IN THE SUPREME COURT OF FLORIDA

DAVID DAVIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO.: 73,464

4DCA: 4-86-2038

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, David Davis, was the Appellant in the Fourth District Court of Appeal and the Defendant in the Trial Court. The Respondent was the Appellee and the Prosecution respectively, in those lower courts. In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to the Appendix which includes the decision of the District Court of Appeal. The symbol "R" will be used to refer to the Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged by Information with one count of armed robbery and one count of attempted first degree murder [R979-980;983;988]. The charges involved an accident at a local convenience store, in which the clerk was stabbed repeatedly during the course of a robbery.

The Respondent adduced testimony from five witnesses. Tina Carroll was the clerk (and co-owner) of the convenience store. On the day in question, she opened the store at 6:45 a.m. by herself. Shortly thereafter, a skinny black male, whom Ms. Carroll had seen a number of times before, came to purchase a beer. After buying the beer, the male left. However; the male returned, shortly thereafter, to get cigarettes. The man produced a large bill and when Ms. Carroll couldn't make change, drew a large knife and asked for money. Ms. Carroll handed about $96.00 over to the man and after he had ordered her to come from behind the counter, he threatened her and promptly stabbed her in the arm and back and left the store. Thinking he had gone, Ms. Carroll got up from the floor and the man returned and again stabbed her a number of times and left the store. Ms. Carroll told police that the suspect had a red shirt with a logo saying "You've come a long way baby". She made a positive identification of the Petitioner in a photo lineup three days later at the hospital and confirmed that identification in Court [R568-602].

Ms. Carroll also admitted that the Petitioner first walked around the store as if he didn't know where he was going [R633;637].

She also testified that the Petitioner paid for the goods with his hands and had no gloves on. She did not see that the Petitioner's finger was missing nor did she notice that his front tooth was missing [R639-640]. She did not remember that the Petitioner was the perpetrator until 9:00 p.m. the day of the crime [R-634]. She was in much pain when she made her initial identification [R-635]. She claimed to have seen the Petitioner come into her store on a daily basis two to three years prior to the crime [R-571].

Ronald Neil worked for the Palm Beach Post and was in the area at the time of the crime. He saw a black male, approximately six feet (not taller) with a red or maroon shirt, running from the store. He could not identify the Petitioner as that man [R659-665].

Dr. Sherer treated Ms. Carroll for her wounds. The doctor testified that she had multiple stab wounds to her neck, chest and shoulders in her front and back. Both her lungs were punctured. She had twenty wounds. Ms. Carroll was admitted to the hospital on May 11th and was discharged on May 16th [R673-678].

John Battle was a civilian witness who went to buy cigarettes at the store that day. As he entered the store he saw Ms. Carroll on the floor bleeding and began chasing the suspect. Mr. Battle never caught the suspect but did describe him *as* a black male, 19-21 years of age, a block haircut, with red shirt and blue pants. He could not identify the Petitioner as the perpetrator [R699-705].

Sgt. Barber supervised the investigation. He went to the hospital and got a description from Ms. Carroll: black male, 5'6" - 5'7" tall, with a beard, light complexion, red shirt with *a* logo and skinny. The crime scene was "neutral" and yielded no

evidence. Barber presented four separate photo lineups to Ms. Carroll and in the last one, three days after the crime, Ms. Carroll identified the Petitioner as the thief. Barber admitted that Ms. Carroll earlier said that the suspect looked like Joseph Bivins, an escapee who was an early suspect in this case. Barber never tried to get a composite done of the Petitioner at any point nor did he take written statements from the witnesses. The Petitioner was arrested on May 15th, four days after the crime. Barber never searched the Petitioner's house and never did find any clothes matching those described. None of the blood on the scene matched the Petitioner's blood type [R707-763].

The Petitioner did not take the stand on his own behalf. On this evidence, the Petitioner was found guilty as charged [R913-9141. On September 13, 1986, the Petitioner was sentenced to two life terms in prison, running consecutively to each other [R1029-1030]. The Petitioner's sentencing range was 17-22 years in prison. Notice of Appeal was timely filed and this appeal follows.

POINTS INVOLVED

I. WHETHER SECTION 921.001(5) MAY NOT RE APPLIED AGAINST THE PETITIONER TO PRECLUDE REMAND FOR RESENTENCING WHERE ONLY ONE OF THE SEVERAL REASONS GIVEN FOR HIS GUIDELINE DEPARTURE SENTENCE WAS HELD VALID ON APPEAL?

II. WHETHER THE TRIAL JUDGE ERRED IN DEPARTING FROM THE GUIDELINES?

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE RESPONDENT TO USE A PEREMPTORY CHALLENGE IN A RACIALLY DISCRIMINATING MANNER?

SUMMARY OF ARGUMENT

POINT I: Section 921.001(5), Florida Statutes, which seeks to preclude remand of a guidelines departure sentence althought several of the reasons for departure have been found invalid on appeal, addresses a matter of procedure which is within the exclusive province of this Court to regulate. As such, it is in violation of Article V, Section 2(a) of the Florida Constitution. Should this Court determine that the statute is in fact substantive, then its application against the Petitioner, whose crime was committed prior to its effective date, violates the constitutional proscription against ex post facto laws.

POINT II: The Trial Judge improperly departed from the guidelines - excessive force is inherent in the crimes charged; mental trauma was not supnorted by evidence and is not of the extreme degree necessary; and there is no pattern of escalating criminal activity. Thus, because there are no valid reasons to depart, remand for resentencing within the guidelines is in order.

POINT III: The Trial Judge erred in allowing the prosecutor to use a racially discriminating peremptory challenge. An analysis of the prosecutor's stated reason - that the prospective juror waved and/or smiled at defense counsel - shows the superficiality of this justification. The Trial Judge found this was not grounds to strike the juror for cause and the other evidence indicates the juror was not partial to either party. Thus, the strike cannot be justified by a credible race-neutral reason and is improper.

ARGUMENT

I. SECTION 921.001(5) MAY NOT BE APPLIED AGAINST THE PETITIONER TO PRECLUDE REMAND FOR RESENTENCING 'WHERE ONLY ONE OF THE SEVERAL REASONS GIVEN FOR HIS GUIDELINE DEPARTURE SENTENCE WAS HELD VALID ON APPEAL.

In its decision reviewing the Petitioner's appeal from the guidelines departure sentence, the Fourth District Court of Appeal held that of several reasons given by the trial court to justify the Petitioner's sentence, only one could be found valid. Recognizing that this Court's decision in Albritton vs. State, 476 So.2d 158 (Fla. 1985) required reversal of such a sentence for a determination by the trial court whether it would impose the same departure sentence based solely on the single reason remaining, the Fourth District Court of Appeal nevertheless declined to reserve, relying on the intervening' enactment by the legislature of Section 921.001(5), Florida Statutes (1987) which provides in pertinent part:

> when multiple reasons exist to support a departure from guidelines sentence, the departure shall be upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure.

'Petitioner's offense was committed on May 11, 1985[R-979]. Section 921.001(5), Florida Statutes (1987) became effective on July 1, 1987. Ch. 87-110, Laws of Florida.

The Fourth District Court of Appeal relying on its decision in Abt vs. State, 528 So.2d 112 (Fla. 4th DCA 1988) has taken the position that Section 921.001(5) is procedural in nature and thus does not violate the ex post facto clause when applied against defendants like the Petitioner, who committed their crimes before its effective date. The rationale of the Fourth District Court of Appeals directly conflicts with the prior holdings of the Second and Third District Courts of Appeal in Hoyte vs. State, 518 So.2d 975 (Fla. 2nd DCA 1988) and State vs. Mesa, 520 So.2d 328 (Fla. 3rd DCA 1988).

The Fourth District Court of Appeal's reliance on Abt vs. State, supra, and Section 921.001(5) to avoid reversal of the Petitioner's departure sentence is misplaced. For if, as the Fourth District Court has held, Section 921.001(5) is a matter of procedure not controlled by the ex post facto caluse of the United States and Florida Constitutions, then it is unconstitutional.

Article V, Section 2(a), Florida Constitution, provides in pertinent part:

> The Supreme Court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature. (emphasis added)

Thus, the legislature has no constitutional authority to enact any

law relatinp to judicial practice and procedure. Graham vs. Murrell, 462 So.2d 34 (Fla. 1st DCA 1984). For purposes of defining the province of the courts, a rule of procedure prescribes the method or order by which a party enforces substantive rights or obtains redress for their invasion. Substantive law, on the other hand, creates such rights. Practice and procedure are the machinery of judicial process as opposed to its product. Military Park Fire Control Tax Distrct No. 4 vs. DeMarois, 407 So.2d 1020 (Fla. 4th DCA 1981). Thus, in DeMarois, the district court held that a statute which purported to give priority to certain appeals over other civil cases violated the constitutional delegation of procedural issues to the courts. And any statute which conflicts with the judicial deternination in a matter of procedure is not controlling. Rhynes vs. State, 312 So.2d 520 (Fla. 4th DCA 1975).

The prescribed punishment for a criminal offense is substantive. Benyard vs. Wainwright, 322 So.2d 473 (Fla. 1976). But sentencing itself is a judicial function governed by the rules of procedure. For example, regulation of presentence investigation reports is within the purview of the Supreme Court's constitutional rule-making power. A statute requiring presentence investigation reports for defendants found guilty of felonies was in violation of the doctrine of separation of powers as a legislative attempt to create a rule of procedure for the courts. Johnson vs State, 308 So.2d 127 (Fla. 1st DCA 1975), affirmed Johnson vs. State, 346 So.2d 66 (Fla. 1977).

Applying these principles to the present case, it is readily

apparent that the sentence to which a defendant is exposed when he commits a crime is a matter of substantive law which must be legislatively defined. The sentencing guidelines themselves, then, are appropriately articulated in the statutes. But the mechanics of their imposition may be guided by procedural rules promulgated by the Supreme Court. Again, the right to appeal from a guidelines departure sentence is substantive, and thus for the legislature to determine. See, Abney vs. United States, 431 U.S. 681, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). This includes defining when an appeal is authorized: for instance, a legislative enactment which restricts a defendant from appealing the extent of his guidelines departure sentence defines when and from what type of order an appeal may be taken, a proper legislative function. Austin vs. Town of Oviedo, 92 So. 2d 648, 650 (Fla. 1957). Consequently, ch.86-273, ~~Laws of~~ Florida, which precludes appellate review of the ~~extent~~ of a guidelines departure controls a matter of substantive law and so does not violate the doctrine of separation of powers. Booker vs. ~~State~~, 514 So.2d 1079 (Fla. 1987).

Quite different is the issue at bar, however. For the legislature has unquestionably authorized appeal from a guidelines departure sentence for the purpose of testing the validity of the reasons for departure. Section 921.001(5) therefore purports to govern not the appealability of an order, but rather to control a part of the appellate process itself. The legislature has here attempted to tell the appellate courts, which have been given the

power to review, in what manner they may conduct that review. But review of the validity of the guidelines departure reasons -- and the fashioning of an appropriate remedy where some or all of those reasons are found to be invalid -- is of just that type of judicial scrutiny which has always been a part of the appellate function, as this Court noted by its quotation, in Booker, 514 So.2d at 1082, n.2, of the following passage from United States vs. Hartford, 489 F.2d 652, 654 (5th Cir. 1974):

> Appellate modification of a statutorily authorized sentence, however; is an entirely different matter from the careful scrutiny of the judicial process by which the particular punishment was determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is, on the contrary, a necessary incident of what has always been appropriate review of criminal cases. (Emphasis original)

Therefore; Section 921.001(5) seeks to effect an improper legislative interference with the appellate process, a function over which control is constitutionally limited to the courts. As such, it cannot serve as authorization to negate the appropriately arrived at determination of this Court in Albritton as to the effect of an appellate court's finding that some of a trial court's reasons for departure are valid but some are invalid.

This Court itself has implicitly suggested its rejection of a Abt-type analysis. As outlined in Powell vs. State, 515 So.2d 1294, 1297 at n.1 (Fla. 2nd DCA 1987), this Court has already declined to adopt a Sentencing Guidelines Commission recommendation that a departure sentence he upheld where a single valid reason for

departure remains after appellate review has determined other reasons for departure relied on by the sentencing judge to be invalid. Rules of Criminal Procedure Sentencing Guidelines -- Amendments, 12 F.L.W. 162 (Fla. April 2, 1987); Rules of Criminal Procedure -- Amendment -- Sentencing Guidelines, 509 So.2d 1088 (Fla. 1987). In the latter opinion, the Court noted the many amendments to the sentencing guidelines which were legislatively enacted (including that at issue in this case) and stated: "We have not considered these amendments and make no ruling as to their validity in this opinion." But since then, this Court has decided Griffis vs. State, 509 So.2d 1104 (Fla. 1987), wherein it held that a sentencing judge's boiler plate recitation that he would have imposed the same sentence based on any one of the reasons for departure does not obviate the need to remand the case for resentencing where other reasons for departure are found invalid. In so holding, this Court saw "no reason to recede from our position of December 1985," despite the intervening legislative enactment of Section 921.001(5):

> We reiterate the principle of Albritton. Such a sentence can be affirmed only where the appellate court is satisfied by the entire record that the state has met its burden of proving beyond a reasonable doubt that the sentence would have been the same without the impermissible reasons. A statement by the trial court that it would depart for any of the reasons given, standing alone, is not enough to satisfy that burden.

See also, Anthony vs. State, 524 So.2d 655, 657, n.3 (Fla. 1983).

This result is supported by logic as well as the law. A blanket rule requiring affirmance of a departure sentence even where nine of ten reasons for departure were found invalid would totally negate the proper discretionary role of the sentencing judge to make a reasoned decision as to the appropriate sentence to be imposed based on the severity of the valid justification for the departure sentence; having once determined that degarture is justified, the sentencing judge is not presumed to automatically impose the maximum sentence in all cases, but he is to consider, based on the aggravating circumstances correctly before him, what sentence, albeit autside the guidelines, will best serve the needs of justice. See, Abt vs. State, supra. Depriving the trial judge of the opportunity to perform this role by taking away his obligation to reconsider his departure sentence when some of his reasons for departure sentencing are found invalid in effect strips the judge of his sentencing discretion in a backdoor way not contemplated by the sentencing guidelines scheme.

Consequently, the legislative enactment of Section 921.001(5) can have no effect on this appeal or any other, since it is an unconstitutional attempt by the legislature to govern a matter of procedure which is within this Court's exclusive province to determine. The lower court's decision in Abt, which completely ignores this defect, therefore, cannot be approved.

Moreover, even if the Petitioner's argument in this regard is rejected, and Section 921.001(5) is viewed as a change in

substantive sentencing law so as to avoid the constitutional attack urged, supra, Section 921.001(5) cannot be invoked against the Petitioner in the instant case. For in that event, the retroactive application of Section 921.001(5) to the instant cause would violate the ex post facto clauses of the United States and Florida Constitutions. Hoyte, Mesa, supra. Clearly, the Petitioner suffers detriment as a result of this new legislative pronouncement: under prior law as enunciated in Albritton vs. State, supra, the Petitioner's sentence should have been remanded to the trial court when the appellate forum found all but one of the reasons justifying his departure sentence to be invalid. Now, the Petitioner may be denied any relief because of the intervening enactment of amended Section 921.001(5). The operation of Section 921.001(5) in cases where the offense was committed before its effective date must thus be held to violate the prohibition against ex post facto laws.

Under either interpretation of the statute, however, as procedure or substance, the Fourth District Court of Appeal erred in applying it against the Petitioner.

11. THE TRIAL JUDGE ERRED IN DEPARTING FROM THE GUIDELINES.

This is another upward departure from the guidelines. Here, the trial judge sentenced the Petitioner to two consecutive life sentences [R1029-1030], where Petitioner s presumptive range was seventeen to twenty-two years in prison R-10281. Each of the reasons given by the trial judge are improper and require reversal of the Petitioner's sentence.

Departures from the presumptive sentence are not favored- indeed, Rule 3.701(d)(11), Fla.R.Cr.P. (1985) seeks to discourage unwarranted departure from the guidelines. Albritton vs. State, 476 So.2d 158 (Fla. 1985). Departures are proper only where there are clear and convincing reasons to warrant aggravating or mitigating a sentence. State vs. Mischler, 488 So.2d 523 (Fla. 1986); Rule 3.701, supra. The reasons for departure must be credible and proven beyond a reasonable doubt. State vs. Mischler, 488 So.2d at 525. The departure below violates these established rules. The reasons to depart cited by the judge are discussed are follows:

1. "Cruel and heinous manner in which offense was committed including 37[2] separate stab wounds on victim'' or, restated, excessive force.

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[2]The only evidence regarding the number of wounds came from Dr. Sherer, who treated Ms. Carroll for her wounds. He testified that she had 20 stab wounds [R-676].

The Petitioner was charged with, and convicted of, armed robbery and attempted first degree murder [R-988]. Thus, these crimes entailed taking money by "force, violence, assault or putting in fear" and "repeatedly stab[bing] Tina Carroll with a knife." Id.[3]

The general rule, applicable here, is that the sentencing court cannot use an inherent element of the charged crime[s] to justify departure. State vs. Mischler, supra; State vs. Cote, 487 So.2d 1039 (Fla. 1986). This is because inherent components of the charged crimes are already built into the guideline range. Gibson vs. State, 509 So.2d 1284 (Fla. 3rd DCA 1987); Bowdoin vs. State, 464 So.2d 596 (Fla. 4th DCA 1985). The departure in this case violates this rule because the conduct identified by the judge - 37 separate stab wounds - is identical to the crime of which the Petitioner was convicted - "repeatedly stab[bing]" the victim.

Thus, this case is akin to the line of cases which disapprove excessive force in a homicide as a valid reason to depart. See Lamond vs. State, 500 So.2d 342 (Fla. 5th DCA 1986) (second degree murder); Hannah vs. State, 480 So.2d 718 (Fla. 4th DCA 1986) (manslaughter). Here, the charge was attempted homicide, by repeated stabbing. While the violence of an

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[3] Ms. Carroll received many wounds but she was unable to call her husband and the police immediately after the stabbing [R589-590] and was conscious and alert and able to converse with Sgt. Barber about the details of the crime shortly thereafter [R-712]. The physical effects of her injuries did not linger for long - she was admitted to the hospital on May 11, 1986 and was discharged five days later, on May 16, 1986 [R-677].

attempted murder in this fashion is undeniable, nonetheless, it is not unusual or extraordinary based on the crime the Petitioner was charged with and convicted of.

The Petitioner recognizes that this Court has approved excessive force as a valid reason to depart in a robbery case, see e.g. Perdieu vs. State, 12 FLW 238) (Fla. 4th DCA October 7, 1987); Allen vs. State, 12 FLW 1505 (Fla. 4th DCA June 17, 1987); Harris vs. State, 482 So.2d 548 (Fla. 4th DCA 1986), but these cases do not address the problem here - where the defendant is charged with robbery and attempted first degree murder by repeated stabbings. Thus, Petitioner's case is fundamentally different from those cases because the Petitioner was specifically charged with the additional offense of attempted murder by repeated stabbing.

Moreover, another infirmity for this reason is that Petitioner was assessed points[4] for victim injury on the scoresheet. To now allow departure for victim-injury is inproper. Vanover vs. State, 498 So.2d 899 (Fla. 1986).

In summary, the trial court is attempting new heights in departure law - a triple dipping. That is, Petitioner's guidelines score was elevated because of the nature of the offense charged and because of the serious injury to Ms. Garroll. To now allow a departure for these same reasons is unfair and illegal.

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[4] 21 points were assessed to Petitioner because of death or serious bodily injury [R-1028]. These points caused Petitioner to be bumped up one cell. See Rule 3.988(a), Fla.R.Cr.P. (1985).

2. "Mental Trauma on victim and victim's family"

The lone evidence supporting this reason was a statement from Ms. Carroll in the pre-sentence investigation (PSI) report, which reads, in pertinent part:

> She [Tina Carroll] has never felt this way before, but she is now terrified (sic) of young black males. Her kids, according to Mrs. Carroll, are still scared and have problems dealing with what happened [with] their mother.

SR2.[5] No other evidence in this regard was presented at trial, [R567-659], or at sentencing [R927-951].[6]

Psychological trauma as a reason to depart has been the subject of numerous decisions from the Florida Supreme Court. That Court has been forced to try to outline the degree of trauma that supports departure because "almost all victims of a crime will feel some trauma." State vs. Rousseau, 509 So.2d 281, 284 (Fla. 1987). Thus, the court has indicated that "the type of psychological trauma to a victim that usually and ordinarily results from being a victim of the charged crime is inherent in the crime and may not be used to justify departure." Id. See also Ochoa vs. State, 509 So.2d 1115 (Fla. 1987); Lerma vs. State, 497 So.2d 736 (Fla. 1986). It is clear, then, that the mental trauma must be an extreme degree, not usually associated with the charged crimes.[7]

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[5] The trial judge specifically relied on this statement as the basis for this finding [R-970].

[6] Ms. Carroll and her family purposely did not appear at the sentencing hearing to avoid an appearance of being vindictive [R944-945].

[7] The First District has certified a question to the Florida Supreme Court regarding whether "extraordinary" emotional trauma can be a basis to depart in case where a defendant is charged with a robbery, kidnapping and sexual battery in

This Court has recognized that there can be extreme emotional trauma in an armed robbery. See Grant vs. State, 510 So.2d 313 (Fla. 4th DCA 1987); Davis vs. State, 458 So.2d 42 (Fla. 4th DCA 1984), approved 477 So.2d 565 (Fla. 1985). Nonetheless, the departure in this case cannot be supported for three reasons: one, this reason has not been proven beyond a reasonable doubt, as required. State vs. Mischler, supra. That is, the lone statement of Mrs. Carroll in the PSI is an insufficient basis to establish trauma - we do not know how long or how severe her phobia is; we do not know if she has returned to work; and we have no evidence that she is seeking psychological counseling or treatment for her condition. This is wholly inadequate proof. See Shaw vs. State, 510 So.2d 1112 (Fla. 4th DCA 1987)(change in personality is insufficient trauma to justify departure). Second, if this Court holds there is, indeed, evidence of mental trauma, then the evidence fails to establish mental trauma beyond what one would ordinarily expect in the additional crime of attempted first degree murder by repeated stabbing. No one could reasonably expect Mrs. Carroll not to have been affected to a significant degree by the crimes in this case. Thus, her fear of young black males[8] is hardly unusual for the crimes involved. See Shaw vs. State, supra. Finally, there is no basis in law or fact to support a finding that Mrs. Carroll's family

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Harris vs. State, 509 So.2d 1299, 1302 (Fla 1st DCA 1987), but the other districts have been unanimous in approving such a reason. See Fryson vs. State, 506 So.2d 1117 (Fla. 1st DCA 1987); Cortez vs. State, 497 So.2d 671 (Fla. 2nd DCA 1986); Moreira vs. State, 500 So.2d 343 (Fla. 3rd DCA 1986); Hipp vs. State, 509 So.2d 1208 (Fla. 4th DCA 1987).

[8] Again, the duration and intensity of this fear are not established on this record.

suffered psychological trauma. Normally, the only evidence supporting such a finding requires the fact that the family actually witnessed the crime. Carter vs. State, 485 So.2d 1292 (Fla. 4th DCA 1986). See also Casteel vs. State, 498 So.2d 1249 (Fla. 1986); Lumpkin vs. State, 12 FLW 1955 (Fla. 3rd DCA August 1, 1987). Here, Ms. Carroll's family did not see the crime and was only (understandably) concerned with the aftermath of the injuries sustained. While this concern is surely legitimate, it cannot justify departure, else the guidelines would be rendered a nullity.

Thus, the record and case law do not support a finding of the degree of mental trauma necessary for a valid departure.[9]

3. "Not included strong arm robbery[10] shows escalated criminal activity."

Escalating criminal activity is a valid ground to depart, Keys vs. State, 500 So.2d 134 (Fla. 1986), but there must be a pattern of behavior, including several offenses, not, as here, just two offenses. Smith vs. State, 507 So.2d 788 (Fla. 1st DCA 1987). See also Abt vs. State, 504 So.2d 548 (Fla. 4th DCA 1987) ("a history of crimes committed in an escalating pattern in

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[9] This case also does not involve the other type of mental trauma identified by Rousseau - discernible physical manifestation resulting from the psychological trauma.

[10] The strongarm robbery occurred prior to the commission of the charges in this case, but Petitioner was not convicted of that offense until after the commission of the offenses in this case. The parties did not score the offense under the mistaken assumption that, because there was no judicial determination of the prior offense before the commission of the primary offense, it was unscoreable [R933-934]. See Frank vs. State, 490 So.2d 190, 192 n.1 (Fla. 2nd DCA 1986). Even if the strongarm robbery was included as a prior offense, it would not have altered Petitioner's presumptive range (15 additional points). See Rule 3.988(a), Fla.R.Cr.P. (1985).

nature and severity can be a valid basis to deviate"); Ballard vs. State, 501 So.2d 1285 (Fla. 4th **DCA** 1986) ("escalating pattern of more serious offenses" is a valid reason to depart). The trial judge's view of the pattern from a sole prior strong arm robbery to the offenss charged does not meet this standard and is improper. Smith vs. State, supra; Abt vs. State, supra; Ballard vs. State, supra.

111. THE TRIAL COURT ERRED IN ALLOWING THE RESPONDENT TO USE A PEREMPTORY CHALLENGE IN A RACIALLY DISCRIMINATING MANNER.

This issue involves a matter spawned by Batson vs. Kentucky, __U.S. , 106 S.Ct. 1712 (1986) and State vs. Neil, 457 So.2d 481 (Fla. 1984)[1] - an examination of the Respondent's stated reason for justifying his strike of the only black prospective juror on the venire. Thus, this case calls for this Court to give real meaning to the constitutional guarantees announced in Neil. This, in turn, calls for this Court to go beyond the facially race-neutral explanation given by the Respondent and criticially analyze that purported justification in light of the facts of this case. If this Court is faithful to Batson and Neil, then the Respondent's racially discriminatory motive will be readily anparent.

A. Factual Background

This issue centers on the Respondent's strike of Mrs. Bowser, a black prospective juror [R431-432]. Initially, Mrs. Bowser indicated to the trial judge that she was "petrified" of the voir dire process and that she did not want to answer questions, if called in front of the venire [R177].[2] The trial judge inquired of the parties, but neither the Respondent nor defense

[1] The trial judge anticipated defense counsel's reliance on both Batson and Neil in support of Petitioner's objection to the Respondent's strike [R431-433].

tried to get her struck for cause at this point [R-178].

When Mrs. Bowser's number was called, the trial judge decided to allow counsel to question her privately, after the other jurors were excused for the day [R-390]. During the voir dire examination by the parties, Mrs. Bowser exhibited an articulate and even-handed manner and a profile typical of many jurors: a divorcee from Long Island [R-392]; an ex-steno secretary who was now a companion for an elderly woman during the season [R391-392]; whose ex-husband and son were professional singers [R-392]; who belonged to no social or civic clubs [R-3941; liked to fish, crochet and read [R-394]; and had no family, or friends, that had been a victim of a crime, in trouble with the law, or member of a law enforcement agency [R394-395]. Mrs. Bowser was not affected by being black and affirmatively diclaimed any racial bias [R396-397]. Moreover, she indicated that she felt she would be comfortable in the jury room (opposed to speaking in open court) and that she would not hesitate to express her opinions, nor would she fail to listen to the other jurors [R398-400]. She expressed a high, sincere respect for the judicial process and the power that it represents [R-4011. In short, Mrs. Bowser was an intelligent, diligent and impartial prospective juror with high regard for the task at hand.

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[2]Mrs. Bowser was anticipating a problem -- she was not yet called from the venire to be questioned. However; her fears came to pass, as she was called later on in voir dire [R-386].

Nonetheless, the Respondent attempted to have Mrs. Bowser struck for cause [R428-429]. The following transpired:

> THE COURT: Okay. What is the basis that you want to challenge Juror Number 4, Mrs. Bowser?
>
> MR. HESTER: Two grounds, Judge, the first being her statements and conduct yesterday I believe demonstrate instability and weakness of, I will say, personality, that would indicate to the State that she is not up to the rigors and the obvious lengthy heat of discussion that jurors often face. And in a matter such as this, that is my first ground.
>
> I don't think she has the makeup and demonstrated that she does not have the makeup that could properly weigh these matters.
>
> I think she is the type of person that could hang up the jury, as opposed to reaching a decision.
>
> Secondly, and more importantly - -
>
> THE COURT: If what you are saying is that she couldn't make a decision. I gather from what she was saying, she will go along with what the others will do. And I don't see how she would hang up the jury.
>
> MR. HESTER: I don't know how she would react. I don't know if she would go along or if she would throw up her hands and say, "I can't decide."
>
> THE COURT: Let me hear your second point.
>
> MR. HESTER: I am more concerned about this. She was leaving the courtroom yesterday, and Juror Number 4 took the opportunity to wave goodbye to the defense table. I think in that conduct she has demonstrated a lack of impartiality, has demonstrated she already feels some sort of identification with the defense, for what reason, I don't know. But she demonstrated that conduct here, which is her inability to be an impartial juror in this case.
>
> And I think through that demonstration she has disqualified herself as a juror.

Mr. Newman saw this himself. He pointed it out to me.

[R428-429]. Mr. Newman, co-counsel for the prosecution, elaborated:

> MR. NEWMAN: On her way out, as she was going, she had not quite passed me yet, she lifted up her right hand, waved goodbye in a friendly manner to Ms. Whitfield [defense counsel]. And I don't know whether or not Lynn saw it or not.
>
> I don't even know if she knows, but I don't believe that she was waving to anybody else.
>
> The best I could see, she was waving goodbye. That is all I can tell you.

[R-430]. Defense counsel responded:

> MS. WHITFIELD: I saw her hand but I didn't --I don't know who she was waving at.
>
> I thought she was waving to everybody.
>
> I saw her hand go up. Mr. Newman says he saw her waving directly to me. You couldn't tell who she was looking at. I thought she was waving at everyone in the courtroom, because she -- because you took consideration to her outside of the other jurors.
>
> I don't think it indicates any partiality on one side or the other.

Id.

The trial judge summarily dismissed the state's first reason based on Mrs. Bowser's testimony [R428-429] and then proceeded to inquire of Mrs. Bowser regarding the second reason:

> THE COURT: As you left the courtroom last evening, Mrs. Bowser, I understand that you waived goodbye.
>
> Do you recall doing that, when you left last evening?
>
> MRS. BOWSER: Waved goodbye?
>
> THE COURT: Yes, ma'am.

MRS. BOWSER: I acknowledged that to the attorney here as a thank you for calming me down.

But other than that, --

THE COURT: No. No. I understand that you actually waved your hand when you left last evening, as you were leaving the courtroom.

Do you recall doing that?

MRS. BOWSER: No, I don't recall waving to anyone in particular. I just recall acknowledging the fact that I was able to be calmer and I felt relieved about it, calmer, as a result of having the audience, and I felt relieved.

THE COURT: But you don't recall waving goodbye.

MRS. BOWSER: No.

MR. NEWMAN: Judge, can I ask her something?

Can you just tell us what you meant by acknowledging Ms. Whitfield? What do you do to acknowledge that you were thankful?

MRS. BOWSER: I smiled at you. I don't know if you recognized it. I just wanted to say "thanks", for making me feel relaxed instead of being up tight.

MR. NEWMAN: How did you acknowledge it?

MS. BOWSER: I smiled; that's all.

MR. NEWMAN: Do you think it is possible that you, at the same time you smiled to her, you waved to her also, thank you?

MRS. BOWSER: No. I don't think so, since I had my bag. I don't believe -- I think I just gestured.

THE COURT: For the purpose of the record what you are doing is bowing your head when you say you are making a gesture?

MRS. BOWSER: Yes, and smiled.

THE COURT: Okay. And to whom did you do this?

MRS. BOWSER: I'm sorry. I forgot your last name.

MS. WHITFIELD: Whitfield.

THE COURT: Whitfield.

MS. BOWSER: Whitfield.

THE COURT: You bowed to Ms. Whitfield as you were going out last evening?

MS. BOWSER: Yes.

THE COURT: Any further inquiry by the State?

MR. NEWMAN: Did you make that acknowledgement to any attorney other than Ms. Whitfield?

MS. BOWSER: No. She was in my view, and she was looking in that general direction. So I just -- My expression would be a thank you for making me less uptight.

MR. NEWMAN: Thank You.

THE COURT: Any further inquiry?

MR. NEWMAN: No.

MS. WHITFIELD: Have you formulated any opinions as to this case, either toward the State or toward the defense?

MS. BOWSER: An opinion? No.

MS. WHITFIELD: Do you think that after hearing the evidence presented in this case you could be both fair to the State and to the defense in this case?

MS. BOWSER: Yes. I have no compunctions about that at all.

THE COURT: Anything further?

MS. WHITFIELD: No.

THE COURT: By the State?

MR. NEWMAN: I have nothing.

[R437-440]. After this inquiry, the trial judge denied the Respondent's motion to strike Ms. Bowser for cause [R-440]. The Respondent promptly exercised a peremptory challenge against Ms. Bowser "for the reasons stated" (for the strike for cause), Id., and defense counsel reiterated her objection [R441-442].

B. The Presumption of Properly Exercised Peremptory Challenges Laid Bare.

Neil provides a step-by-step process toevaluate claims of racially discriminatory peremptory challenges:

> Instead of Swain, trial courts should apply the following test. The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the Court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective juror's race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, than the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

457 So.2d at 486-7. Thus Neil contemplates a cautious, orderly

approach to overcome the presumption of correctly exercised peremptory challenges.

The parties, here, did not follow this procedure, probably because of the manner in which the Respondent raised the issue -- on a motion to strike for cause. Thus, the Respondent explicitly stated his reasons for striking Mrs. Bowser without any preliminary determination by the trial judge that there was a "strong likelihood" that race motivated the peremptory challenge. Nonetheless, in this situation this Court can, and should examine the reason given to strike Mrs. Bowser. This is so because the Neil presumption of a properly employed strike does not apply where the prosecutor's motives are express. The Court in Garrett vs. Morris, 815 F.2d 509, 511 (8th Cir. 1987) stated the rule:

> We believe that where, as here, the prosecutor volunteers the reasons for his actions and makes them part of the record, he opens the issue up for review. The record is then no longer limited solely to proof that the prosecutor has used his peremptory challenges to strike all black jurors from the defendant's jury panel, and the presumption that the prosecutor has acted properly falls away At that point, the Court has a duty to satisfy itself that the prosecutor's challenges were based on constitutional permissible trial-related consideration, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination.

(e.s.). See also, Weathersby vs. Morris, 708 F.2d 1493 (9th Cir. 1983), cert. denied, 464 U.S. 1046 (1984)(same). This logical approach to an increasingly common problem is supported by Florida cases. See Parker vs. State, 476 So.2d 134 (Fla. 1985) (analyzing the prosecutor's "voluntary" offer of justification

for challenge); Hale vs. State, 480 So.2d 115, 116 no.1 (Fla. 2nd DCA 1985) (reasons given by prosecutor must be reviewed on appeal when trial judge asks, correctly or not, for justification); Taylor vs. State, 491 So.2d 1150 (Fla. 4th DCA 1986)(where the trial judge asks for justification "it is appropriate to examine the reasons given"); Thomas vs. State, 502 So.2d 994, 996 (Fla. 4th DCA 1987)(determining merits of reason given despite no finding of necessity to justify by the trial judge). Thus, the prosecutor is not protected by the Neil presumption in this case --the cloak or correctness has been laid bare and it is this Court's obligation to examine the reasons stated.

C. Giving Substance to Neil - Going Beyond a Facially Race-Neutral Justification.

In Neil, the Florida Supreme Court joined a minority of other courts to curb racial discrimination in peremptory challenges. Neil thrust Florida into the forefront of the growing dissatisfaction with the rigid constraints of Swain vs. Alabama, 380 U.S. 202 (1965). Indeed, Neil preceded the high court's review of Swain for two years. See Batson vs. Kentucky, supra. Despite the enlightened Neil framework, Florida courts have done little more than pay lip service to the rule. As this Court observed, "no Florida district court of appeal nor the Supreme Court has specifically found a reason given by a prosecutor unacceptable." Taylor vs. State, supra. It is long past time to make Neil more than just an empty promise --this Court must critically analyze the justification given and send a clear

signal to trial courts that racial discrimination in jury selection will not be tolerated.

A welcome change in this approach to the problem has come from two recent decisions from the Third District. See Slappy vs. State, 503 So.2d 350 (Fla. 3rd DCA 1987); Floyd vs. State, 511 So.2d 762 (Fla. 3rd DCA 1987). In these cases, the Third District has required more than a facially race-neutral explanation -- the state must provide a "credible race-neutral explanation." 511 so.2d at 763. The facts in this case make clear that the Respondent's explanation is far from credible.

The crux of the issue is whether Mrs. Bowser's actions of smiling and/or waving at defense counsel is a sufficiently race-neutral explanation for the strike here.[3] Petitioner submits that Mrs. Bowser's actions were nothing out of the ordinary for many typical jurors and that in several important respects the record here is woefully inadequate to support a finding that she was partial to the defense: First, the record is clear that Mrs. Bowser's response was a sincere, natural response to an intimidating situation[4] and was wholly unrelated to her views as to her obligations as a juror. Thus, she had

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[3] The trial judge dismissed the state's first reason - instability and weakness of personality [R-428] - by a factual finding that she would not hang up the jury and that she would go along with the other jurors [R428-429].

[4] The record suggests that Mrs. Bowser also smiled at the prosecutor, even though she didn't think he recognized it [R-438]. Thus, it is likely, considering Mrs. Bowser's earlier reservations, that she was thankful to all parties for assisting her in getting through the ordeal of voir dire.

formed no views about the case before trial nor did she "have [any] compunctions...at all" in being fair to both the state and defense [R439-440]. Secondly, and more importantly, the trial judge implicitly recognized that Mrs. Bowser's actions did not indicate *any* partiality by denying the Respondent's motion to strike Mrs. Bowser for cause [R-440]. That is, if the judge found that there was a basis for any reasonable doubt concerning Mrs. Bowser's partiality to Petitioner, or his lawyer, it would have been obligated to remove her for cause. Singer vs. State, 109 So.2d 7, 23 (Fla. 1959). See also, Section 913.03(10), Fla.Stat. (1985)(Challenge for cause acceptable if juror has "a state of mind...that will prevent him from acting with impartiality). Thus, in essence, the trial judge ruled[5] that the Respondent's fears were not founded in fact. This implicit ruling completely undermines the Respondent's rationale.

Moreover, there is reason for this Court to be extremely cautious with regard to approving such facile excuses in this regard. As the Court in Floyd noted, emotional reactions (or the lack thereof) of prospective jurors are a speculative basis to strike a juror and fails to meet the test of being a "reasonably clear and specific explanation". 511 So.2d at 764. This view comports with logic -- given Mrs. Bowser's initial wariness of the voir dire process, any juror would likely have reacted the same way.

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[5] The competency of a juror is a mixed question of law and fact to be determined by the trial judge in his discretion. Singer vs. State, supra, at 22.

More importantly, if this approach were sanctioned, this Court would open the analysis up to consider the countless, varied responses of each prosecptive juror. That is, any slight physical manifestation of emotional response -- i.e. smile, frown, closing of eyes, turning the head, nod of the head, laugh etc. -- will now be a basis for a peremptory challenge. This Court can take judicial notice of the vagaries of categorizing human emotional responses in any given situation. This area is a minefield, devoid of any basis for meaningful comparisons, and certainly no basis to allow patent racial discrimination.

CONCLUSION

Based upon the for going Arguments and authorities cited therein, the Petitioner requests that this Court reverse the decision of the district court of appeal below and remand this cause with directions to resentence the Petitioner within the sentencing guidelines.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to JOHN W. TIEDEMANN, Assistant Attorney General, Room 204, 111 Georgia Avenue, West Palm Beach, FL, this 30th day of January, 1989.

FRANK B. KESSLER, ESQUIRE