OA 2-9-89 017

IN THE SUPREME COURT OF FLORIDA

CHARLES L. STOCKTON,

Petitioner,

v. CASE NO. 72,921

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Stockton v. State, 529 So.2d 739 (Fla. 1st DCA 1988). The one volume record on appeal will be referred to as "R", followed by the appropriate page number in parentheses. The transcript will be referred to as "T". All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE

Petitioner was charged by information with second degree murder with a firearm (R 5). The cause proceeded to jury trial on May 30-31, 1985, and at the conclusion thereof, petitioner was found guilty as charged (R 62). Petitioner's timely motion for new trial (R 63-65) included an affidavit of trial counsel, in which he stated that he rendered ineffective assistance of counsel because his closing argument neglected to mention a crucial witness and "served only to emphasize the lack of any coherent defense to the charge." (R 69, paragraph 11 h). The motion was denied by written order filed June 14, 1985 (R 71).

On July 11, 1985, petitioner was adjudicated guilty and sentenced to 40 years in prison, which was a departure from the recommended guidelines range of 17-22 years (R 94-98), for which the trial judge gave three written reasons for departure (R 99-100).

Petitioner pursued a timely appeal to the First District. As related by the majority opinion of the lower tribunal:

> Appellant was tried upon the charge of second degree murder with a firearm, and the evidence established that the victim was killed during an altercation involving numerous individuals. Witnesses testified that appellant shot the victim after being heard to say, "I'll kill one of you." Other witnesses presented contradictory testimony. Appellant admitted discharging a firearm, but stated that he merely shot his gun into the air. Appellant also recanted an earlier admission that he had shot the victim.
>
> At the conclusion of the evidence the court indicated to counsel that a time limitation would be imposed for closing argument. Defense counsel requested an

> hour, explaining, "I'm not very well prepared." The court limited closing argument to 30 minutes per side, and overruled defense counsel's objection. Appendix at 2.

Judge Zehmer, in dissent, set forth the conflicting testimony, on the crucial issue of whether appellant fired the shot which killed the victim, by quoting extensively from petitioner's initial brief. Appendix at 4-6. Judge Zehmer characterized petitioner's counsel's closing argument as:

> poorly organized and reflect[ing] a manifest lack of of meaningful preparation and intelligible presentation to the jury which was attributable, in substantial part, to defense counsel's haste to cover all the evidence in detail in the limited time given him. Appendix at 7.

On appeal, petitioner argued that the limitation of closing arguments to 30 minutes per side was reversible error, due to the number of witnesses, the severity of the charge and its penalty, the conflicting nature of their testimony on the crucial issue of whether appellant fired the shot which killed the victim, and the length of the testimony. The majority found no reversible error and affirmed. Appendix at 2. In dissent, Judge Zehmer found:

> The only reason for the [30 minute] limitation discernible from this record was the court's expressed desire to accommodate the personal convenience of the jury--they could, if they so elected, finish the case late Friday night and avoid returning to court on Saturday. Because the state requested 45 minutes for argument, and defense counsel requested at least one hour, the court's 30-minute restriction conforming to his previous comment to the jury that closing argument would not "take

more than an hour total" is patently arbitrary. Appendix at 9-10.

Petitioner also argued that the jury should have been reinstructed on justifiable and excusable homicide. As stated by the majority:

> After the jury commenced deliberations it requested a reinstruction on the distinction between second degree and third degree murder. The court advised counsel that it would reinstruct the jury on these offenses, and also on manslaughter. Defense counsel requested a reinstruction on justifiable and excusable homicide, but the court denied this request. The jury was then reinstructed as to second degree murder, third degree murder, and manslaughter. Appendix at 3.

The majority found no reversible error on this point as well. Appendix at 3. Judge Zehmer again dissented, and reasoned:

> Had the trial court deemed that the jury's request could be satisfactorily answered by merely instructing on second and third degree murder, a different question would be presented. Although the specific request was to distinguish between second and third degree murder, ... the trial court undoubtedly determined that the similarity in degree and definition of criminal conduct made it necessary to include reinstruction on manslaughter as well as third degree murder. This was an eminently sound decision in my opinion. But, having made it, the judge also should have given a complete reinstruction on manslaughter. Appendix at 10 (footnote omitted).

Petitioner also argued that the three reasons for departure were invalid:

> 1) The Sentencing Guidelines recommendation of 17-22 years is insufficient for retribution, deterrence, rehabilitation and for the safety of the public.

> 2) The Defendant's criminal history all consisting of juvenile records, indicates that a prison term of 17-22 years is inadequate punishment for this Defendant. ... The Defendant's criminal history is set forth in the presentence investigation.
>
> 3) The Defendant's possession and ownership of a firearm was an admitted violation of the terms of his California parole and but for this violation the murder would not have occurred. (Appendix at 11 and R 99-100; citations omitted).

The majority of the lower tribunal apparently disapproved reason #1, approved reason #2 and #3, and remanded for resentencing. Appendix at 3. Judge Zehmer dissented in part. He found reason #1 to be invalid, reason #2 to be "legally insufficient as stated", because it considered both scored and unscored juvenile convictions, and reason #3 to be invalid, because it was based upon a finding that petitioner had violated his probation, which was not supported by the record. Appendix at 11.

A timely notice of discretionary review was filed on August 12, 1988, and this Court granted review by order dated November 7, 1988.

III STATEMENT OF THE FACTS

The evidence established that Patrick Statham was killed in the aftermath of a brawl which broke out outside the Joe James Recreation Center, following a party in honor of (but not limited to) the Jacksonville Lee High School football team (T-281-82, 296-98, 328-29, 381, 418-19, 429-32, 467-69, 718, 738-40). The fight was precipitated by an argument which arose over one car blocking another car (T-283, 333-34, 353-57, 606-07, 610-11, 638-40, 718-19, 743-48). At one point in the altercation, petitioner (a non-student) was either shoved or hit by Milton Gordon, a Lee High linebacker (T-287, 300, 303-04, 334-35, 358, 384, 402-03, 470-71, 485-88, 503, 614-18, 622-23, 628-31, 642-44, 662, 670-71, 749-51, 775).

According to several state witnesses, petitioner went back to his car, got a gun, pointed it in the direction of Milton Gordon and Patrick Statham (who were, or may have been, in the process of beating up a boy on the ground), and fired, striking Statham (T-228-90, 293-96, 338-44, 386-89, 421-25, 473-78). According to petitioner and one defense witness, petitioner was not, and could not have been, the person who shot Patrick Statham, because of the positioning of the various participants; if petitioner had fired toward Statham he would have hit one of his own friends (T-645-46, 659, 754-55). Another defense witness testified that he saw Raymond Bell pointing a gun at Statham (T-723-25).

Four state witnesses, Diane Strawbridge, Clarence Frazier, Alonzo Davis, and Milton Gordon, claimed that petitioner fired

the fatal shot (T-289-90, 293, 295-96, 387-89, 414, 423-24, 428, 476-78). A fifth state witness, Arthur Mitchell, saw petitioner pointing the gun, but didn't see him shoot it (T-338). Davis (who said he was as close to petitioner at the time of the shooting as the distance from the witness stand to the jury box (T-423, 442)) claimed that immediately before the shooting petitioner said "I'll kill one of you punks" and then, after the shooting, said "I told you I'd kill one of you punks" (T-423, 428, 442-443). Davis testified that anyone standing as close as he was, and not even necessarily that close, would have heard these statements - "I mean when he said it, he made it clear" (T-442-43). Milton Gordon said he heard petitioner say "I'll kill one of you punks" (T-501); Clarence Frazier said he said, "nigger, I'll kill you" (T-501); and Arthur Mitchell (who said he was about six feet away from petitioner, the distance from the witness stand to the beginning of the jury box (T-342-43)) didn't hear him say anything at all (T-369).

Anywhere from four to eight to a dozen or more people were participants in the fight, which took place in the midst of a crowd of onlookers (T-311, 320-21, 336, 359, 473, 522-23, 534, 538-39, 667, 731, 752). There were apparently a number of people in the vicinity with guns, and there was shooting going on both before and immediately after the shooting of Patrick Statham (T-470, 608-09, 654, 659, 725, 809). Among those with guns were Raymond Bell (T-302, 310, 330, 359-60, 395, 402, 446, 654, 664, 722, 731, 746); Arthur Mitchell's brother (T-808-09); and a short, stocky individual named Charles, referred to as

"New York" (T-583-84, 779, 799-800, 804-11), whom at least one state witness (Clarence Frazier) may have confused with petitioner (T-399, 401, 412-13, see T-659-60, 743-46). The number of gunshots heard at the time Patrick Statham was shot varied from witness to witness -- two (T-310), one (T-377), seven (T-542, 551-53), four or five (T-608, 611), two (T-665-66), one (T-723).

While it is true that several state witnesses (including the aforementioned Clarence Frazier) identified petitioner as the person who shot Patrick Statham, it is also true that several defense witnesses testified otherwise, Trevio Parks saw Raymond Bell pointing a gun in the direction of Patrick Statham, and said you couldn't really tell who shot him (T-723-25). Parks also testified that the day after the shooting, Bell told him that he was the one who had killed the victim (T-816-25). Linda Spivey, petitioner's girlfriend, testified that Raymond Bell hollered out to her that he "killed that MF" but that Charles was going to do the time for it (T-827, 826-39). Ralph Williams testified that petitioner had a gun, but that he could not have been the one who shot Statham because of the positioning of the people involved; if he had fired in Statham's direction "[he] would have hit one of us in the back" (T-645-46, 659). Petitioner testified that he fired into the air; if he had fired straight ahead he would have hit Bubba (Ralph Williams), Peanut, or Aaron (T-754-55).

According to Raymond Bell, petitioner told him (after the shooting but before petitioner's arrest) that if the boy got

shot in the back, he did it, but otherwise he didn't do it (T-815). Petitioner also expressed the same doubt to Detective Eason after his arrest, depending on whether Patrick Statham got shot in the back or in the chest (T-487). During the conversation, Detective Eason led petitioner to believe that the victim was shot in the back, and since petitioner thought he was the only one standing behind him with a gun, he concluded that his shot must have hit him (T-756-57, 769). The medical examiner, Dr. Floro, testified that Patrick Statham was shot in the chest (T-513-14). Now that he was aware of this fact, petitioner testified that he did not shoot Statham (T-757).

There was conflicting evidence as to other material facts as well. Officer Rusty Rogers, who had been called to the scene of the disturbance before the shooting occurred, saw a short black male in a grey sweatshirt raise his arm to the victim's chest level; Rogers then saw a muzzle flash (R-524-25, 536, 545). [Note that defense witness Ralph Williams described the other boy named Charles, or "New York", as being about petitioner's height and wearing a grey shirt (T-660), while state witness Clarence Frazier mistakenly thought petitioner and "New York" were the same person (see T-399, 401, 412-13)]. At least two state witnesses, Arthur Mitchell and Milton Gordon, had testified in deposition that petitioner had his shirt <u>off</u> at the time he was pointing the gun at Statham and Gordon (T-369-71, 492-95), though at trial Mitchell said he "can't recall" whether petitioner still had his shirt off, and

Gordon claimed he wasn't paying attention to that (T-369, 492). Defense witness Ralph Williams testified that the shot that hit Statham could not have been fired by petitioner (T-645-46, 659) and that petitioner still had his shirt off when he (Williams) turned around after the shooting (T-659).

Petitioner testified that he had gone back to the car to get his gun because he was upset and angry, after having been "blindsided" by Milton Gordon (T-750-52). When petitioner got back to where the fight was, Gordon and Patrick Statham had a boy on the ground, and they were beating and kicking him (T-752-54). Petitioner was concerned that the boy was getting seriously hurt (T-753). Petitioner pointed his gun at Gordon (T-754). Gordon said to Statham "Hey, he got a gun, let's go"; he pulled Statham away and they started to leave (T-754). Bubba (Ralph Williams) jumped in between, and petitioner fired into the air (T-754). As Gordon and Statham ran, petitioner heard some more gunshots (T-755).

With regard to the person on the ground, the testimony of the state's witnesses once again covered the spectrum. According to Dianne Strawbridge, in deposition, Patrick Statham was not even involved in the fight (T-301-02). At trial, she testified that he was trying to break it up (T-302). According to Clarence Frazier, Statham was trying to break up the fight; he was not hitting someone who was on the ground (T-403-04, 410-11). Frazier did not recall testified in deposition on the Tuesday before trial that Statham was hitting and fighting with a "dude" who had grabbed his leg; the court reporter must be

lying if she wrote that down (T-404-05). But according to Milton Gordon, Patrick Statham "was beating up on" the guy on the ground, but he (Gordon) was not (T-473-74, 489-90, 504-505, 507). Gordon denied having said in his deposition taken a week earlier that "Patrick and I" were beating up on the guy (T-490-92), or, if he did say that, there could be a different explanation (T-403-04). The court reporter was subsequently called as a witness, and played a tape recording of Milton Gordon's deposition, in which he stated at least four times in succession that (after Patrick came over to help him and they "kind of took control" of the fight) "we" or "Patrick and I" were beating up on this individual (T-623-24). "I was -- we was just beating and knocking and I just never looked down to see who it was" (T-624).

At the conclusion of the testimony, the court advised the jury that closing arguments would not require more than an hour total, and it could decide whether to conclude the trial that night (Friday, May 31, 1985), or return the next day (Saturday, June 1, 1985) (T 839-41). The jury opted to stay and finish (T 844), and after a 10 minute recess (T 845), closing arguments commenced at 5:50 p.m. (T 846).

The court advised counsel: "contrary to my general policy", that closing arguments would be limited, to which the prosecutor responded by saying he needed 45 minutes, and petitioner's counsel, one hour (T 843). Petitioner objected to the limitation (T 845).

The prosecutor's first closing argument was rather brief (T 854-60), lasting nine minutes (T 886). Petitioner's counsel said he was tired and thanked the jury (T 860). He discussed the law relating to reasonable doubt and the burden of proof (T 861-62). He said the two issues to be decided were whether petitioner shot the victim (because there was a question in his own mind, depending upon whether the victim was shot in the back), and if he did, just what kind of homicide it was (whether second or third degree murder, manslaughter, or justifiable homicide) (T 862-63). He noted that the medical examiner found he was shot in the chest, and surmised that the victim was ducking down from his assailant (T 865-66).

Petitioner's counsel further discussed the positions of the parties as recalled by the various civilian witnesses, and noted that their recollection differed from that of the police officer (T 868-71). Counsel discussed whether petitioner had put his shirt back on (T 872-73). Counsel argued that all of the prosecution witnesses were students and good friends of the victim, who had coordinated their stories (T 873-75).

Counsel discussed the testimony of Clarence Frazier, and whether petitioner and "New York" were the same person (T 875-76). Counsel noted how teenage boys act and recalled the testimony about the fight between petitioner and Arthur Mitchell (T 878-80). Counsel noted the sizes of the participants in the fight and theorized that petitioner was justified in getting his gun in order to protect the boy on the ground, who was being beaten by the victim and the linebacker (T 880-82).

As counsel noted that the witnesses differed widely as to how many shots were fired, the court advised that his time was up, but granted two or three more minutes (T 883). Counsel stated that he had a reasonable doubt as to whether petitioner fired the bullet, but if he did, it was at most third degree rather than second degree murder, but then turned around and argued that petitioner did not shoot the fatal shot (T 884-85).

The court noted that petitioner's total argument consumed 36 minutes and granted the prosecutor an additional 24 minutes (T 886).

The jury retired for dinner (T 899) until 7:35, when it returned to receive its instructions (T 904-23), and then began deliberating at 8:13 p.m. (T 924). At 9:45 p.m., the jury asked to be reinstructed on the difference between second and third degree murder (T 926). The court decided to grant that request, and also instruct on manslaughter, because: "I feel it's incumbent to at least give all the degrees if I give any of them." (T 926-27). Petitioner requested reinstruction on justifiable and excusable homicide, to which the prosecutor objected, and the court agreed with the prosecutor (T 927).

The jury was instructed as indicated, and retired again at 10:00 p.m. (T 928-32). It returned its guilty verdict 16 minutes later (T 932-34).

IV SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that the court, over petitioner's timely objection, imposed an arbitrary and unreasonable time limitation of 30 minutes on petitioner's closing argument. Petitioner had requested one hour, and the prosecutor 45 minutes. Contrary to its stated policy, the trial court limited closing to 30 minutes, not based upon an assessment of the facts and circumstances of the case, but rather on a desire to complete the trial on Friday night, instead of holding a weekend session. The proper remedy is to grant a new trial.

Petitioner will also argue in this brief that the trial court reversible erred in refusing to reinstruct on justifiable and excusable homicide when it reinstructed on manslaughter. Although the jury only requested reinstruction on the difference between second and third degree murder, the trial court proceeded to reinstruct on manslaughter as well, without a complete manslaughter instruction, and told the jury that it had complete instructions on all three offenses. The proper remedy is to grant a new trial.

Petitioner will also argue in this brief that his guidelines departure sentence is illegal. The first reason for departure was properly struck below. The second depends upon both scored and unscored juvenile offenses and so lacks a proper factual basis. The third is founded upon a probation violation which was never proven, and which was assessed points on the scoresheet. The proper remedy is to remand for resentencing.

V ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN IMPOSING AN ARBITRARY AND UNREASONABLE 30 MINUTE TIME LIMIT ON PETITIONER'S CLOSING ARGUMENT.

In its opinion, the majority of the lower tribunal found that the arbitrary limitation of petitioner's closing argument to 30 minutes was not unreasonable and so not reversible error. The majority opinion is incorrect in light of more than 60 years of Florida jurisprudence.

In May v. State, 89 Fla. 78, 80-81, 103 So. 115, 116 (1925), this Court stated that the applicable law with regard to time limitations on closing argument:

> The right of an accused in a criminal prosecution to be heard by himself or counsel, or both, cannot be denied him. Sec. 11, Declaration of Rights. But the limitation of the time for argument must of necessity, within reasonable bounds, rest in the discretion of the trial court. This is the general rule. The right may be waived, but when requested, reasonable time must be allowed. The question to be determined is what is reasonable time, and this depends upon the facts and circumstances of each case. No hard and fast rule can be prescribed. But if it appear that the time for argument is unreasonably limited, such action will be held an abuse of discretion requiring a reversal of the judgment for new trial. This statement of the law finds general support in the adjudicated cases.

Adhering to the holding in May, Florida appellate courts have reversed for new trials, because closing argument had been unreasonably or arbitrarily limited, in such cases as Pittman v. State, 440 So.2d 657 (Fla. 1st DCA 1983) (30 minute limit error in resisting arrest); Neal v. State, 451 So.2d 1058 (Fla.

5th DCA 1984) (25 minute limit error in second degree murder and robbery); Stanley v. State, 453 So.2d 530 (Fla. 5th DCA 1984) (10 minute limit error in burglary and theft); Foster v. State, 464 So.2d 1214 (Fla. 3d DCA 1984) (15 minute limit error in robbery); Rodriquez v. State, 472 So.2d 1294 (Fla. 5th DCA 1985) (15 minute limit error in burglary); and Cain v. State, 481 So.2d 546 (Fla. 5th DCA 1986) (15 minute limit error in sale of drugs); and compare with Garcia v. State, 501 So.2d 106 (Fla. 3rd DCA 1987) (1 1/4 hours enough in first degree murder and robbery). Closing argument is "a basic element of the adversary fact-finding process in a criminal trial". Herring v. New York, 422 U.S. 853, 858 (1975). As the court recognized in Foster v. State, supra, at 1215:

> Running through all of these cases is the court's concern that where human liberty is at stake, as in a criminal case, considerable leeway must be given to defense counsel in arguing his case to the jury. To be sure, defense counsel is not entitled to filibuster the case or engage in unreasonably long arguments, but nonetheless wide latitude must be given counsel in arguing his case to the jury and ordinarily arguments restricted to thirty minutes or less are considered suspect.

In the present case, after the last witness finished testifying, the trial court offered the jury a choice: "As I indicated to you yesterday that you possibly would rather stay late tonight or have to come back on Saturday. Monday is definitely out of the question, so those are the two alternatives we have available to us" (T-839-40). The judge estimated that closing arguments would "not take more than an hour total", the jury instructions half an hour, and he could not

predict how long it would take them to deliberate a verdict (T-840). He then excused the jury to decide their preference (T-840-41). While the jury was gone, the judge said:

> Assuming that we're going into closing argument, contrary to my general policy, I have the feeling it's going to be necessary that I limit closing arguments and I will be glad to listen to proposed limitations from counsel if you wish to make an expression.
>
> MR. DECANDIO [prosecutor]: Your Honor, I would ask for 45 minutes. I believe that would be sufficient. It's not a case that involves that much testimony, although it's evidently been spread out.
>
> THE COURT: I indicated to the jury the possibility of a total of an hour. But, Mr. Link, at any rate --
>
> MR. LINK [defense counsel]: I generally take about 45 minutes, but on this one I'm not very well prepared so I really don't know, Judge. I would request an hour.
>
> THE COURT: If they say they want to stay, we're going to stay awhile, at any rate. I'm not sure how much we're going to stay. We've got to be prepared for dinner again, I suppose. It's very likely.

(T-842-43).

At that point, the jury returned and its spokesman told the court "We're going to stay" (T-844). The court then informed counsel that he was limiting closing arguments to 30 minutes a side (T-845). Defense counsel objected to this limitation, and said:

> Again, I'm not too well organized for my argument at this point and I feel 30 minutes in a case with as many witnesses as this and as significant a case as this is an improper restriction on closing arguments and denies my client effective assistance of counsel.

(T-845).

The trial court overruled the objection (T-845).

After thirty minutes had elapsed, the trial court interrupted defense counsel's argument and told him his time was up, but that he would allow three more minutes because some time had been consumed by the prosecutor's objections (T-883). After defense counsel concluded his argument, the court noted for the record that his "total argument was 36 minutes"[1] (T-886).

As defense counsel pointed out in his affidavit attached to the motion for new trial, he "was so unprepared for argument that, when the Court admonished that his time was up, counsel omitted any mention of Raymond Bell and his relation to the defense of this case" (R-69). While the evidence at trial was conflicting as to both the circumstances of the shooting and the identity of the perpetrator, there was testimony before the jury that: (1) Raymond Bell, a participant in the melee, had a gun; (2) petitioner was not in a position where he could have shot Patrick Statham; (3) Raymond Bell was pointing his gun in the direction of Statham immediately before the latter was shot; and (4) Bell had later admitted to two different

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[1]The court then stated that the prosecutor would have 24 minutes remaining in rebuttal, having used 9 previously (T-886). Thus, the record is not altogether clear whether Mr. Link argued for 36 or 33 minutes (including the time taken up by the prosecutor's objections). Either way, petitioner's position is unchanged - the time restriction was unreasonable under the facts and circumstances of this case.

individuals that he, not petitioner, had shot the victim (but that petitioner was going to do the time for it).

The failure of counsel, after introducing all of this evidence, to even mention it in his closing argument was irreparably prejudicial; it effectively sabotaged petitioner's most viable defense. As Mr. Link made clear in his affidavit, this was no "strategic" decision on his part (R-69-70); he was simply too disorganized and unprepared to argue the case cogently. But it is also true that Mr. Link's ability to argue in petitioner's defense was hampered by the trial court's imposition of an unreasonable time restriction, given the nature and extent of the conflicting evidence before the jury, the magnitude of the crime charged, and the severity of the penalty.

When requested, reasonable time for argument must be allowed. May v. State, supra; Neal v. State, supra; Foster v. State, supra. In this case, after the court said he "had a feeling" that it would be necessary to limit closing arguments and asked for counsel's input, the prosecutor asked for 45 minutes. The prosecutor thought that would be sufficient, because, in his opinion "it's not a case that involves that much testimony, although it's evidently been spread out" (T-843). Bear in mind also that it was the prosecutor's task to emphasize the eyewitness testimony against petitioner, and to downplay the inconsistencies among the various witnesses and their prior inconsistent statements (see T-859-60, 891-93).

Conversely, it was defense counsel's task to thoroughly explore these inconsistencies in order to generate a reasonable doubt as to petitioner's guilt, and, if possible, to show that the evidence supported interpretations other than guilt (such as the possibility that Raymond Bell fired the fatal shot). Obviously, any curtailment of the length of argument would be more harmful to the party seeking to explore the inconsistencies in the testimony than to the party seeking to minimize them. Defense counsel told the trial court that he ordinarily takes about 45 minutes, but due to his lack of preparation for this trial he felt he would need an hour.

After the jurors reported that they had decided to stay late, the trial court announced that closing arguments would be limited to 30 minutes, and overruled defense counsel's objection thereto. This was exactly half of the time defense counsel had requested, a 30 minute reduction, and was 15 minutes less than what even the prosecutor thought would be sufficient. This curtailment of argument (which, as the trial judge stated, was contrary to his general policy) does not appear to have been based on any assessment, reasonable or otherwise, of the facts and circumstances of the case, or the nature and extent of the evidence, or the seriousness of the crime or the penalty. Rather, it appears that the trial court imposed the limitation solely to move the trial to completion that evening, rather than having to resume it on Saturday. However, as recognized in Cain v. State, supra "[t]here are no 'cost savings' in insisting on this kind of courtroom

efficiency", especially where it deprives the accused of his right to fully and cogently present his defense. See Foster v. State, supra.

The question of what is a "reasonable" time depends on the facts and circumstances of each case; among the factors which have been considered are the seriousness of the crime charged, the severity of the potential penalty, the length of the trial, the number of witnesses, the existence (or absence) of conflicts in the evidence, and the complexity of the defense or defenses available. See May v. State, supra; Pittman v. State, supra; Neal v. State, supra; Foster v. State, supra; Rodriquez v. State, supra.

In the present case, petitioner was charged with and convicted of second degree murder with a firearm, a life felony. The potential penalty for this offense is life imprisonment. Petitioner (who was 18 years sold at the time of the offense) was in fact sentenced to 40 years imprisonment; since this sentence was imposed pursuant to the guidelines procedure (though it represented a departure from the recommended range), petitioner will not be eligible for parole. Thus the concern voiced in Foster v. State, supra, at 1215, that "where human liberty is at stake ... considerable leeway must be given to defense counsel in arguing his case to the jury" is particularly applicable here.

The only aspect of this trial about which there was no disagreement is (as Alonzo Davis put it) "Everybody see[s] their own different things" (T-461), or (as Arthur Mitchell put

it) "Everybody going to have a different point of view to the story" (T-371). [See also the prosecutor's closing argument, at T-891]. Accordingly, both the prosecutor and defense counsel questioned and cross-examined the witnesses at length as to the position and location of the various people involved (see T-306-09, 312-14, 352-53, 363-69, 387, 407-08, 432-33, 436-37, 439-41, 456-57, 495-500, 506, 542-46, 643, 655-58, 723-25).

Petitioner's trial [not including the 1/2 day jury selection proceeding (T 112-245)] lasted two full days and into the night. Eight witnesses testified for the state; each of these witnesses (with the exception of the medical examiner) was extensively cross-examined by defense counsel. Every one of the six state witnesses who were present at any point during the melee was confronted with inconsistent testimony given in deposition (see T-301-02, 304-06, 308-09, 319-25, 347-49, 360-62, 370-71, 393-99, 401-02, 404-07, 445-46, 454-56, 483-88, 490-94, 507, 539-41, see also T-615-31). Seven witnesses were presented by the defense. The trial transcript, from the beginning of the first witness' testimony to the end of the last, is 559 pages in length. The evidence was sharply conflicting as to the identity of the perpetrator, and as to the circumstances giving rise to the shooting.[2]

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[2]The undersigned challenges any mortal to collate and relate the facts on pages 6-11 of this brief in 30, 33, or 36 minutes, even without the record cites.

Moreover, defense counsel was faced with the necessity of arguing alternative theories of defense. Given petitioner's testimony that he did not shoot the victim, given the testimony of petitioner and Ralph Williams that the various participants were positioned in such a way that petitioner could not have been the one who shot the victim, and given the wide-ranging testimony of various state and defense witnesses regarding the number of people with guns and the number of gunshots heard around the time the victim fell, there was plainly available a defense of misidentification, at least to the extent of arguing that the state had failed to prove petitioner's guilt beyond a reasonable doubt. Given the testimony that Raymond Bell was pointing a gun in the direction of the victim, and that he later told Trevio Parks and Linda Spivey that he was the one who shot him, it could (and should) have been argued that Bell may have committed the murder.

Given the testimony that another individual named Charles (or "New York), who was about petitioner's height and who was wearing a gray top, was in possession of a gun, and given the fact that at least one of the state's witnesses, Clarence Frazier, mistakenly thought petitioner and "New York" were one and the same (T-399, 401, 412-13), an argument was available that the state's witnesses may have seen the boy from New York fire the shot, and confused him with petitioner. This possibility is strengthened by the fact that Officer Rusty Rogers (who could not identify the perpetrator) saw the shot fired by

a short black male in a gray sweatshirt,[3] while two of the state's key witnesses (Mitchell and Gordon) had stated in their depositions that, when they saw petitioner pointing his gun, he had his shirt off (T-369-71, 492-95). Complicating matters still further is the fact that Detective Eason and Raymond Bell each claimed that petitioner admitted that he fired the fatal shot on the assumption that the victim was hit in the back. Both Eason and Bell indicated that petitioner was not really sure whether it was his bullet that struck the victim, depending on whether he was hit in the back or in the chest. The victim was, without any doubt, shot in the chest.

As if the evidence as to identity and the possibility of misidentification was not complicated enough, there was substantial evidence in this case from which the defense could contend that even if the jury found beyond a reasonable doubt that petitioner fired the shot, the killing was not second degree murder, but rather was manslaughter, third degree murder, or even justifiable homicide.[3] There was evidence that the shooting occurred in the midst of a brawl involving up to a

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[3]Clarence Frazier had testified on deposition that the gunman was wearing a grey sport coat or blazer, a scarf and chains around his neck, but no shirt (T 397-98). The gunman bragged that he was from New York (T 402). Ralph Williams testified that there was another man present named Charles, who is called "New York", because that is where he is from. That man is about the same height as petitioner, and was wearing grey sweat pants and a grey shirt (T 659-61).

[3]See Issue II, infra.

dozen people. There was evidence petitioner had been "blind-sided" by the Lee High Middle linebacker Milton Gordon (though the state and defense witnesses disagreed as to whether Gordon shoved him gently or hit him hard). There was evidence, both from defense witnesses and some of the state witnesses, indicating that Patrick Statham and Milton Gordon had taken control of the fight; that they had someone on the ground and were "beating up on" him. Petitioner testified that he thought this person was getting hurt down there, and might be seriously hurt (T-753). At that point, according to petitioner, Gordon pulled Statham off of the person on the ground; they ran off, and petitioner fired into the air (T-754).

The above evidence, if credited by the jury, could support a finding of justifiable homicide (if the jury found that petitioner reasonably believed that deadly force was necessary to prevent great bodily harm to another, i.e. the still-unidentified young man on the ground); or manslaughter (if it found that petitioner acted in the heat of passion or upon a sudden combat, but with a deadly weapon); or third degree murder (if it found that the killing occurred as a consequence of, and while petitioner was engaged in, an aggravated assault upon Gordon and/or Statham). Thus, this was one of the relatively rare trials where viable alternative defenses could be argued. Under these circumstances, defense counsel's request for an hour to argue his case to the jury was certainly not unreasonable. Even the prosecutor asked for 45 minutes, since,

from his point of view, this was "not a case that involves that much testimony" (T-843).

The trial court's decision to impose an even more restrictive limitation was against his ordinary policy, and was apparently motivated solely by a desire to finish the trial that night so the jury would not have to return on Saturday. The right of the accused in a criminal trial to fully and fairly present his defense to the jury cannot be sacrificed in favor of such an expediency. See Foster v. State, supra; Cain v. State, supra; see also Herring v. New York, supra. For the jury and the other participants in the trial it was one more day and a ruined weekend. For petitioner, it was forty (40) years.

McDuffee v. State, 55 Fla. 125, 46 So. 721 (1908) was a prosecution for armed robbery; the defendant received a twelve year sentence. The evidentiary phase of the trial "occupied but a portion of the morning session" of the court, and in narrative form covered 11 typewritten pages. There were four witnesses on each side. The testimony, as described by the appellate court, was "without complications". The victim of the robbery positively identified the defendant. The defendant denied having committed the crime, and presented three alibi witnesses, none of whom could account for the defendant's presence at the crucial time. This Court wrote:

> It is easy to conceive of cases where a limitation of thirty minutes would be a gross abuse of discretion, depending on the character of the evidence, the number of witnesses and other circumstances, and

> in such cases we should not hesitate to interfere, especially should the record disclose that the limitation actually prevented counsel from proper argument, but after a careful reading of the cases cited to us in behalf of this assignment, we feel confident that no abuses of discretion is now made to appear.

McDuffee v. State, supra, 55 Fla. at 128.

In Hickey v. State, 484 So.2d 1271 (Fla. 5th DCA), review denied, 492 So.2d 1335 (Fla. 1986), the defendant contended on appeal that the trial court "abused its discretion by unreasonably limiting closing argument in this murder trial to 30 minutes per side, thus ... depriving him of his constitutional right to due process and to a fair trial." The appellate court noted that this was a four day trial; and that the transcript of the testimony consisted of almost 750 pages, and the entire trial transcript ran close to 900 pages. The court then stated:

> In several recent cases, we have disapproved severe limitation of closing argument in criminal cases. [citations omitted]. Other district courts have done the same [citations omitted]. In the case before us, the defense counsel requested one hour for closing argument. Because the prosecutor asserted that 30 minutes should be enough, the court restricted argument to that time, and announced in advance that he would not even hear or consider a motion to extend the time if, as the deadline approached, defense counsel was not finished and thought some more time was required. Defense counsel was cut off when his time had run. We fail to see how a few minutes longer of closing argument would have impeded the administration of justice in this case. In May v. State, 89 Fla. 78, 103 So. 115 (1925), the Florida Supreme Court held that although no hard and fast rule could be prescribed, if it appeared that time for argument was unreasonably limited, such action

would constitute an abuse of discretion requiring the reversal of a judgment for a new trial. In Herring v. New York, 422 U.S. 853, 859, 95 S.Ct. 2550, 2553, 45 L.Ed.2d 593, 598 (1975) the United States Supreme Court said:

> There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge.

The cases which have reversed judgments because of unreasonable restriction of closing argument are indicative of the concern that in a criminal case, considerable leeway must be given to defense counsel in arguing his case to the jury. The court should not unduly restrict this argument even where the state's case is strong and the court believes the defense has very little about which to argue. Foster v. State, 464 So.2d 1214 (Fla. 3d DCA 1984). It is for the jury, not the trial judge, to determine the strength or weakness of the state's case and of the proffered defense. Herring v. New York, supra. Arbitrarily limiting a defendant's closing argument to 30 minutes in a murder trial which has been going on for four days, no matter how vexing the lawyer's behavior has been, seems to us to be an unreasonable restriction of the defendant's right to present his case to the jury.

Hickey v. State, 484 So.2d at 1274.

Under the circumstances of the present case, the trial court's restriction of closing argument was, if anything, more arbitrary and more unreasonable than in Hickey. There was an abundance of contradictory testimony to be sorted through, and even the prosecutor's estimate of the time necessary for

closing argument was greater than what the trial court permitted. The curtailment of argument was not based on the trial court's perception of the strength or weakness of the state's case nor on the proffered defenses (though, as Hickey makes clear, that is a matter to be determined by the jury in any event); rather, it was motivated entirely by solicitude for the jury's convenience, without regard to the nature of the case and the evidence. Petitioner's right to present his four defenses to the jury was unreasonably restricted, and he is entitled to a new trial. Hickey v. State, supra; Pittman v. State, supra; Foster v. State, supra; Cain v. State, supra.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO REINSTRUCT THE JURY ON JUSTIFIABLE AND EXCUSABLE HOMICIDE WHEN IT WAS REINSTRUCTED ON MANSLAUGHTER.

In its opinion, the majority of the lower tribunal also found that there was no need to reinstruct on justifiable and excusable homicide when reinstructing on the residual homicide offense of manslaughter. This decision is likewise indefensible.

When the trial court reinstructs the jury on manslaughter, it is reversible error to deny the defendant's request that the jury also be reinstructed on justifiable and excusable homicide. See e.g. Hedges v. State, 172 So.2d 824 (Fla. 1965); Martin v. State, 294 So.2d 414 (Fla. 4th DCA 1974); Clark v. State, 301 So.2d 456 (Fla. 3d DCA 1974); Jackson v. State, 317 So.2d 454 (Fla. 4th DCA 1975); Hunter v. State, 378 So.2d 845 (Fla. 1st DCA 1979); Kelsey v. State, 410 So.2d 988 (Fla. 1st DCA 1982); Niblack v. State, 451 So.2d 539 (Fla. 2d DCA 1984). The rationale underlying these decisions is that the jury must always be given a full and complete instruction as to any particular offense. See Hedges v. State, supra; Kelsey v. State, supra, at 989; Reynolds v. State, 438 So.2d 190 (Fla. 1st DCA 1983). Any repeated charges must be complete on the subject involved. Hedges v. State, supra, at 826; Jackson v. State, supra, at 455; Henry v. State, 350 So.2d 512, 514 (Fla. 4th DCA 1977); approved, 359 So.2d 864 (Fla. 1978).

Manslaughter is "a residual offense which is actually defined by reference to what it is not" [Kelsey v. State,

supra, at 989]; thus, manslaughter cannot be adequately defined without definitions of justifiable and excusable homicide. Green v. State, 244 So.2d 167 (Fla. 2d DCA 1971); Robinson v. State, 338 So.2d 1309, 1312 (Fla. 4th DCA 1976); Pouk v. State, 359 So.2d 929 (Fla. 2d DCA 1978); Nelson v. State, 371 So.2d 706 (Fla. 4th DCA 1979); Reifsnyder v. State, 428 So.2d 738 (Fla. 2d DCA 1983); Delaford v. State, 449 So.2d 983, 984 (Fla. 2d DCA 1984); Niblack v. State, supra, at 540. A full and complete instruction or reinstruction on manslaughter must necessarily include instructions on justifiable and excusable homicide. Hedges v. State, supra, at 826; Green v. State, supra; Whitehead v. State, 245 So.2d 94, 98 (Fla. 2d DCA 1981); Clark v. State, at 457; Jackson v. State, supra; Reynolds v. State, supra, at 191; Delaford v. State, supra, at 984; Niblack v. State, supra, at 539. A reinstruction on manslaughter which omits the definitions of justifiable and excusable homicide leaves the jury with "an incomplete and potentially misleading instruction". Hedges v. State, supra, at 826. See Clark v. State, supra, at 457; Jackson v. State, supra, at 455. Where the issue is preserved by a request for reinstructions on justifiable and excusable homicide, or by an objection to their omission, the trial court's refusal to give them is reversible error, regardless of the degree of homicide the defendant is actually convicted of. Hedges v. State, supra (manslaughter); Clark v. State, supra (second-degree murder); Hunter v. State, supra (third degree murder); Kelsey v. State, supra (manslaughter); Niblack v. State, supra (second degree murder).

In the present case, the jury submitted a written question asking the court to explain again the difference between second degree murder and third degree murder (T-926). The trial court informed both attorneys that it intended to reinstruct on manslaughter as well, because "I feel it's incumbent to at least give all the degrees if I give any of them" (T-926-27). Defense counsel then requested that the court also re-instruct the jury on justifiable and excusable homicide (T-927). The court asked the prosecutor if he had any thoughts on the subject (T-927). The prosecutor replied, "Your Honor, I would object to that, but I have no objection to your proposed form of instruction" (T-927). The trial court announced that it would reinstruct on the definitions of second degree murder, third degree murder (together with the predicate felony of aggravated assault), and manslaughter (T-927). Noting defense counsel's request as an objection (T-927), the court omitted the definitions of justifiable and excusable homicide (T-928-32). The trial court prefaced its reinstructions by cautioning the jury not to give undue emphasis to the portion of the instructions which were being repeated (T-928). However, it also advised them that it was repeating the full definition of the three crimes for which petitioner could be found guilty (T-928).

Since the trial court, over objection, gave the jury an incomplete and potentially misleading reinstruction on manslaughter, the question arises whether this plain error was obviated by the fact that the jury did not specifically ask to

be reinstructed on manslaughter. The answer is that it was not. In Jackson v. State, supra, the jury had been properly instructed on the various degrees of homicide and on justifiable and excusable homicide. In the midst of its deliberations, the jury requested "a description of the degrees in writing that we could look at". The trial court asked whether the jury wanted a reinstruction on justifiable and excusable homicide; the foreman answered "No, sir". The court then orally reinstructed on the degrees of homicide but omitted the definitions of justifiable and excusable homicide; defense counsel objected to the omission. The court stated that he had limited his reinstruction to what the jury had asked for. Reversing Jackson's conviction, the appellate court said:

> The [state] relies upon Hysler v. State, 85 Fla. 153, 95 So. 573 (1923) to support the trial court's action, but we feel that reliance is misplaced. Hysler held that when the jury requests that certain portions of the court's charge be re-read to them it is not necessary that the court re-read the entire charge to the jury. That rule was reaffirmed by the Supreme Court in Hedges v. State, Fla. 1965, 172 So.2d 824. But in reaffirming the rule the Hedges court pointed out: "However, the repeated charge should be complete on the subject involved." 172 So.2d at 826. That opinion makes it crystal clear that failure to reinstruct on excusable and justifiable homicide leaves the jury with an incomplete and potentially misleading instruction. Numerous convictions of late have been reversed for failure to follow that rule.
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> As usual every new case seems to have a "new wrinkle" and this one is no exception. Sub judice the trial judge asked the jury if they wanted to be reinstructed on excusable and justifiable homicide and they declined. Which seems to bring us to the question: can the

> trial court reinstruct the jury inadequately on a subject because the jury indicates an interest in only some limited phase of the subject in question? We think not. The entire subject of jury instructions is difficult at best. Some seriously question their efficacy in any event. Be that as it may, the jury is hardly in a position to discern many of the fine distinctions involved in the law to be applied without guidance from the court. Thus, great care must be exercised in giving jury instructions so the jury may obtain the whole picture of a particular subject. Therefore, in instructing and in reinstructing on manslaughter, it is essential to instruct on excusable and justifiable homicide to enable the jury to understand the definition of manslaughter. Hedges v. State, supra; Halfrich v. State, 122 Fla. 375, 165 So. 285 (1936).

Jackson v. State, supra, at 455.

See also Crapps v. Murchek, 330 So.2d 173, 175 n.1 (Fla. 4th DCA 1976).

On the other hand, where the jury requested clarification of the difference between first and second degree murder, and where the trial court limited his reinstruction to those two offenses and did not purport to reinstruct on manslaughter, no reversible error was found. Henry v. State, 350 So.2d 512 (Fla. 4th DCA 1977), approved 359 So.2d 864 (Fla. 1978). The Fourth District Court of Appeal distinguished Hedges: "Quite logically, the Hedges court points out that in instructing the jury on manslaughter it is necessary to define excusable and justifiable homicide and murder because of the definition of manslaughter". Henry v. State, supra, 350 So.2d at 513. "...[In] order to supply a complete definition of manslaughter as a degree of unlawful homicide it is necessary to include

also a definition of the exclusions." Henry v. State, supra, 350 So.2d at 513, quoting Hedges v. State, supra, at 826.

> The principle to be gleaned from Hedges is that in reinstructing a jury the trial court is not required to once again give the jury the Court's entire charge. Hysler v. State, 85 Fla. 153, 95 So. 573 (1923), "However, the repeated charges should be complete on the subject involved." Hedges v. State, supra.

The District Court concluded:

> While a court cannot give a complete instruction on manslaughter without defining excusable and justifiable homicide and murder, we conclude that a court can certainly define first and second degree murder fully without also defining manslaughter. The reason for this conclusion is that, unlike the definition of manslaughter, which definition specifically excludes murder, the definitions of first and second degree murder do not by definition specifically exclude manslaughter. Therefore, a court may completely define first degree murder and second degree murder without making any reference to manslaughter and excusable and justifiable homicide.
>
> In passing, we think it advisable to mention that in Jackson v. State, 317 So.2d 454 (Fla. 4th DCA 1975), the circuit court reinstructed the jury on second and third degree murder and manslaughter, but (at the jury's suggestion) not on excusable and justifiable homicide. We correctly held there that (because of the reinstruction on manslaughter) the omission of a reinstruction on excusable and justifiable homicide was reversible error.

Henry v. State, supra, 350 So.2d at 514.

The District Court's decision was approved by this Court in Henry v. State, 359 So.2d 864 (Fla. 1978), upon which the

majority below relied. This Court also recognized that in order to supply a complete definition of the residual offense of manslaughter, it is necessary to define justifiable and excusable homicide. Distinguishing Hedges in the same manner as the District Court did, this Court said: "The jury in Hedges was given an incomplete instruction with regard to manslaughter. In the instant case, the jury was not reinstructed on manslaughter but was recharged exclusively on first and second degree murder." Henry v. State, supra, 359 So.2d at 867. See also Engle v. State, 438 So.2d 803, 810-11 (Fla. 1983).

In the present case, like Hedges and its progeny and unlike Henry, the trial court did reinstruct the jury on manslaughter, and in fact purported to be giving them a "full definition" of all the crimes for which petitioner could be found guilty (T-928). While, under the rationale of the Henry decision, the court arguably had the discretion to limit its reinstruction to the specific offenses mentioned in the jury's question,[4] that is not what it did. Rather, the trial court reinstructed the jury on manslaughter, but did so improperly.

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[4]Note, however, that this Court rather carefully limited its holding in Henry. The precise holding is that "on the facts of this case, the trial judge did not abuse his discretion in limiting reinstruction to an unambiguous response to the jury's request." Henry v. State, supra, 359 So.2d at 868. Note also that this Court has mandated complete reinstruction in its standard jury instructions. Appendix at 10, note 2.

See Kelsey v. State, 410 So.2d 988, 989 (Fla. 1st DCA 1982), in which the First District Court formerly recognized, in reversing for failure to reinstruct on justifiable and excusable homicide as an integral part of the definition of manslaughter, that: "... the Henry opinion cannot be read as a grant of approval for the giving of a less than full and complete instruction as to any particular crime". See also Hunter v. State, 378 So.2d 845 (Fla. 1st DCA 1979), in which the jury had initially asked for reinstruction on the penalties for the various possible crimes, but the trial court instead reinstructed on the elements of those crimes. In reinstructing on manslaughter, the court "made passing reference" to excusable or justifiable homicide, but refused to reinstruct on their definitions. The First District Court of Appeal reversed, concluding that the "trial court ... erred in giving only a partial reinstruction to the jury." Hunter v. State, supra, at 846. The Court determined that, since the trial court had refused to include justifiable and excusable homicide in his discussion of manslaughter, Hedges, not Henry, was the controlling authority.

In the present case, when the trial court informed counsel that it was going to reinstruct the jury on manslaughter, defense counsel properly requested that it also reinstruct the jury on justifiable and excusable homicide. The prosecutor, for no apparent reason, objected to defense counsel's request, though he did not object to the court's decision to include manslaughter in the reinstructions. The court's refusal,

under these circumstances, to give a complete reinstruction on manslaughter was reversible error. Hedges v. State, supra; Martin v. State, supra; Clark v. State, supra; Jackson v. State, supra; Hunter v. State, supra; Kelsey v. State, supra; Niblack v. State, supra. Since defining justifiable and excusable homicide as a part of the definition of manslaughter is a mandatory requirement [Clark v. State, supra; see also Delaford v. State, supra; Niblack v. State, supra], since the omission of the requested reinstructions leaves the jury with an incomplete and potentially misleading instruction [Hedges v. State, supra; Clark v. State, supra; Jackson v. State, supra], and since "[s]elf-defense and justifiable and excusable homicide may be equally as relevant to a determination of guilt for second degree murder as it would be to manslaughter" [Clark v. State, supra, at 457; see also Niblack v. State, supra], the error cannot be written off as "harmless". See also Hunter v. State, 389 So.2d 661 (Fla. 4th DCA 1980); Rodriguez v. State, 443 So.2d 286, 292 (Fla. 3d DCA 1983).

ISSUE III

THE TRIAL COURT ERRED IN IMPOSING A 40 YEAR DEPARTURE SENTENCE UPON THREE INVALID REASONS FOR DEPARTURE.

The three reasons for departure are set forth at pages 4-5 of this brief. The first, that the 17-22 year range was insufficient, was properly invalidated by the lower tribunal on authority of Scurry v. State, 489 So.2d 25 (Fla. 1986). Appendix at 3, 11.

The second reason relates to petitioner's criminal history, which all consists of juvenile offenses, since petitioner was age 18 at the time of the instant offense. The lower tribunal apparently construed this reason as setting forth appellant's scored and unscored juvenile convictions, and held that the departure sentence of 40 years was supported by "appellant's lengthy unscored juvenile record". Presumably, the scored juvenile convictions as a reason for departure were invalidated on authority of Hendrix v. State, 475 So.2d 1218 (Fla. 1985), and the unscored juvenile convictions as a reason for departure were approved on authority of Weems v. State, 469 So.2d 128 (Fla. 1985).

The prosecutor introduced at the sentencing hearing (T 974) copies of petitioner's California juvenile record (R 72-84). The sentencing guidelines scoresheet, in the prior record section, assesses 33 points for two prior second degree felonies (R 91). Thus, it would appear that two of petitioner's prior juvenile offenses were assessed points on the scoresheet. Because the sentencing judge relied upon a mixture

of scored and unscored offenses, he must be directed to consider his departure decision in light of only the unscored convictions.

According to petitioner's amended initial brief in the lower tribunal at page 42,[5] those unscored priors consist of two shoplifting offenses and one petit theft. It is not "lengthy". The double departure from the recommended guidelines range of 17-22 years cannot be justified by relying upon three unscored juvenile misdemeanors.

In Musgrove v. State, 524 So.2d 715 (Fla. 1st DCA 1988), this Court held that a departure from three to 10 years could not be supported by one unscored juvenile felony and two unscored juvenile misdemeanors because they were not substantial. This Court must follow Musgrove and hold that petitioner's three juvenile misdemeanors do not justify departure. See also White v. State, 501 So.2d 189 (Fla. 5th DCA 1987)("quite minimal" unscored juvenile record invalid reason).

Even if petitioner's unscored juvenile convictions are valid reasons for departure, they do not justify the double departure here. The appellate courts in this state are reading

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[5]The undersigned cannot provide a record cite to verify this statement because he was not the author of the amended initial brief filed in the lower tribunal, and because by order dated February 17, 1986, the lower tribunal allowed the presentence investigation disclosed to former counsel for both parties, but prohibited counsel from photocopying it, and directed that counsel's copies be returned to that court and sealed. However, the brief of respondent filed below does not dispute this assertion.

this Court's opinion in Weems, supra, to allow any length of departure for unscored prior convictions. This makes no sense. This Court should limit the effect of its prior holding.

Fla. R. Crim. P. 3.701(d)(5)(c), the rule against scoring "stale" juvenile convictions, was no doubt intended, as was the rule against scoring even more "stale" adult convictions, Fla. R. Crim. P. 3.701(d)(5)(b), to protect a defendant who remained crime-free for a number of years. Yet, if the unscored convictions are permitted to justify departure, the defendant is being penalized by the operation of a rule which was designed to protect him.[6]

Moreover, Mr. Weems was facing sentencing on a burglary, as well as another felony and another misdemeanor. His scoresheet called for any non-state prison sanction. He was sentenced to a total of two years for the three offenses. Because he had 13 prior juvenile convictions, including 11 for burglary, only two of which were scored, the exasperated sentencing judge could not place him on probation. Petitioner's situation is quite different from that of Mr. Weems.

The lower tribunal apparently construed the third reason as setting forth petitioner's parole status and violation of that parole by his possession of a firearm, and held that the

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[6]If the three misdemeanors were scored in the prior record section, four points would be added to the scoresheet, for a new total of 244, which would not have changed the recommended range.

departure sentence of 40 years was supported by "appellant's ... admitted ownership of a firearm contrary to probation [sic] conditions shown by the record". Appendix at 3. The scored parole status should have been invalidated as a reason for departure on authority of Hendrix, supra, because petitioner was assessed 21 points on the scoresheet in the legal constraint section.[7] See also Wheeler v. State, 525 So.2d 1008 (Fla. 3rd DCA 1988).

Likewise, petitioner's use of a firearm cannot be justified as a reason for departure because his crime, second degree murder, was reclassified from a first degree felony punishable by life, Section 782.04(2), Florida Statutes, to a life felony by operation of Section 775.087(1), Florida Statutes. That reclassification added 15 points to the primary offense section of the scoresheet. Thus, this portion of reason #3 should have been invalidated below on authority of Hendrix, supra. See also Bowdoin v. State, 464 So.2d 496 (Fla. 4th DCA 1985) and Gray v. State, 522 So.2d 91 (Fla. 1st DCA 1988)(use of a firearm improper reason to depart where defendant convicted of armed robbery).

Moreover, as recognized by Judge Zehmer's dissent below. appendix at 11, the double departure from the recommended guidelines range of 17-22 years cannot be justified by relying

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[7]Counsel made this objection at the first sentencing hearing (T 976).

upon the violation of parole by ownership of a firearm because there is nothing in the record to show that petitioner's California Youth Authority parole has ever been revoked. In Bradley v. State, 509 So.2d 1137 (Fla. 2nd DCA 1987), the court held that the pendency of a parole violation proceeding could not be used as a reason for departure. If the California Youth Authority decided to revoke petitioner's parole and sentence him to additional incarceration, then so be it. However, it is not up to a Florida judge to determine how much extra time petitioner should receive because he violated his California parole.

This Court should strike the remaining reasons for departure and direct the imposition of a guidelines sentence on authority of Shull v. Dugger, 515 So.2d 748 (Fla. 1987), since the judge is not authorized to set forth new reasons for departure.

Finally, this Court has both the power and the obligation to review the extent of the departure for petitioner's 1984 crime. See Booker v. State, 514 So.2d 1079 (Fla. 1987). The framers of the guidelines believed a 17-22 year sentence was quite sufficient for one who commits a second degree murder with a firearm, who is on parole, and who has two prior scored felony convictions. Yet the sentencing judge doubled that presumptively-correct sentence and imposed 40 years on a defendant who was 18 years old, had no prior violent felonies,

and no record whatsoever as an adult.[8] The judge made no attempt to explain why petitioner deserved a sentence twice as severe and two cells higher than the guidelines called for. This Court must reduce petitioner's departure sentence, if there is to be any departure at all, to a less severe level.

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[8]The judge originally imposed an illegal sentence of 50 years (R 87-90), and when it was corrected, the judge properly rejected the prosecutor's call to increase it to life (T 998). See Blackshear v. State, 13 FLW 586 (Fla. September 29, 1988).

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse his judgment and sentence and remand for new trial. In the alternative, petitioner requests that his sentence be vacated and the cause remanded for resentencing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief on the Merits has been furnished by delivery to William A. Hatch, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #098565, Post Office Box 500, Olustee, Florida, 32072, this 28 day of November, 1988.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER