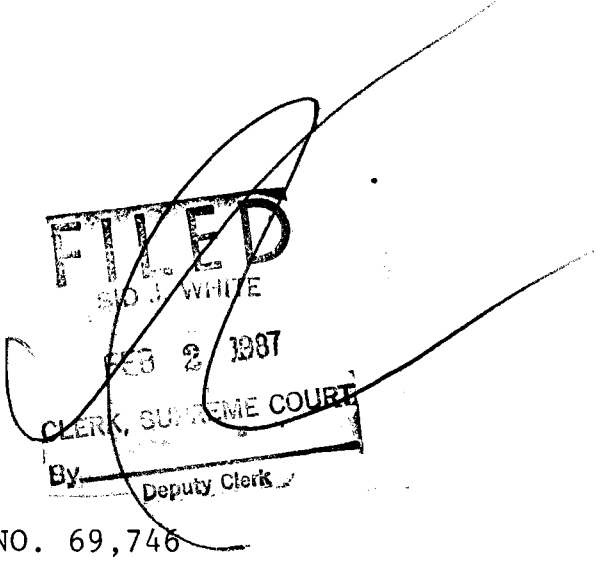
IN THE SUPREME COURT
OF FLORIDA



GARY ELLIS MATHIS,

Petitioner,

v.

CASE NO. 69,746

STATE OF FLORIDA,

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Gary Ellis Mathis, the defendant in the trial court and the appellant before the First District Court of Appeal, will be referred to in this brief as "petitioner." The State of Florida, the prosecuting authority in the trial court and the appellee before the First District Court of Appeal, will be referred to as "respondent" or "the State."

The record on appeal consists of six volumes: four volumes of pleadings, various docket instruments, and depositions; one volume of transcript; and one supplemental volume containing depositions. References thereto will be designated by the symbols "R", "T", and "S" respectively followed by the appropriate page number and enclosed in parentheses.

STATEMENT OF THE CASE AND FACTS

The State accepts as reasonably accurate petitioner's statement of the case and facts to the extent that the statement is relevant to the narrow issue before this Court. However, the State would note that the record reflects that petitioner was sentenced to eighteen years as to Count X, charging armed robbery with a firearm, and not ten years as petitioner indicates at page two of his statement. (R 66).

SUMMARY OF ARGUMENT

The State submits that the certified question should be answered in the affirmative. It is clear from the appellate court decisions addressing the issue that the courts, while approving the trial courts' use of the language under scrutiny sub judice, are cautiously reviewing the records before them to ensure that trial judges are making the specific finding only after a conscientious examination of the factors in the particular casebefore them.

An adoption of a similar "standard of review" by this Court would fully satisfy the standards set forth in Albritton v. State. Uniformity in sentencing would be evenly balanced against avoiding the usurpation of a trial judge's sentencing discretion, both stated purposes behind the sentencing guidelines. Moreover, the reasonable doubt standard espoused in Albrittion would still be met by requiring the State to demonstrate that the trial judge made the specific finding that he would depart for any one reason for departure after a conscientious weighing of the factors before him.

However, even if this Court were to answer the certified question in the negative, it is the State's position that the four reasons for departure upheld by the First District below should likewise be ruled permissible by this Court and, as a result, petitioner's sentences affirmed.

ISSUE

(RESTATED) A TRIAL COURT'S STATEMENT MADE AT THE TIME OF DEPARTURE FROM THE SENTENCING GUIDELINES, THAT IT WOULD DEPART FOR ANY ONE OF THE REASONS GIVEN, REGARDLESS OF WHETHER BOTH VALID AND INVALID REASONS ARE FOUND ON REVIEW, CLEARLY SATISFIES THE STANDARDS SET FORTH IN ALBRITTON V. STATE.

Petitioner only briefly makes any argument concerning the certified question sub judice, devoting the majority of his brief to a discussion of whether the four reasons found valid by the First District in its opinion below should likewise be ruled permissible by this Court. Of course, any discussion as to the validity of those four departure reasons is only pertinent if this Court answers the certified question sub judice in the negative. If this Court answers the question in the affirmative, then, as long as one of the four reasons found valid below is sustained by this Court, petitioner's sentence must stand. Accordingly, the State will first address the certified question and then turn to a discussion of the viability of the four reasons for departure upheld by the First District in the instant case.

Petitioner contends, on the last page of his discussion, that to answer the certified question sub judice in the affirmative would destroy the very purpose of the guidelines to ensure uniformity in sentencing. The specific certified question before this Court, however, is whether a trial judge's statement that he would depart for any one of the reasons given satisfies the standards set forth in Albritton v. State, 476 So.2d 158 (Fla. 1985), and in Albritton

this Court specifically stated:

> While the guidelines are intended to eliminate unwarranted disparity and to promote uniformity of sentences, they are not intended to usurp judicial discretion. Sentencing is still an individualized process.

Albritton, 476So.2d 158, 160. See also, State v. Mischler, 488 So.2d 523, 525 (Fla. 1986).

The State submits that to prohibit a trial judge from imposing a departure sentence on the basis of several reasons but with the express finding that any one of the reasons would sustain the departure would be tantamount to eliminating the last vestige of judicial discretion left to trial judges at sentencing. If this Court truly believes that "sentencing is still an individualized process," then it must allow trial judges the discretion to weigh the sentencing factors before them and, in the particular case where the facts dictate such a finding, to determine expressly that any one of the departure reasons would support the departure sentence.

The State is not suggesting that, in answering the certified question sub judice in the affirmative, this Court should condone the inclusion of such language by trial courts as a standard practice in every sentencing departure order. Rather, trial courts should be urged to utilize the finding only when the facts before it warrant it, and appellate courts should be advised to undertake a review of each record where the finding is made with the express purpose of determining whether the trial court's conclusion was based upon a conscientious weighing of the relevant factors in the particular case before it.

This approach was suggested by Judge Barfield in his concurrences in Griffis v. State, 11 F.L.W. 2300, 2301 (Fla. 1st DCA October 30, 1986) and Reichman v. State, 11 F.L.W. 2301, 2302 (Fla. 1st DCA October 30, 1986), wherein the instant question was first certified.[1] The judge reasoned:

> I recognize the possibility that some trial judges may be tempted to include such a statement in all departure sentences, as noted by the court in The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 3 (Fla. 1985), in which it declined to approve a committee note that set out what the court characterized as "boiler plate language" to be included in the written statement of reasons for departure, "where deemed appropriate." Trial judges, sworn to uphold and serve the ends of justice, must avoid this temptation.
>
> The court perceptively noted that in many cases the improper inclusion of an erroneous factor will affect the objective determination of the appropriate sentence. However, in some cases it is reasonable for the trial judge to conclude, after conscientiously weighing the relevant factors in his decision to depart, that his decision would not be affected by elimination of one or more of several reasons for departure. A statement such as the one made by the trial judge in this case must be coupled with such a careful determination.
>
> We should not address the appropriateness of such language outside of the context of a specific decision. The issue should be determined in a particular case not merely upon scrutiny of the language used, but upon an evaluation of the record to see whether it reflects a carefully considered judgment of the trial judge that he would have departed as he did even if the impermissible reasons were omitted. As in Kigar, [v. State, 495 So.2d 273 (Fla. 5th DCA 1986), it is apparent in this case that the trial judge made such a reasoned determination, that his statement was not "boiler plate," and that he believed a departure sentence was necessary and justified by any one of the reasons given.

[1] The identical question was also recently certified by the First District in Snelling v. State, 12 F.L.W. 169 (Fla. 1st DCA December 30, 1986).

(Emphasis supplied). As Judge Barfield notes, the Fifth District employed a similar rationale in Kigar v. State, 495 So.2d 273 (Fla. 5th DCA 1986). There in concluding that the trial judge's determination that he would have departed for any one of his departure reasons was appropriate, Judge Orfinger, writing for the majority, stated:

> We see no purpose to be served by sending the case back and asking the trial judge in effect, to tell us if he really meant what he said. The supreme court recently disapproved the use of "boiler plate" language in departure sentences to the effect that a departure sentence would still be imposed even if some reasons were invalid, see The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311, 312 (Fla. 1985), but we do not believe that the supreme court intended to prohibit trial judges from making such a finding on an individualized case by case basis. See Brown v. State, 481 So.2d 1271 (Fla. 5th DCA 1986). Where the record indicates, as it does here, that the trial judge conscientiously weighed the relevant factors in imposing sentence and in concluding that a non-state prison sanction was inappropriate, and that he would have departed for any valid reason, and where he says so in his order, we should give the order due deference. The language used here was not a "boiler plate" provision in a printed order. This was a typewritten order specifically prepared for this case, and the sentencing dialogue clearly indicates that the trial judge, in the exercise of his sentencing discretion, believed that a departure sentence was necessary and justified.

Id. at 276-277. (Emphasis supplied).

The State agrees with Judges Orfinger and Barfield that a trial judge's sentencing discretion should not be further usurped by prohibiting the use of such a finding as is under review here - - at least in situations where it is clear to the reviewing court that the trial court has specifically made its determination following a conscientious examination of the facts before it. Moreover, the State agrees with Judge Barfield that reviewing courts should determine

the appropriateness of the trial court's finding that it would have departed for any one reason within the context of each particular case and that such review should not merely cease with the scrutiny of the language used, but rather should include "an evaluation of the record to see whether it reflects a carefully considered judgment of the trial judge that he would have departed as he did even if the impermissible reasons were omitted." Griffis, 11 F.L.W. at 2301; Reichman, 11 F.L.W. at 2302.

Such a "standard of review" in cases such as the instant one would be in absolute conformity with Albritton v. State, because it would still place the burden on the State to prove beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentences; i.e., the State would still be required to show that the trial judge made the finding in question in specific consideration of the facts before him.

This test was plainly met sub judice inasmuch as the record affirmatively reflects that the trial court made the subject finding after a conscientious examination of the factors of the specific case before him. Specifically, the trial judge stated:

> I am accepting as a basis for departure from the recommended guidelines of seven to nine years those reasons set forth by the state beginning on page 7 of their memorandum. I'm going to adopt each of the reasons in numbered paragraphs 1 through 7 as a reason to depart from the guidelines and further make this statement that in my opinion any one of the reasons for departure would be sufficient to depart from the guidelines sentences. While the law requires only one finding, I think all seven of those are compelling reasons, but anyone standing alone, in my opinion, would be sufficient, and I would so find, to depart from the guidelines in this case.

(T 92-93).(Emphasis supplied).

It is additionally clear from the record that the language sub judice was not simply "boilerplate." Black's Law Dictionary defines "boilerplate" as follows:

> Language which is used commonly in documents having a definite meaning in the same context without variation; used to describe standard language in a legal document that is identical in instruments of a like nature.

In the instant case, because the record reveals that the trial judge below specifically made the subject finding based upon his consideration of the facts of the individual case before him, it can in no way be said that the court's language was boilerplate. Moreover, there is nothing in the record which would demonstrate that the trial judge sub judice routinely places in all of his departure orders the finding that he would depart for any one of the reasons given regardless of whether both valid and invalid reasons are found on review, and the petitioner makes no such allegation in his brief.

As were the Courts in Kigar, Griffis, and Reichman, the State is not unmindful of this Court's recent disapproval of a proposed sentencing guidelines provision which would have allowed the use of what this Court termed "boiler plate" language in sentencing departure orders to the effect that a departure sentence would still be imposed even if some reasons were invalid, see, The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311, 312 (Fla. 1985). In rejecting the proposed amendment, this Court reasoned that "[t]here is too great a temptation to include this phraseology in all departure sentences and we do not believe it appropriate to approve

boiler plate language. The trial judge must conscientiously weigh relevant factors in imposing sentences; in most instances an improper inclusion of an erroneous factor affects an objective determination of an appropriate sentence." Id.

The State agrees that a rule allowing such language would perhaps encourage some trial courts to utilize the finding more often than was appropriate. However, the State nevertheless asserts that, by its holding in this case as well as in the other similar cases pending before this Court, a workable balance can be struck by adopting the rationale of Judge Barfield sub judice, and requiring a case-by-case determination. As long as certain safeguards are utilized by the reviewing courts to ensure that the trial judge has made the subject finding based upon a conscientious examination of the relevant factors in each specific case before him, neither the trial court's finding nor the appellate court's affirmance of that finding runs afoul of the requirements and concerns set forth in Albritton.

Accordingly, because the record sub judice indicates that the trial judge below made such a finding following a conscientious examination of the particular case before him, the standards set forth in Albritton have been satisfied and petitioner's sentence must be affirmed.

Turning to a consideration of the specific reasons for departure sub judice, it is the State's primary position that review by this Court of the four reasons ruled valid by the First District below is not necessary because the certified

question sub judice should be answered in the affirmative. Nevertheless, should this Court disagree with the State in this regard, the State will now, in an abundance of caution, address petitioner's arguments concerning the propriety of each of those four reasons.

It is important to note, in reviewing each of the four reasons for departure, that petitioner expressly acknowledges that each of the reasons has been found to be appropriate in certain cases but appears to assert that the facts of the instant case are readily distinguishable from those cases and do not therefore support departure sub judice. (Petitioner's brief at 25).

The first reason ruled valid by the First District was as follows:

> The commission of nine (9) felonies within approximately an hour and a half at three (3) different locations in Jacksonville, all nine (9) of which involved the use of a firearm and six (6) of which involved threats to kill innocent victims, constituted a "crime binge" that cannot be tolerated by this community. Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984).

(R 72).

The temporal proximity of events or what the trial judge characterized as a "crime binge" has been repeatedly upheld as a clear and convincing justification for departure. Decker v. State, 482 So.2d 511 (Fla. 1st DCA 1986); Sabb v. State, 479 So.2d 845 (Fla. 1st DCA 1985); Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984); Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984); Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984). Even so, Petitioner

attempts to distinguish Manning on the theory that those offenses were committed in a two-day period rather than in an hour and a half as here. This argument is illogical and must fail. Petitioner robbed three different Jacksonville convenience stores in ninety minutes. Each robbery was a separate incident involving different victims only a few miles apart. In those ninety minutes, nine felonies arising from the three separate incidents were committed by the petitioner. If these facts cannot be characterized as a "crime binge," no facts can be. The record fully supports the trial judge's finding,(see, e.g. T 60-61, 68-69, R 209), and, in particular, includes a map demonstrating the geographic proximity of the three convenience stores. (R 43).

The second reason for departure ruled valid by the First District was the trial court's third reason for departure. In that reason, the trial court stated:

> After placing the gun in Ms. Clark's stomach, a victim, the defendant repeatedly threatened death. After telling Ms. Clark "I'll blow your shit away, lady, right here" he subsequently threatened"...if you call the cops, I'll blow your head through your damn window."
>
> Mr. Barker, a victim, was similarly threatened, with a firearm, that if anyone was in the back room and Mr. Barker was lying, the defendant would "blow him away." Also, the defendant threatened that if "anybody pulled up in the parking lot he would blow him away" or if Mr. Barker tried to call from the outside phone he would "blow him away".
>
> The pointing of the gun at each victim accompanied by threats of imminent death, with the ability to carry it out, under the facts and circumstances of this case, constituted an excessive use of force

> and threatened violence. Such force and threatened violence went beyond the force necessary to commit armed robbery or aggravated assault. Such excessive force and threatened violence constitutes a clear reason for departure. Mincey v. State, 460 So.2d (Fla. 1st DCA 1984); Smith v. State, 454 So.2d 90 (Fla. 2nd DCA 1984).

(R 73). Excessive use of force and the active threatening of the victims with death or great bodily harm has repeatedly been found to be a permissible basis for departure. See e.g., McPherson v. State, 11 F.L.W. 2511 (Fla. 1st DCA, December 3, 1986); Cawthon v. State, 486 So.2d 90 (Fla. 5th DCA 1986); Morales v. State, 471 So.2d 625 (Fla. 2d DCA 1985); Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984). While the courts in each of these decisions implicitly recognized that force or threat may be an inherent component of the crime charged, they also recognize that a defendant may go beyond the degree of force or threat contemplated by the statute defining the offense. In Morales, an aggravated battery case, the Court found that the "defendant's outrageous actions and excessive use of force against defenseless people and the particular facts and circumstances relating to the instant offense - provide clear and convincing reasons supporting the trial judge's departure from the guidelines." Morales at 626.

Likewise, sub judice, the petitioner's vicious verbal assaults, repeated threats of death, and shoving of his gun at each victim, at one point pushing the gun in the victim's side, constitute the same type of outrageous action contemplated by the courts in Mincey, Morales, and other such cases and are relevant facts and circumstances surrounding the commission of the instant offenses. Murphy

v. State, 459 So.2d 337 (Fla. 5th DCA 1984); Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984). These facts are clearly supported by the record (See e.g. T 61-65, 68-72), and, contrary to petitioner's assertions, demonstrate that the trial court's reliance upon such actions was an appropriate basis for departure.

The third reason found valid by the First District was the trial court's fourth reason for departure. Specifically, that reason was as follows:

> Two of the victims, Ms. Mary Clark and Sheila Johnson, were females working alone at night. The defendant, male, armed with a firearm, took advantage of their vulnerability and entered their place of employment at night, when each victim was alone and defenseless, pointed the gun at each and threatened death. Such conduct warrants exceeding the recommended guidelines. Parker v. State, 10 F.L.W. 1859 (Fla. 2nd DCA, July 31, 1985); Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985).

(R 73). Nearly identical reasons for departure were held valid in Parker v. State, 478 So.2d 823 (Fla. 2d DCA 1985) and Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985). While petitioner attempts in his brief to distinguish Hunt from the instant case, he does not and, indeed, cannot, distinguish Parker, where the trial court's reason for departure was simply that "the victim was female and the defendant was male, and the crime occurred at night." Parker at 824.

Finally, the last reason found valid by the First District was the trial court's fifth reason for departure:

> The defendant's use of heroin, cocaine, quaaludes and alcohol prior to the robberies, and the influence of those drugs on him during the robberies, coupled with his use of a firearm and death threats, "enhanced the danger to others through irrationality". Carney v. State, 458 So.2d 13, 15 (Fla. 1st DCA 1984).

(R 73). Petitioner contends that this reason is based upon the mere speculation that someone may have walked into the store resulting in the creation of risk to other persons. However, it appears that the actual factual predicate for the reasons is more aligned with that in Carney v. State, 458 So.2d 13,15 (Fla. 1st DCA 1984), that "the robbery was motivated by [petitioner's] physical state due to the influence of drugs, and that, accordingly, such an irrational state "enhanced the danger to others." The "others" in this case does not mean innocent bystanders who may have happened in the store, but the victims themselves.

Regardless, it cannot go unnoted that in Scurry v. State, 489 So.2d 25 (Fla. 1986), this Court stated that the fact that a defendant was drinking prior to committing the crime of first degree murder with a firearm was not a valid basis for departure because voluntary intoxication is a defense to the specific intent crime of first-degree murder. Scurry at 29.

Accordingly, pursuant to Scurry, that aspect of the trial court's reason for departure sub judice that he was intoxicated prior to committing the offenses would not be a valid basis for departure as to the specific intent crime of robbery with a firearm.[2] However, the

[2] The State would also contend that, as regards this specific ground for departure, Scurry does not appear to "square" with this Court's holding in State v. Mischler, supra, to the extent that the departure reason in Scurry that the defendant drank before committing the offenses does not fit within the three categories which this Court found could never be used to justify departure. It is not a reason prohibited by the guidelines themselves; it has not already been taken into account in calculating the guidelines score and it is not an inherent component of the crime in question. Mischler, 488 So.2d at 525.

State would submit that Scurry is distinguishable because the trial court did not simply note that the petitioner was under the influence of alcohol and drugs at the time of the offenses, but went on to find that such an irrational state "enhanced the danger to others." This aspect of the trial court's reason for departure is a fact and circumstance surrounding the commission of the crime and certainly is a valid basis for departure independent of any defense of voluntary intoxication. Murphy, supra; Garcia, supra.

Finally, even if Scurry could be applied to invalidate the trial court's reason for departure as to the specific intent crimes involved, it is clear that voluntary intoxication is not a defense to the offense of use of a firearm in the commission of a felony, section 790.07, Florida Statutes, and, accordingly, the above reason for departure would be valid as to the three counts of that offense of which petitioner was convicted.

Petitioner also asserts in his summary of argument that there were numerous mitigating factors which the trial court ignored sub judice, the most notable factor being that the petitioner committed the crimes while under the influence of drugs and alcohol. However, it is well settled that it is within the trial court's discretion to determine whether sufficient evidence exists of a particular mitigating circumstance, and if so, the weight to be given it. White v. State, 446 So.2d 1031, 1036-1037 (Fla. 1984); State v. Mischler. Accordingly, the trial court's failure to find mitigating circumstances despite the information submitted by the defense was not error. The trial court made plain that it had considered the evidence of petitioner's drug and alcohol use and was not swayed by it. (T 91-92). Such a weighing

and ultimate determination was clearly within the court's discretion.

As a result, because each of the four reasons upheld by the First District below constitutes a valid basis for departure, supported by clear and convincing evidence, the First District's opinion sub judice must be sustained.

CONCLUSION

Based on the foregoing, this Court should answer the certified question sub judice in the affirmative and approve the First District's decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to J. Craig Williams, Esquire, 211 Liberty Street, Suite One, Jacksonville, Florida, 32202, on this the 2nd day of February, 1987.

Patricia Conners
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