of a culpable negligence conviction the facts surrounding the death may more properly be considered as a reason for departure.

6. Lewis v. State, 496 So.2d 211 (Fla. 1st DCA 1986)

Although vacating a departure sentence imposed for a conviction for second degree murder the court noted that two of the reasons for departure were valid, viz. the manner in which the murder was carried out and the vulnerability of the elderly victim. However, absolutely no facts are given so as to judge the applicability of this holding to the instant case. Respondent asserts that the "manner in which a murder is carried out" is not the same as "the use of excessive force." The former could encompass a lengthy period of torture and/or terrorizing and have nothing at all all to do with the actual force used to effect the murder.

In summary, the case sub judice does not conflict with any of the cases cited by Petitioner. These cases are all distinguishable on their facts or because of the absence of sufficient facts which renders them useless as far as precedential value. Therefore this Court should decline to accept jurisdiction in the instant case.

POINT II

THE DECISION SUB JUDICE DOES NOT CONFLICT WITH McGOUIRK V. STATE, 470 So.2d 31 (Fla. 1st DCA 1985).

In the case sub judice, the court ruled invalid as a reason for departure that "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." In so ruling, the court noted that if the victim was dead, there could be no sexual battery. Petitioner alleges conflict with McGouirk v. State, 470 So.2d 31 (Fla. 1st DCA 1985) wherein the court held that "the reason expressed by the court for its departure, that the crime was 'grotesque', showing utter disregard for human [life]", is clear and convincing." Id. at 32. Respondent asserts that this holding is not in conflict with the case sub judice for three reasons:

First, there is absolutely no mention in McGouirk, supra, as to what the crimes were that the defendant committed. It could have, for example, involved a placing of a bomb in a crowded area. Certainly, the applicability of a decision devoid of facts is questionable.

Second, the instant case involves a conviction for second degree murder which by its very definition requires that the accused acts with "a depraved mind regardless of human life." Thus, this reason is improper as being an inherent component of the crime for which he was being sentenced. State v. Mischler, 488 So.2d 523 (Fla. 1986)

Third, if as the trial court stated, a sexual battery was committed, this reason for departure cannot stand because it is based on an offense for which he was never convicted.

In summary, absolutely no conflict exists between the instant case and McGouirk, supra. Therefore, this Court should not accept jurisdiction.

CONCLUSION

Based on the reasons and authorities presented herein, Respondent respectfully requests this Honorable Court decline to exercise its discretionary jurisdiction.

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 4th day of May, 1987.

Michael S. Becker
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