IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,297

WILLIE B. HARRIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner was the defendant at trial and the appellant in the Fourth District Court of Appeal. The respondent was the prosecution at trial and the appellee. In this brief, the parties will be referred to as they appear before this Honorable Court. The symbol "R" will be used to denote the record on appeal and the sentencing transcript.

STATEMENT OF THE CASE AND FACTS

The respondent accepts the petitioner's statement of the case and facts as substantially correct and complete with the correction that, according to the record, Mrs. Harris did not "run into Publix" after being attacked, but rather "she was like walking, kind of stumbling in a little bit." (T. 122)

PAGE 3 IS MISSING

SUMMARY OF THE ARGUMENT

The victim's account of the beating given her with a hammer by the petitioner fully supports the trial court's and the district court's conclusion that the attack had been carried out in an excessively brutal manner. The severity of her injuries had been scored on the scoresheet; the manner in which the crime was carried out had not. It was proper for the district court to affirm the trial court's departure on the basis of excessive brutality.

The method espoused by the Fifth District, rather than the First District, was properly relied upon in determining the correct scoring for a prior 1967 Florida conviction of second-degree murder with a firearm, an act ranked at the top, Level 10, in severity by the Florida legislature.

ARGUMENT

I.

THE DISTRICT COURT'S OPINION APPROVING A DEPARTURE FROM THE RECOMMENDED SENTENCING GUIDELINE RANGE BASED ON EXCESSIVE BRUTALITY WAS CORRRECT.

The recommended sentence for the petitioner in the instant case was 17-22 years, the permitted sentence 12-27 years, and the sentence imposed 30 years. The petitioner claimed in the district court that the three-year upward departure sentence was invalid because the written reasons--"extensive emotional trauma" and "excessive brutality"--did not support a departure. The district court upheld the second reason, citing State v. McCall, 524 So. 2d 663 (Fla. 1988), and Vara v. State, 546 So. 2d 1071 (Fla. 2d DCA 1989).

At trial, the petitioner's wife testified that he hit her in the head with a hammer repeatedly as she screamed, fell, got up, and tried to run away. (T. 190) In trying to protect her head, she was hit on one hand and the thumb of the other hand was "crunched." (T. 190-191) The petitioner held her by the hair and hit her in the eye with the hammer. The third time she tried to get up, she felt her skull crack and the taste buds in her mouth completely change; she "knew it was all over." (T. 191) She was unable to say how many times she was hit in the head with the hammer, but she had six round spots on her head where the hair did not grow back. (T. 1930 She also testified that her right thumb was broken and in a cast; that her left hand was splinted because of the swelling; that she had stitches in the right side of her

face, a skull fracture, broken bones in her nostril, and broken bones on both sides of the eye socket. (T. 193) She continued to have intermittent problems from bleeding in the eye although she had not lost her vision in the eye. (T. 196-197) She testified on cross examination that she continued to have severe headaches, sometimes two to three times a day, and feels like falling asleep. The doctors told her that she may always have trouble. (T. 203-206). An eyewitness to the beating said that the blows to Mrs. Harris' head sounded to him like gun shots; he saw the defendant hit her with full-swing blows of the hammer. (T. 209, 212)

The petitioner argues that his actions did not support a departure because (1) they were already factored into his guideline sentence as victim injury points, (2) they were simply part of the "imminently dangerous" and "depraved mind" elements of his offense, and (3) they failed to permanently maim Mrs. Harris and thus were not sufficiently egregious to fit the criteria laid down by this Court in McCall. Each of these arguments must fail.

The petitioner claims that the excessive brutality relied on by the district court for its departure "was essentially the injuries to Mrs. Harris." Petitioner's Brief at 9. In fact, the brutality of an offense resides in the *manner* in which the offense is carried out or in the *nature* of the offender, not in the *result*. Once the distinction is recognized it is easy to see why points are scored for victim injury in amounts corresponding with the seriousness of the injury--from none through slight and moderate to severe or death--and why it is acceptable to depart based on the

manner in which the offense is committed. See State v. McCall, 524 So. 2d 663 (Fla. 1988)(proper to depart based on egregious conduct). The petitioner in the instant case received 21 points for severe victim injury, points that he does not contest and that are supported by testimony of broken bones, eye injuries, cuts, gashes, and "crunches." The *manner* in which he inflicted those injuries was, contrary to his contention and as found by the trial and district courts, excessively brutal as well.

"Brutal" is defined as "[c]haracteristic of or befitting a brute; cruel: *a brutal assault*." The American Heritage Dictionary 213 (2d college ed. 1982). One dictionary points out that "brutal" as an adjective, when "said of physical acts, stresses unfeeling cruelty." Id. Moreover, contrary to the defendant's representation otherwise, "excessive brutality" and "excessive force" are not interchangeable concepts; an act may be cruel or brute-like but be carried out without extraordinary force. See Lerma v. State, 497 So. 2d 738 (Fla. 1986)(excessive brutality may support departure against defendant convicted of sexual battery by slight force). Cruelty justified an upward departure in a case cited by the district court in support of the decision here being reviewed. See Vara v. State, 546 So. 2d 1071 (Fla. 2d DCA 1989). Vara pursued his victim through several rooms of her house, repeatedly shooting her until she died in the utility room. Id. at 1072. The only difference between the Vara victim and Mrs. Harris is that Mrs. Harris did not die in spite of the petitioner's repeated blows with the hammer as she got up, fell down, got up

again, and eventually was able to get inside the door of her place of employment before the petitioner actually succeeded in killing her. The Second District found that Vara's *manner* of killing was excessively cruel, merciless, and ruthless and justified departure. Id. The same is true of the method used in the instant case.

In McFadden v. State, 529 So. 2d 351 (Fla. 1st DCA 1988), the reviewing court recognized the distinction between injury resulting from an offense and the brutal method of committing the offense. McFadden "strangled the victim to the point of unconsciousness during his attempt at sexual battery, and when she regained consciousness briefly, he banged her head against the floor until she again lost consciousness." Id. at 353. McFadden's victim lost consciousness; Mrs. Harris did not. However, surely repeated beating on the head and in the face with a hammer as a victim struggles to her feet is as brutal a method of attack as McFadden used and is to be considered separate and apart from the injuries inflicted or the force used to inflict them. See Hall v. State, 517 So. 2d 692 (Fla. 1988)(departure not based on severe victim injury but on egregious conduct of defendant).

The defendant also argues that second-degree murder encompasses in the element of "imminently dangerous to another and evincing a depraved mind" the same conduct used by the trial court to depart from the guidelines. To reject the argument requires only a cursory examination of case law, which is replete with decisions finding that cruelty and brutality are, where supported by the record, appropriate reasons for departure in second-degree

or other murder convictions. See, e.g., McCall, 524 So. 2d 663; Vara, 546 So. 2d 1071; Williams v. State, 531 So. 2d 212 (Fla. 1st DCA 1988); Freer v. State, 514 So. 2d 1111 (Fla. 1st DCA 1987); Davis v. State, 489 So. 2d 754 (Fla. 1st DCA 1986).

Finally, it is clear that whether Mrs. Harris suffered "near fatal injuries with long lasting and severe results," Petitioner's Brief at 8, is simply irrelevant to the inquiry before this Court. That this is so flows from the recognition, discussed above, of the difference between the method of attack and the injuries resulting from the attack. The question here is whether a person whose facial bones have been broken by repeated full-swing blows with a claw hammer, whose head evidences six hammer blows where hair no longer grows, who was pursued and beaten about the face and head with the hammer as she three times fell and got up in an attempt to escape, has been attacked with excessive brutality. The trial court and the district court found that she had. This Court must also, and affirm the petitioner's sentence.

II.

THE DISTRICT COURT WAS CORRECT IN ORDERING THE PETITIONER'S 1966 SECOND-DEGREE MURDER CONVICTION TO BE SCORED AS A FIRST-DEGREE FELONY.

In 1967 when the petitioner was convicted of second degree murder, felonies were not divided into degrees, as they are under current statutes. Compare § 782.04, Fla. Stat. (1967), with § 782.04(2), Fla. Stat. (1993). For this reason, the petitioner claims that his prior second-degree murder, a serious offense no matter when committed, can be scored as no greater an offense than a third-degree felony for sentencing purposes. As support, he cites Florida Rule of Criminal Procedure 3.701(d)(5)(a)(3),[1] which states that when the degree of a prior felony is ambiguous or impossible to determine, the offense must be scored as a third-degree felony and Johnson v. State, 525 So. 2d 964 (Fla. 1st DCA 1988), which scored a prior robbery conviction according to the above-stated rule.

The Fifth District takes a different view from the First when scoring prior offenses. In Jenkins v. State, 556 So. 2d 1240 (Fla. 5th DCA 1990), the Fifth District disagreed with the defendant that the proper score for a 1965 armed robbery conviction was "impossible to determine." The Jenkins court reasoned, logically, that if the crime had been committed out of state there would be no difficulty in scoring it pursuant to the "analogous or parallel"

[1]Now appearing as rule 3.702(d)(8)(E).

Florida statute. See Fla.R.Crim.P. 3.701(d)(5)(a)(2).[2] Not being able to determine in Jenkins' case what type of weapon he had used, the court scored the prior armed robbery as a first-degree and not life felony. In Witherspoon v. State, 601 So. 2d 609 (Fla. 5th DCA 1992, as it had in Jenkins, the reviewing court noted conflict with the Johnson decision and rejected reasoning requiring scoring a 1975 Texas armed robbery as a third-degree felony. Noting the seriousness with which robbery has always been treated in Florida and the analogous Florida statute in effect in 1975 permitting a classification as less than a first-degree felony only if no weapons at all had been carried, the Witherspoon court found it "equitable" to score the armed robbery convictions as first- rather than third-degree felonies.

The facts of Roberts v. State, 507 So. 2d 761 (Fla. 1st DCA 1987), demonstrate an "ambigous" or uncertain circumstance requiring a resolution in favor of the defendant. See committee note, Fla.R.Crim.P. 3.701(d)(5). Roberts had been convicted in 1970 of breaking and entering. It was unclear, however, whether he had been convicted as having entered with the intent to commit a felony or a misdemeanor. In such a case, the court concluded, the offense would not be scored, as it had been, as a second-degree felony. There is no such ambiguity or uncertainty extant in the instant case: the petitioner was convicted in the 1960's of second-degree murder, an offense warranting consideration as a crime greater than a third-degree felony in Florida or any jurisdiction.

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[2]Now appearing as rule 3.702(d)(8).

To score such an offense as a third-degree felony is simply to ignore the equities of criminal justice. The legislature has assigned the highest level of severity to the type of crime committed by the petitioner in 1967. See § 921.0012, Fla. Stat. (1993)(unlawful, unpremeditated killing of human under § 782.04(2) ranked as Level 10 severity).

The Second District in Huffman v. State, 611 So.2d 2 (Fla. 2d DCA 1993), recognized the need to apply the sense, if not the letter, of the law to the scoring of prior convictions. Huffman claimed that his 1972 Florida Conviction for rape was unscoreable because it was a capital felony. Recognizing the irony of being able to score a prior life felony but unable to score a more serious, prior capital felony, the court observed that an alternative scoring for the prior Florida conviction could be accomplished by applying Rule 3.701(d)(5)(a)(2), and its language regarding the "analogous or parallel Florida statute."

The petitioner in the instant case was convicted in Florida in 1967 of a very serious crime. The purpose of the numerical quantifiers in the scoresheet is to indicate the relative seriousness of offenses in order to come to a consistent and equitable determination of the proper range of sentence to be imposed on each defendant. To assign to second-degree murder a number appropriate to a much less serious offense is to violate the spirit of the guidelines. Thus, the trial court correctly determined that the second-degree murder, in which the presentence

report showed a firearm was used (T. 91), was properly scored as a first-degree felony.

CONCLUSION

Wherefore, based on the foregoing analysis and citation of authority, the respondent respectfully submits that the decision of the district court should be affirmed.

Respectfully submitted,

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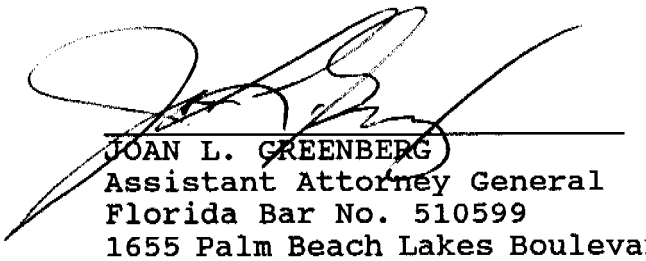

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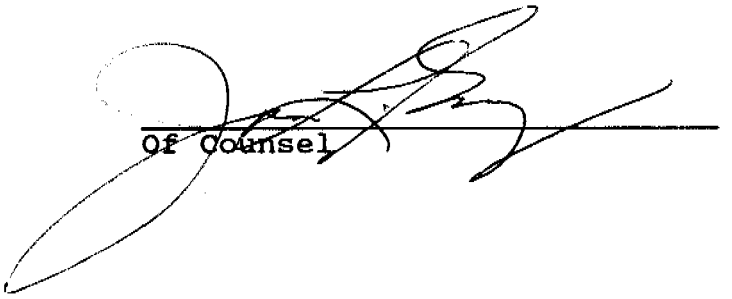
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS has been furnished by courier to CHERRY GRANT, Assistant Public Defender, Criminal Justice Buuilding/6th Floor, 421 Third Street, West Palm Beach, Florida 33401, this 29th day of August 1995.



Of Counsel