IN THE SUPREME COURT OF FLORIDA

DONALD LEWIS SMITH, :

Petitioner, :

v. : CASE NO. 80,551

STATE OF FLORIDA, :

Respondent. :

_____ :

INITIAL BRIEF OF PETITIONER ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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INITIAL BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal in Smith v. State, ____ So.2d ____, 17 FLW D2240 (Fla. 1st DCA Sept. 25, 1992), in which the First District certified a question.

All proceedings were held in Alachua County before Circuit Judge Elzie Sanders. The record on appeal will be referred to as "R" and the one-volume transcript as "T."

II STATEMENT OF THE CASE AND FACTS

April 20, 1988, petitioner was indicted by the grand jury in Hillsborough County on a charge of first-degree murder of his wife, Judy Lynn Smith (R-1). The indictment alleged that Judy had been killed between March 17 and March 27, 1988 (R-1).

Because the site of the offense was unknown, defendant elected venue, and the cause was transferred for trial to Alachua County (R-26).

January 12, 1989, Smith was convicted by a jury of first-degree murder (R-122). While the sentence form is apparently not contained in the record, Judge Sanders imposed the mandatory sentence of life without parole eligibility for 25 years.

October 2, 1990, the First District Court of Appeal reduced Smith's conviction to second-degree murder and ordered resentencing. Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990).

At resentencing January 28, 1991, the prosecutor castigated the district court's opinion at length, reiterating his belief that the evidence was sufficient to prove premeditation, saying, inter alia, this is "the type of opinion that continues to erode public confidence in the criminal justice system" (T-7-10). The prosecutor characterized Smith at length as being cold and remorseless, although he conceded these are not valid reasons for departure. The prosecutor argued Smith engaged in an elaborate coverup of his wife's death, by wrapping the body in chains and placing it in Tampa Bay, not reporting her

disappearance to the police, and lying to her father, their children and others that she had left him (T-12-17).

Defense counsel responded that, if it could be called a coverup, it was not very successful, not as elaborate as the steps taken in Everage, infra, and pointed out certain things Smith did which were not consistent with a coverup. Chief among these was letting a neighbor into the house, who saw Judy's eyeglasses, contact lenses, clothing and other personal belongings, and later giving the neighbor a photo and other information so she could report Judy's disappearance to the police. Defense counsel also noted Smith had no prior criminal record at all, and it was not appropriate for the state to bring up the issue of remorse, since that factor could not justify departure (T-18-29).

The presumptive guidelines sentence was 12 - 17 years (R-164). The court imposed a sentence of 30 years in prison (R-160-63). The only reason for departure was written thus:

> This court finds that the defendant engaged in an elaborate cover-up to prevent the disclosure of his wife's death and the extent of his involvement in that death. This cover-up delayed the discovery of the body of the victim thereby impeding the ultimate investigation of the criminal acts. Under the authority of Everage v. State, [infra], the stated reason herein and the facts in the record as to the defendant's actions, the court finds that a departure is required for the above stated reason.

(R-156). Notice of appeal was timely filed February 11, 1991 (R-165).

On appeal after remand, the First District Court affirmed without opinion on the authority of Everage v. State, 504 So.2d 1255 (Fla. 1st DCA 1986), review denied 508 So.2d 13 (Fla. 1987), but certified the following as a question of great public importance:

> DO DEFENDANT'S EFFORTS TO COVER UP A CRIME ALLOW SENTENCING GUIDELINES DEPARTURE?

Notice to invoke was timely filed, and this appeal follows.

III SUMMARY OF ARGUMENT

The sole reason for departure from the guidelines, that defendant engaged in an elaborate coverup of his wife's death, is not a valid reason for departure, and the contrary 1986 decision in Everage, infra, is incorrect. The decision in Everage was based on an interpretation of Rule 3.701(d)(11), Florida Rules of Criminal Procedure, which is indefensible in itself as a matter of English grammar and syntax. Further, petitioner could have been, but was not, charged with the offense of removing a body with the intent to alter the evidence or circumstances surrounding the death. Thus, this reason is invalid because factors for which no conviction has been obtained cannot be used to justify departure. Everage is further insupportable in light of this court's decision in Tyner, infra, and other developments in Florida Supreme Court caselaw concerning flight and concealment.

IV ARGUMENT

ISSUE PRESENTED

THE SOLE REASON GIVEN FOR DEPARTURE FROM THE GUIDELINES, THAT DEFENDANT ENGAGED IN AN ELABORATE COVERUP OF HIS WIFE'S DEATH, WAS NOT VALID.

In petitioner Smith's first appeal, the First District Court reduced his conviction to second-degree murder. The district court decided correctly, in accordance with longstanding precedent, that concealment of the body is not sufficient to prove premeditation of the killing. Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990). The question before the court on resentencing is, what is the significance of concealing the body in determining sentence. Perhaps more pointedly, the question is whether concealing a body is an aggravating circumstance in a killing, that is, does it make the killing worse? Petitioner contends that concealing the body has no significance for sentencing, and the departure sentence based on this reason was not valid and must be reversed.

Donald Smith was convicted of murdering his wife, Judy. When Judy disappeared on March 17, 1988, Smith told family and friends she had left him. On March 27, Judy's body, wrapped in chains and covered with a bedspread, was found floating in Tampa Bay. The medical examiner said the body had been in the water six to eight days. 568 So.2d at 966-67. In his first appeal, the First District reduced Smith's conviction from first- to second-degree murder and remanded for resentencing.

On resentencing, the trial court departed from the presumptive guidelines sentence of 12 to 17 years and imposed a sentence of 30 years in prison. The only reason for departure was that Smith had engaged in an elaborate coverup of the murder, the trial court citing Everage v. State, 504 So.2d 1255 (Fla. 1st DCA 1986), review denied 508 So.2d 13 (Fla. 1987). The First District Court affirmed, but certified a question.

In Jenkins v. State, 120 Fla. 26, 161 So. 840 (1935), the defendant killed his wife, after which he hid the body for a time. Jenkins claimed his wife had attacked him with a knife, that he killed her in self-defense, then hid the body out of fear. The Florida Supreme Court reduced his conviction from first- to second-degree murder on the ground the evidence was not sufficient to prove premeditation. The court said (with apologies for the run-on sentence):

> Like Moses, the Biblical character, whose justifiable killing of the Egyptian (Exodus 2: 11-15) was followed by the concealment of the victim's body in order to avoid arrest and execution for his deed, the defendant in this case, in his version of the homicide, which is uncontradicted, admitted that after...killing the negro woman [his wife] with whom he was at the time having a personal encounter, he became afraid and "looked this way and that way, and when he saw that there was no man he slew (his victim) and hid her in the sand"...

120 Fla. 26-27. The First District Court reached a similar result in Smith's first appeal, reducing his conviction second-degree murder on the ground that a thoughtful disposal of the body was not sufficient to prove the murder itself was

committed in a thoughtful or premeditated manner. Smith, 568 So.2d at 968.

Before beginning his argument, petitioner would draw the court's attention to the highly improper and inflammatory argument of the prosecutor at resentencing. The prosecutor attacked most vituperatively the district court's decision, repeating many times his personal belief that the evidence was sufficient to prove premeditation, although the district court had expressly held to the contrary. The prosecutor harped on Smith's alleged lack of remorse and coldness, neither of which are valid reasons for departure. While conceding that this court had held that acts done upon a body after death do not aggravate a killing, the prosecutor disagreed with that principle, and brought up the fact that only Adam Walsh's head was returned to his family (T-12-17). The prosecutor's unwarranted attack on the district court contributes to the "erosion of public confidence in the judiciary" and merits admonishment by this court.

In 1986, in Everage, supra, the First District Court held that the elaborate coverup of a murder justified a departure sentence. This conclusion is not sustainable for several reasons. First, the Everage decision turns on the court making a semantical distinction between the terms "instant offenses" and "primary offense," when no such distinction exists. Second, factors for which no conviction has been obtained cannot be used to justify departure. As Smith could have been, but was not, charged with the offense of removing a body with the

intent to alter the evidence or circumstances surrounding the death, this was not a valid reason for departure.

Third, the Everage decision conflicts with the decision of another district court, Phelps v. State, 490 So.2d 1284 (Fla. 5th DCA), review denied 500 So.2d 545 (Fla. 1986), a case involving a coverup and mutilation of a body after death, and with the decision of this court in State v. Tyner, 506 So.2d 405 (Fla. 1987), approving 491 So.2d 1228 (Fla. 2d DCA 1986), in which this court interpreted the same subsection of Rule 3.701 which Everage interpreted, but reached a different result. Finally, Everage is irreconcilable with other recent Florida Supreme Court decisions on flight, concealment and valid reasons for departure.

Everage argued that his alleged elaborate coverup was prohibited as a reason for departure by Rule 3.701(d)(11), Florida Rules of Criminal Procedure, which provides in pertinent part:

> Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.

504 So.2d at 1257. The First District said the "intent of this deceptively simple provision is not entirely clear." The term "instant offenses" is not expressly defined in subsection (d)-(11). The Everage court said that "instant offenses" presumably did not mean either "primary offense" or "additional offenses at conviction," because those terms as defined in the rule are limited to offenses for which the defendant has been convicted. Id. The court concluded that factors which relate

to the primary offense, as opposed to "instant offenses," are not precluded under (d)(11) and can be used to justify departure. Thus, the court concluded, Everage's coverup of his wife's death related to the primary offense, not the "instant offenses," thus was not precluded by (d)(11) and was a valid reason for departure. Id.

The Everage court's discussion of the meaning of the term "instant offenses" and the subsection as a whole was unnecessarily complicated and did nothing to clarify the issue. In the final analysis, the Everage decision turned on the court making a semantical distinction between the terms "instant offenses" and "primary offense," a distinction which does not in fact exist, and which is indefensible as a matter of English grammar and syntax. The Everage decision was misguided, and the time has come for this court to reconsider it.

As used in subsection (d)(11), "instant offenses" is clearly meant to encompass both the primary and additional offenses at conviction. The antecedent for the phrase "for which convictions have not been obtained" is not "instant offenses," but rather, is "factors." "Factors" is modified by two phrases: "[factors] relating to the instant offenses," and "[factors] for which convictions have not been obtained." The pertinent part of the subsection should be read thus: "Reasons for deviating from the guidelines shall not include factors for which convictions have not been obtained."

The Everage court concluded that the phrase "for which convictions have not been obtained" modified "instant

offenses," although it was having a little trouble with this concept. This conclusion was just plain wrong. It is not enough, contrary to the Everage court's claim, to justify departure that the factor relates to the "primary offense," rather than the "instant offenses." The "primary offense" is one of the "instant offenses." When this court reexamines Everage, it will see that that opinion was built on a foundation of grammatical error. This cannot be allowed to stand.

Perhaps it would have been enough for a correct decision for the Everage court to have referred to the committee notes, which provide in pertinent part:

> The court is prohibited from considering offenses for which the offender has not been convicted.

Committee Notes to Rule 3.701(d)(11), Fla.R.Crim.P. This portion of the committee notes has not changed since the 1983 inception of the guidelines.

Moreover, covering up the crime is either an offense for which no conviction has been obtained, or it is just irrelevant in determining sentence. While Everage treated the coverup as a factor that was not a separate crime, it is indeed a crime to remove or disturb a body, with the intent to alter the evidence or circumstances surrounding the death. Section 406.12, Florida Statutes, provides:

> It is the duty of any person in the district where a death occurs...who becomes aware of the death of any person occurring under the circumstances described in s. 406.11 to report such death and circumstances forthwith to the district medical examiner. Any person who knowingly fails or

> refuses to report such death..., who refuses to make available prior medical or information pertinent to the death investigation, or who, without an order from the office of the district medical examiner, willfully touches, removes, or disturbs the body, clothing, or any article upon or near the body, with the intent to alter the evidence or circumstances surrounding the death, shall be guilty of a misdemeanor of the first degree... (emphasis added)

Assuming Smith killed his wife and placed her body in Tampa Bay, then he arguably committed an offense under section 406.12. He was neither charged with nor convicted of this crime, making it is a "factor...relating to the instant offense...for which convictions have not been obtained." Rule 3.701(d)(11), Fla.R.Crim.P. This renders invalid the departure based on this reason.

It is also noteworthy that, as far as petitioner has been able to determine, not a single case since Everage has used that case to justify departure on the basis of an elaborate coverup. In Gray v. State, 522 So.2d 92 (Fla. 1st DCA 1988), overruled on other grounds, Hernandez v. State, 575 So.2d 640 (Fla. 1991), the First District Court said the alleged coverup did not amount to the elaborate coverup of Everage and held that departure reason invalid. In Campbell v. State, 558 So.2d 34, 40 (Fla. 1st DCA 1989), reversed on other grounds, 577 So.2d 932 (Fla. 1991), the district court used Everage to find a different reason for departure - risk of harm to others - valid. And, as the court can see, neither Gray nor Campbell has fared very well in this court.

Further, Everage conflicts with the decision of the Fifth District in Phelps, supra, Phelps murdered his wife, then beheaded, eviscerated, further mutilated her body, and threw the headless body into a trash dumpster. The trial court found as a reason for departure, inter alia:

> The manner in which this crime was committed and efforts to cover up this crime have caused the survivors of the victim to endure particularly horrendous mental anguish and grief.

490 So.2d at 1285. The district court reversed for resentencing, on the ground there was no evidence the crime was committed in an excessively brutal manner, and that the mutilation, while perverted, occurred after the death and did not indicate the killing itself was excessively brutal. Id.

Finally, although Everage did not find that the defendant could have been, but was not, convicted of another crime for the "coverup," because it could have and should have found this factor, the Everage decision also conflicts with the decision of this court in State v. Tyner, supra. The Fourth District certified the following question in Tyner:

> Is the court permitted to consider any factors relating to the instant offense as a basis for departure for the guidelines if such factors would have subjected the defendant to prosecution for a crime of which he has not been convicted?

506 So.2d at 405.

The basic facts of Tyner are that the defendant and another man, Hall, planned a burglary. Tyner was present when Hall borrowed a gun. Tyner was told no one would be home at

the time of the burglary. He drove Hall to the scene, immediately drove off a half-mile, then met Hall later. Hall alone entered the house and killed two people inside. The murder charge against Tyner was dismissed under Rule 3.190(c)(4), Florida Rules of Criminal Procedure. Tyner was convicted of the burglary, however, and the trial court departed from the guidelines on the ground that two people were killed as a result of the armed burglary. 506 So.2d at 406.

On appeal, the Second District reversed the departure, holding that subsection (d)(11) precluded consideration of the murders as a reason for departure because Tyner had not been convicted of those crimes. The supreme court agreed, saying:

> This language [of the rule] is plain. Judges may consider only that conduct of the defendant relating to an element of the offense for which he has been convicted. To hold otherwise would effectively circumvent the basic requirement of obtaining a conviction before meting out punishment.

506 So.2d at 406. See also Santiago v. State, 478 So.2d 47,49 (Fla. 1985), in which the supreme court said:

> Rule 3.701(d)(11)...provides that reasons for deviating from the guidelines shall not include factors relating to either the instant offense or prior arrests for which convictions have not been obtained.

While Tyner makes no mention of Everage, Everage's interpretation of the meaning of subsection (d)(11) is irreconcilable with Tyner's view of (d)(11). Tyner's only apparent offense, which was certainly the primary offense, was the burglary. A reason relating to the burglary, the primary offense, which reason constituted a crime he had not been

convicted of, did not justify departure. The Everage court considered the same situation and reached an opposite conclusion. This conclusion cannot stand, and Everage has been implicitly overruled by Tyner.

Even beyond the internal illogic of Everage, its conflict with Tyner, and the fact departure was precluded because Smith was not convicted of the crime of hiding the body, there is yet a larger issue. This larger issue is that it is not enough to justify departure to identify a factor unique or unusual to a particular crime, unless that unusual factor makes the crime worse. That is the question here, did hiding the body after the killing make the murder a worse crime? The answer is obviously no, that disposal of the body was essentially irrelevant to the circumstances of the crime. The First District agreed in reducing Smith's conviction from first- to second-degree murder.

When district courts have tried to identify factors relating to instant offenses which justify departure, the factors so identified by the courts have frequently failed to be even unique or unusual. For example, in Lerma, the Florida Supreme Court had to tell the district courts that psychological trauma was such a common factor in sexual battery that it ordinarily would not support departure, and departure was allowed only when the victim was traumatized over and above the usual (great) amount. Lerma v. State, 497 So.2d 736 (Fla. 1986), receded from on other grounds, 509 So.2d 281 (Fla. 1987). Similarly, in Hall and Wilson, the supreme court had to tell

the district courts that the involvement of parents and family members in the physical and sexual abuse of children was so widespread that abuse of a familial or custodial relationship or trust would apply to most such cases, and as the court would not permit a "built-in" reason for departure, the familial relationship did not support departure in those kinds of cases. Wilson v. State, 567 So.2d 425 (Fla. 1990); Hall v. State, 517 So.2d 692 (Fla. 1988).

The question the supreme court addressed in Wemett is an example of this "unique factor" problem. Wemett v. State, 567 So.2d 882 (Fla. 1990). Wemett was convicted of burglary of a dwelling, assault, unarmed robbery and attempted unarmed robbery of an 84-year-old woman, and the trial court departed on the basis of the victim's age and vulnerability. One way of looking at this is to see it as the district court identifying a factor unusual to the crimes of burglary and assault and robbery - the victim's age. The supreme court said, however, that all victims were vulnerable, so that vulnerability alone, even when expressed as age-based, was not enough to justify departure. The court said:

> Just as almost any female armed-robbery victim could be considered defenseless to a bigger, stronger male, or almost every female sexual-battery victim can be considered helpless when attacked, almost every elderly person could be considered helpless and vulnerable to a younger, stronger assailant such as Wemett. Vulnerability is not a clear and convincing reason to depart from the guidelines when the victim's helplessness is common to nearly all similar crimes.

Wemett, 567 So.2d at 887. The court continued:

> Were we to allow the departure here based solely on age-related vulnerability, virtually every defendant who assaults an elderly person or a child would qualify for a departure regardless of the nature or severity of the offense. These crimes are reprehensible, but such a rule would defeat the purpose and spirit of the guidelines.

Id.

The unique factor issue only partially explains the circumstance of this case. A coverup is a unique factor, but the problem with basing departure on this factor is that, as it happened after the killing, it does not make the crime worse in any legally meaningful way. In Halliwell v. State, 323 So.2d 557 (Fla. 1975), after killing the victim, the defendant "used a saw, machete and fishing knife to dismember the body of his former friend and placed it in Cypress Creek." Id. at 561. The supreme court said that mutilating the body after death, because it occurred after the killing, did not aggravate the killing. See also Phelps, supra.

So, in Halliwell, mutilating the body after death did not aggravate the circumstances of the death. Since hiding the body is a much less gory and offensive activity than dismemberment, Smith's coverup could not be considered an aggravating circumstance, even in the guidelines sentencing context, and be consistent with Halliwell.

The prosecutor below agreed with this when he argued that "The Florida Supreme Court in their wisdom said that everything you do to a body after a body is dead is invalid and should not

be used in determining whether or not a man should get the chair" (T-16-17). The prosecutor naturally disagreed with the supreme court on this. The prosecutor summed up his remarks thus: "Be that as it may, Judge, this elaborate cover-up, everything he did afterward, even though the Supreme Court has said in death penalty cases, you need not look at that, has been upheld by appellate courts as a reason for departure" (T-17). Well, it has been upheld by one appellate court, years ago, and petitioner believes it must now be reconsidered.

As for hiding the body, in Tompkins v. State, the defendant killed the victim, his girlfriend's 15-year-old daughter, after she spurned his sexual advances, and buried her body under the house, where her skeletal remains were discovered more than a year after the girl disappeared. Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). On the day she was killed, Tompkins told her mother that she had run away from home. He also buried her robe, pocketbook and clothing, to make it look like she had run away. 502 So.2d at 416-17. He was convicted of first-degree murder. There was not a hint in Tompkins that hiding the body, which occurred after the killing, as opposed to the circumstances of the killing itself, was an aggravating factor. See also Henderson v. State, 463 So.2d 196 (Fla.), cert. denied 473 U.S. 916, 105 S.Ct. 3542, 87 L.-Ed.2d 665 (1985) (victims' partially-decomposed bodies found some time after killings).

Hiding the body and covering up the killing happened after the crime. Moving the body is a misdemeanor, as it should be. The significant crime was the killing; moving the body was trivial by comparison. Also, if a coverup justifies departure because it impedes law enforcement, it is deeply ironic that it comes up as reason for departure only when it is unsuccessful. This reason does not justify departure.

The state argued at resentencing that, but for the cover-up, it could have proved premeditated murder (T-9-10). Petitioner urges this court to remember that such an assertion is based on the most unfounded sort of speculation, and that Everage, who went to greater lengths to hide his wife's body, was nevertheless convicted only of second-degree murder. Just as the state's failure to prove premeditation beyond a reasonable doubt resulted in this court reducing Smith's conviction to second-degree murder, a departure could not be based on speculation that, but for hiding the body, the state could have proved premeditation. See Freer v. State, 514 So.2d 1111, 1113 (Fla. 1st DCA 1987) ("trial court's assumptions as to the sequence of events surrounding the victim's death are based upon speculation"). Indeed, it is an essential feature of this case that

> the state was unable to prove the manner in which the homicide was committed, what occurred immediately prior to the homicide, the nature of the weapon, or the nature of any wounds. In addition, there was no evidence of the presence or absence of provocation and very little evidence of previous difficulties between the appellant and the victim.

Smith, 568 So.2d at 968.

Moreover, the Everage decision cannot be reconciled with recent decisions of this court clarifying the use of the jury instruction on flight. In Jackson v. State, 575 So.2d 181 (Fla. 1991), this court said of evidence that Jackson was seen driving away from the scene of the crime, possibly in excess of the speed limit, that:

> Departure from the scene of the crime, albeit hastily done, is not the flight to which the jury instruction refers. Otherwise, the instruction would be given every time a perpetrator left the scene, and it would be omitted only in those cases where the perpetrator waited for the police to arrive. The evidence in this case did not warrant an instruction of flight.

575 So.2d at 189. See also Wright v. State, 586 So.2d 1024, 1030 (Fla. 1991), in which the court said:

> Merely fleeing the scene of a crime does not support a flight instruction, nor does the fact that Wright remained at large for six days.

Nor is flight from the scene of a crime a valid reason for departing from the guidelines. Vanover v. State, 514 So.2d 1140, 1141 (Fla. 5th DCA 1987) ("flight to avoid apprehension or prosecution is not a valid reason for departure"); Pendleton v. State, 493 So.2d 1111, 1113 (Fla. 1st DCA 1986) ("the defendant's lack of remorse, and the fact that 'the defendant was finally apprehended in Illinois and returned to Florida for trial' are not permissible grounds [for departure]" (cites omitted)), review denied 504 So.2d 768 (Fla. 1987).

Flight from the scene of a crime and concealment or covering up a crime are variations on the same theme. It is far more typical that one who has committed a crime seeks to conceal his involvement by flight from the scene, but it is hardly unknown for a such a person to seek to conceal the crime itself. Persons who commit crimes are not required to remain at the scene of the crime, or drive themselves immediately to the police station and confess, or if they fail to do so, face a jury instruction on flight, or a sentence almost doubled because they unsuccessfully attempted to conceal a crime.

This last fact must not be forgotten, the whole thought behind a coverup as a reason for departure is deeply ironic, because it comes at the stage when it is clear that the attempted coverup, no matter how "elaborate," was ultimately unsuccessful. Any coverup cited as a reason for departure is a failed attempt at coverup. (This court should also bear in mind that, while Everage kept his wife's body hidden for "several months," 504 So.2d at 1257, Judy Smith's body was hidden for a much shorter time. She was last seen around March 17, her body was found March 27, and the medical examiner said her body had been in the bay six to eight days.)

On the lack of success of the "coverup," this case may also be compared with Hernandez v. State, 575 So.2d 640 (Fla. 1991), in which this court rejected the "professional manner" in which a crime was committed as a valid reason for departure. Hernandez was convicted of drug trafficking and conspiracy to traffic. The supreme court pointed out that most of the

factors characterized as "professionalism" generally mean the defendant had committed the same crime before and planned the present crime; it did not usually mean the crime was committed skillfully.

The court held that "professionalism" gained by having committed the same crime previously was essentially a measure of prior record, which was already counted on the guideline scoresheet, planning was inherent in the crimes involved, and in any event "professionalism" was otherwise too vague a term to support departure. 575 So.2d at 642. Similarly, characterizing Smith's acts after the killing as an elaborate coverup ignores the lack of skill employed in the attempt to conceal the crime.

The sole reason for departure here was invalid. Everage is completely indefensible as precedent, for its internal illogic, because departure on the basis of an crime which did not result in conviction is expressly prohibited, and in light of other caselaw, especially certain recent Florida Supreme Court decisions. Petitioner must be resentenced within the guidelines.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative, reverse his sentence and remand for resentencing within the guidelines.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Carolyn Mosley, Assistant Attorney General, 2020 Capital Circle SE, Suite 221, Tallahassee, Florida 32301, and a and a copy has been mailed to Mr. Donald Lewis Smith, inmate no. 114876, Baker Correctional Institution, P.O. Box 500, Olustee, Florida 32072, this 27 day of October, 1992.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

DONALD LEWIS SMITH,	:	
Petitioner,	:	
v.	:	CASE NO. 80,551
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

APPENDIX TO INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
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ATTORNEY FOR PETITIONER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DONALD LEWIS SMITH, Appellant, vs. STATE OF FLORIDA, Appellee.	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED CASE NO. 91-512

Opinion filed September 25, 1992.

An Appeal from the Circuit Court for Alachua County.
Elzie Sanders, Judge.

Nancy A. Daniels, Public Defender; Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. Everage v. State, 504 So.2d 1255 (Fla. 1st DCA 1986), review denied, 508 So.2d 13 (Fla. 1987). We certify the following question as one of great public importance:

DO DEFENDANT'S EFFORTS TO COVER UP A CRIME ALLOW SENTENCING GUIDELINES DEPARTURE?

SHIVERS, ZEHMER, and KAHN, JJ., CONCUR.