

IN THE SUPREME COURT OF FLORIDA

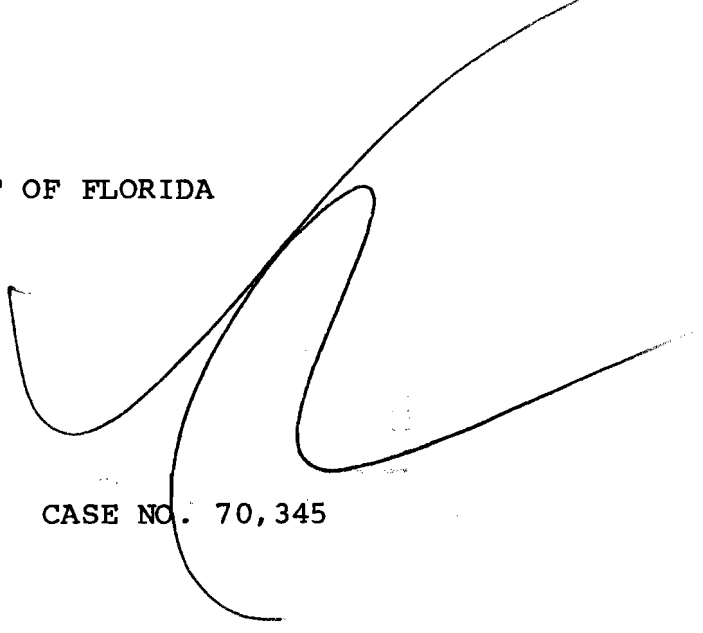
STATE OF FLORIDA

Petitioner,

v.

TRAVIS MCCALL,

Respondent.



CASE NO. 70,345

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF FACTS

In light of the fact that respondent has added some facts and makes a claim that petitioner has taken part of the medical examiner's testimony out of context, petitioner will add the following facts:

Dr. Winter was asked how he would classify the degree of force that was necessary to place the wounds on the victim. He answered: "This would have to be called high impact, high force type of injury to produce this type of shattering of the skull." (R 963). Later, he was again asked how he would classify the injuries and he answered: "Well, severe and massive and lethal." (R 969-970).

Initially petitioner added a statement of the medical examiner as follows: ". . .I do not recall ever having seen this severe degree of fracture of the skull from the skull falling onto a hard object. This is a tremendous impact force." (R 980). Respondent claims the answer was taken out of context because it was a direct response to a question by defense counsel which suggested that the injury to the back of the victim's skull was caused when he fell to the ground and struck his head on an object (R 980). Prior to that statement by the medical examiner, the defense attorney was trying to establish that the victim injuries were based upon such a fall and that the injuries would be classified as contrecoup. The medical examiner testified that the latter type of injury results, for example, when one falls and hits the back of his head on an object but where the brain injury is manifested in the front of the head. The doctor

explained, however, that the victim injuries were not necessarily consistent with such a contrecoup type injury (R 978-979, 980-981, 986).

SUMMARY OF ARGUMENT

Respondent's attempt to make a distinction between "excessive brutality" and "excessive force" is not logical and untenable. Likewise, such a proposition is not supported by the caselaw.

Due to the nature of the severe wounds and the murder weapons used, this murder can be equated to a homicide which is heinous, atrocious, or cruel under section 921.141(5)(h) Florida Statutes (1985).

POINT ON APPEAL

EXCESSIVE FORCE IN A HOMICIDE IS A
PROPER REASON TO DEPART AND THE RECORD
IN THE CASE AT BAR SUPPORTS THAT REASON.

Respondent argues that there is a distinction between "excessive force" and "excessive brutality." Respondent then proceeds to make up his own definition of "excessive brutality" by maintaining the latter term implies torture or conditions precedent to the actual infliction of the death-causing blows (AB 5).¹ Respondent supports his premise citing Harrington v. State, 455 So.2d 1317 (Fla. 2d DCA 1984). Respondent's definition is derived from the facts of the case but not the reasoning or holding of that case. Subsequent cases cited in the initial brief of petitioner upholding the excessive use of force as a reason for departure in a homicide case would not fall in line with such reasoning based upon their facts. Petitioner submits that such a unique definition would only engender confusion and make the guidelines uncertain, contrary to the avowed purpose of the guidelines.

Respondent attempts to distinguish this court's recent holding in Hansbrough v. State, 509 So.2d 1081, 1087 (Fla. 1987), which upheld the use of excessive force as a reason to depart in an armed robbery case which also entailed a murder. Respondent maintains that the only reason excessive force was upheld as a reason for departure was the fact that victim injury was not

¹ The symbol "A.B." will be used to denote corresponding portions of respondent's answer brief.

scored on the guidelines scoresheet. The quoted language from respondent's answer brief belies this contention (AB 7). In upholding the third reason, (cruelty established by the infliction of thirty one stab wounds, and the pain and anguish of the victim), this court noted that the reason was valid because: ". . .[i]t is also valid because victim injury is not a component of armed robbery."(emphasis supplied). In other words, this court was stating that the cruelty or excessive force established by the infliction of the thirty one stab wounds was a proper reason to depart and that the victim injury was an additional reason to uphold this third departure reason. As explained in Hansbrough, and as quoted in respondent's answer brief, this court went on to explain that excessive force is a valid reason to depart and cites Jefferson v. State, 489 So.2d 860 (Fla. 1st DCA 1986); Harris v. State, 482 So.2d 548 (Fla. 4th DCA 1986); Sabb v. State, 479 So.2d 845 (Fla. 1st DCA 1985). Indeed, those latter cases would have scored victim injury. Nevertheless, this court has clearly stated that such a reason to depart is valid. Therefore, respondent's attempt to distinguish Hansbrough is untenable.

Respondent argues that if this court does uphold the reason to depart, then such a departure reason should be similar to the standards promulgated under section 921.141(5)(h), Florida Statutes (1985), which allows the state to establish an aggravating factor in a capital case that the murder was heinous, atrocious, or cruel. If such a standard is used, petitioner would first note that there were two murder weapons involved; a

concrete block and a block of wood (R 822, 827-828, 856-857, 963, 969).² The medical examiner described in detail the extent and severity of the face and head injuries which petitioner will not reiterate because that information is supplied in the initial brief (R 962-963, 966-967). The medical examiner did testify that the cause of death was due to the multiple injuries to the head, skull fracture and brain injuries (R 969). Petitioner submits that the circumstances in this case are similar to two capital cases where this court upheld the finding that the murders were heinous, atrocious or cruel. Heiney v. State, 447 So.2d 210, 215-216 (Fla. 1984) (seven to nine blows to the head with a claw hammer); Thomas v. State, 456 So.2d 454, 457 (Fla. 1984) (where the victim was discovered unconscious, had been severely beaten, kicked or bludgeoned so that his skull was fractured in many places). Although petitioner submits that the standard to depart should not be as high as the standard to find this aggravating circumstance in a capital case, even if it is, petitioner submits that the circumstances surrounding the present case would support a finding that the homicide was committed in a heinous, atrocious or cruel manner.

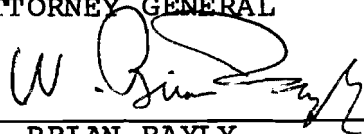
² These murder weapons do not include the mop handle which was inserted into the victim's rectum (R 858, 972).

CONCLUSION

WHEREFORE, petitioner moves this honorable court to reverse the Fifth District Court of Appeal's decision in McCall v. State, 503 So.2d 1306 (Fla. 5th DCA 1987), and to uphold the departure reason promulgated by the trial court that the murder was excessively brutal, and to remand this cause back to the district court to affirm the trial court's departure sentence based upon the excessive brutality or force in the commission of the homicide.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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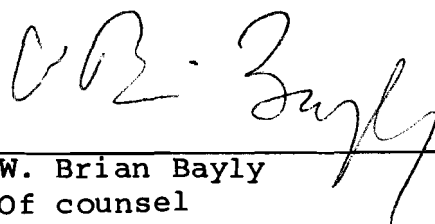


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief on the Merits, has been furnished, by mail, to Michael S. Becker, Assistant Public Defender, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 27th day of October, 1987.



W. Brian Bayly
Of counsel