IN THE SUPREME COURT OF THE STATE OF FLORIDA

GARY ELLIS MATHIS, Petitioner, vs. STATE OF FLORIDA, Respondent.	CASE NO. 69,746 FIRST DISTRICT COURT OF APPEAL NO. BJ-496

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE

The Petitioner was arrested on January 6, 1985 on three separate charges of armed robbery. The State initially filed an information on January 16, 1985, charging four counts of armed robbery (R.11). On February 7, 1985, the State filed an amended twelve count information (R.12-14).

1. The Petitioner entered a plea to counts 4-12 with the understanding the State would recommend 18 years with a six year minimum mandatory. (R 16). The form acknowledges the trial court's indication not to exceed the State's recommendation. Id. The guidelines range of 7-9 years is indicated as is Petitioner's reservation of the right to appeal any sentence in excess of the guidelines. (R 16, 70, T99; PSI at p.1). Petitioner waived the right to appeal the six year minimum mandatory. (R 16, T 99, PSI at p.1).

2. Petitioner filed a written statement of "Mitigating Factors." (R 17-30).

3. The State filed a written memorandum in support of departure from the guidelines, with attachments. (R 41-57).

4. The trial court sentenced Petitioner to 18 years incarceration as follows:

Count	Crime	Sentence
4	Armed Robbery with use of a firearm	18 years
5	Aggravated Assault	5 years
6	Use of a firearm during commission	5 years

	of a felony	
7	Armed Robbery	18 years
8	Aggravated Assault	5 years
9	Use of firearm during commission of a felony	5 years
10	Armed Robbery with use of a firearm	10 years
11	Aggravated Assault	5 years
12	Use of a firearm during commission of a felony	5 years

See generally (R 58). The sentences on each count are concurrent (R 60-68). The two three year mandatory sentences were imposed consecutively. (R 60, 63).

5. A written sentencing order was entered which lists the following seven factors in support of departure. (R 72-74).

> 1. 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).
>
> 2. Innocent victims have suffered severe emotional and psychological trauma and injury, both at the time of the offenses and since, due to the Petitioner's conduct. See Green v. State, 455 So.2d 586 (Fla. 2nd DCA 1984); Marshall v. State, 468 So. 2d 255 (Fla. 2nd DCA 1985); Cote v. State, 468 So. 2d 1019 (Fla. 4th DCA 1985).
>
> 3. After placing the gun in Ms. Clark's stomach, a victim, the Petitioner 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 lying, the Petitioner would, "blow him away." Also, the Petitioner 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 396 (Fla. 1st DCA 1984); Smith v. State, 454 So. 2d 90 (Fla. 2nd DCA 19894).

4. Two of the victims, Ms. Mary Clark and Sheila Johnson, were females working alone at night. The Petitioner, male, armed with a firearm, took advantage of their vunerability 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).

5. The Petitioner's use of heroin, cocaine, quaaludes and alcohol prior 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 of others through irrationality." Carney v. State, 458 So. 2d 13, 15 (Fla. 1st DCA 1984).

6. Moreover, given the Petitioner's use of heroin and cocaine, the pointing of the firearm in three different public businesses, the threat to "blow your shit away, lady" the subsequent threat that "... if anyone pulls up I'll blow you away...", and the possibility that Ms. Clark's niece or an innocent customer could have entered one of the three stores between 7:30 P.M. and 9:00 P.M., an extremely volatile situation resulted that created the

> risk of death or injury to innocent victims. These considerations warrant a departure from the guidelines. Carney v. State, 458 So. 2d 13, (Fla. 1st DCA 1984).
>
> 7. Given all the facts and circumstances surrounding this case, a guideline sentence of seven (7) to nine (9) years is simply insufficient to provide adequate retribution, rehabilitation, and deterrence to the Petitioner and to others. Mincey v. State, 460 So. 2d 396 (Fla. 1st DCA 1984); Williams v. State, 454 So. 2d 741 (Fla. 1st DCA 1984).

(R 72-74).

6. The trial court stated that any one of the seven grounds asserted would in the court's opinion, standing alone justify the departure sentence. (T 93-94). The court would have imposed a harsher sentence but for the negotiated sentencing cap. Id.

7. The PSI recommendation was 30 years incarceration with release after 15 years to be followed by a 15 year probation period. (PSI at p. 6; T 86).

An appeal to the First District Court of Appeals followed. The appellate court affirmed the trial court finding reasons 1, 3, 4, and 6 to be valid reasons for departure and reasons 2, 5, and 7 to be invalid and certified the following question:

> DOES 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, SATISFY THE STANDARD SET FORTH IN ALBRITTON V. STATE?

The Petitioner filed to invoke discretionary jurisdiction and this appeal follows.

STATEMENT OF THE FACTS

The Petitioner committed three robberies between 7:30 p.m. and 8:45 p.m. on January 7, 1985, all involving convenience stores and all committed while the Petitioner was under the influence of drugs and alcohol.

On January 6, 1985, the Petitioner entered a Zippy Mart and asked the clerk, Mary Clark, for a pack of cigarettes and as she reached for the cigarettes, placed a gun at her stomach and told her to give him the money out of the register and also to give him the money out of the safe or he would "blow her shit away". As the Petitioner was leaving the store, he indicated to Miss Clark that if she called the police, he would "blow her head off through the damned window". She testified at the sentencing hearing that she felt he would have done so (T.70). She worked approximately a day and a half after that and then quit her employment on January 8, 1985. She then moved because of family illness and personal illness back to Okeechobee, Florida, where she now resides (T.71).

She had been the victim of two prior robberies which had not dissuaded her from working at a convenience store. In one of the robberies, two black males had robbed her in the process, struck her in the back of her head with a pistol necessitating approximately eleven stitches. Though she expressed concern at the sentencing hearing as to the outcome of the case, she had not kept in contact with the State Attorney's Office and had departed the jurisdiction without notifying them, indicating "her employer knew where she was", even though she was not located until several days before the trial of this cause (T.73). At sentencing, she

indicated that she was more concerned about this case than she had been when someone came in at 3:00 a.m. "splitting her head open" (T.75).

She indicated that the Petitioner appeared to be nervous and shaky as if he were an amateur and she felt more comfortable with people who were cool, calm and collected giving the appearance of professionals (R.98). She further stated that there were two people outside at a phone booth during the robbery, but they left as the robbery was taking place (T.78).

Mary Clark stated that, in her opinion, the Petitioner who committed the robbery was as "scared as I was". She based that upon his mannerisms and the fact that his hand was shaking (R.89). She further indicated the Petitioner never physically injured her (R.94,95). She stated that the Appellant was shaky and upset, and he was not sure of what he was doing, and appeared to be scared and upset (R.98). Mary Clark also said that she had been robbed twice previously, one time in which two black males walked in and "laid the back of her head open". She stated that the experience was much worse that this one (R.99,100). Mary Clark further stated the vehicle driven by the Petitioner was readily distinguishable because it had tape all over the windows on one side.

A second robbery occurred between 8:30 p.m. and 9:00 p.m., and involved a twenty-four year old male clerk, Steven Barker, working at a Lil' Champ store located at 310 South Lane Avenue, Jacksonville, Florida. The vitime indicated that during the hold-up, the Petitioner asked for the money, asked if anyone was in the

back and threatened to blow the clerk away if anybody pulled up outside and came inside the store (T.61). The clerk handed the Petitioner money out of the register including bait money, and during this period of time, the Petitioner jerked a telephone cord from the wall (T.62). As the Petitioner was leaving, he told the clerk not to call the police or go outside and again threatened to "blow him away" (T.62). The clerk indicates that he was afraid, shaky and nervous from approximately two weeks after the robbery (T.63). He stated he quit the job as a result of the robbery, but at the time of sentencing, he had been working at another Lil' Champ for approximately one month (T.64). He stated that one of the conditions of his present employment was that he would not work alone (T.64). The clerk has not seen a medical doctor nor sought any type of professional counseling or treatment since the incident (T.67). He was not physically harmed or touched in any manner.

Steven Barker stated that when the Petitioner said that this was a robbery, he was kind of shaky and nervous and stammering when he talked (R.200). He indicates that there was a shakiness in the Petioner's voice, and stated that, in his opinion, it was entirely possible the Petitioner was under the influence of drugs or alcohol. (R. 201). Steven further stated that the Petitioner was not really sure of what he was going to say or do, and he "wasn't with it", and "didn't seem to have his act together" (R.201, 202). Steven indicated that the Defendant apologized to him saying "Hey, man, I'm really sorry. Times are hard, times are really hard". Steven considered that strange behavior from

someone who had just robbed him (R.203). Steven described the person's overall behavior as being strange, and would attribute that to someone being possibly under the influence of drugs and alcohol (R.206). Steven stated that the person had problems thinking and focusing on what he wanted to do (R.206).

Sheila Johnson did not testify at the hearing. She was the third robbery victim. She was robbed between 8:30 p.m. and 9:00 p.m. and was working alone at a Zippy Mart located at 1121 Ellis Road, Jacksonville, Florida. Sheila Johnson described the Petioner's behavior as that of one bing intoxicated, that his eyes wee bloodshot, and in her opinion, he was under the influence of either drugs or alcohol (R.211). She had a hard time understanding the person and she did not recall all of the details of that particular evening (R. 214). She stated that the Petitioner walked in, asked for the money, told her to open the register, and lift the register drawer. Then the Petitioner left the store (R.215). She thought it was unusual for a person to commit a robbery without attempting to disguise himself in any manner (R.215).

J. A. Austett initially responded to the scene of the robbery at the Zippy Mart where Mary Clark was employed, and later transported the Petitioner to and form the various stores from purposes of identification. He indicated in his deposition that the suspect walked in, and asked to purchase a pack of cigarettes. When Mary reached up to get them, she noticed he was holding a gun, and he demanded money (SA 6). This is contrary to her testimony at the sentencing hearing where she stated the person

initially stuck the gun in her side. Mary Clark described the gun as an automatic .32, but she was not sure (SA 14).

According to Officer Austett, all Miss Clark said was that the suspect shielded the gun in one hand, took the money, and nothing else occurred (SA 15). Officer Austett described the Petitioner's behavior as "kind of whimpering, a little bit of a crying and upset", and the Petitioner was intoxicated and his speeck was slurred, and he wanted to know what was going on, and the officer informed his that he was a suspect in a robbery (SA 18). He stated that the Petitioner's speech was slurred, his eyes were red and watery, and his appearance was similar to persons that he had come in contact before that were under the influence of quaaludes (SA 18). He further stated that the Petitioner fell asleep for a short period of time while he was being transported, and he later characterized this as "just during the whole thing, he kept nodding off" (SA 19). The Petitioner kept asking him what was going on and acted surprised (SA 19). Officer Austett further indicated that when he was getting the Petitioner out of the patrol vehicle for the show-up, he could not get out of his own (SA 23).

T. L. Lumpkin, a robbery detective for a little over one year stated in deposition that the Petitioner "appeared a little high to him" (R.416). He indicated that the peole he interviewe said he was "very nervous" (R.416). He further indicated that when he was arrested, he kept asking "what they got me for, I do not know what's going on" (R.418). He stated that he "appeared a little confused to me". The Petitioner indicated to Detective Lumpkin

that he had a drug problem and in his written statement, said that he was sorry about what happened, and he needed drug rehabilitation (R.425). Detective Lumpkin, when specifically asked if any one of the witnesses said that he had made any moves other than those necessary to actually commit the robbery with the gun, answered: "Other than the fact about the telephone, I can't recall anything else strange happening" (R.428).

Dr. James Larson examined the Petitioner, pursuant to court order, as a confidential expert for the Assistant Public Defender, Theresa J. Sopp. His conclusions were deficits in immediate and recent memory, which was a mild to moderate degree. The Petitioner was able to name on object out of three after five minutes despite apparently trying very hard. His serial sevens were perforemed, with six mistakes, his judgment was impaired and impulsive, and his insight was extremely impaired (R.46). Dr. Larson's clinical impression was that the Petitioner suffered from drug abuse, severe heroin, cocaine, quaalude addiction, and alcoholism with alcoholic blackout spells (R.46). He stated that the Petitioner had a long history during his entire adult life of excessive mind altering chemical use of an illicit nature, including almost every drug known to Western civilization. Dr. Larson indicated that this produced a moderate deficit in his immediate and recent memory. The alcoholic blackout spells are typical from someone who combines alcohol and Soporitics, such as quaaludes. Dr. Larson indicated that during the time of the alleged offense, the Petitioner was most undoubtedly in a blackout spell, and cannot remember anything. He did not feel that this

was feigned or self serving (R.46). Dr. Larson also noted that the Petitioner does have an organic brain syndrome, that is, mild brain damage from his extensive drug use. This was substantiated by the Bender Gestalt, which was angulated and somewhat ragged, and by the Otis Lennon IQ test, in which the Petitioner received a full scale of 88 in the dull/normal range, which he feels is below his normal functioning (R.47). He identified mitigating circumstances in this case involving the use of alcohol, heroin, cocaine and quaaludes during the time of the commission of the alleged offense, and their impairment upon his judgment. Dr. Larson felt that these were mitigating, and felt that this person's best interest would be extensive drug rehabilitation (R.47).

Dr. Ernest C. Miller, a psychiatrist at University Hospital in Jacksonville, Florida, examined the Petitioner on two occasions, and descirbed the Petitioner's problem as profound combined problem in the use of drugs and alcohol that has existed for many years. Dr. Miller stated that the Petitioner comsumes hard liquor, beer, uses a large variety of street pharmicologicals, free-basing cocaine, uses heroin, quaaludes and others, and that he is a clear identifiable habitual drug user and alcohol addict (R. 113). According to the Diagnostic and Statistical Manual of Mental Disorders, he would characterize the Petitioner's addiction as a mental disease and defect (R. 115). He further indicated that his findings as far as his habituation to drugs and alcohol would be a fact consistent with the Petitioner's representation that he was not aware at the time of

what he was doing, and as Dr. Miller stated "a person who is completely out of control and not processing information logically, and behaving in an orderly predictable manner". He further stated that such a person's thinking is disturbed because of the influence of drugs and alcohol on the nerves responsible for reasoning (R. 116). Dr. Miller also said that the frontal portions of the brain become affected with the chronic use of drugs and alcohol and as a result, moral restraints and behaviors are attenuated, that is, weakened (R.117). He also stated that in many cases, a person's ability to distinguish between right and wrong would be attenuated and diminished with the combined effect of heavy alcohol and drug usage (R.117). Dr. Miller said that while the three robberies are consistent with an awareness of one's surroundings, it is also consistent with a lack of awareness, in that the likelihood of being detected and captured is greatly increased, and to sue his words "there are better ways to commit the crimes, I'm sure" (R.121). Dr. Miller also said that the actions as he understands them would indicate someone not thinking optimally (R.122).

As far as the observation of the victims, Dr. Miller indicated that stress would tend to make them less observant or less accurate in their observation as far as intoxication or lack of intoxication (R.123).

Dr. Miller stated that dementia associated with alcoholism, the diagnosis reached by Dr. Virzi, involves interference with brain functioning as a result of organic dysfunction or organic problems causing "false reasoning, logic, judgment, changes in

sensoria, orientation, problems with memory and certain emotional alterations" (R.123). Dr. Miller indicated that the Petitioner exhibited characteristics consistent with someone suffering from organic brain damage or organicity in that he was unable to recall what he did. Secondly, the Petitioner had an EEG with a borderline quality that is seen in heavy chronic drinkers, and that he tended to be a little concrete in his verbal patterns (R. 125).

Dr. Miller further indicated a person with some evidence of organic brain damage would be more affected by drugs and alcohol, than would the average person (R.125, 126). He further stated that a small amount of drugs and alcohol would have a greater impact on a person with this mental status (R.126). Also, the combination of heroin, cocaine and quaaludes along with alcohol would enhance the impairment of the though processes of the person using them (R.127). The Petitioner's indication to him that he had blackouts, is compatible with a history of heavy drinking and drug usage. He indicated that while in a blackout, he would behave in an identifiably irrational way, and yet have no recollection of what he was doing at the time. He feels that he has absolutely no recollection of having committed the crimes (R. 128). He stated that what he believes happens during a blackout is that alcohol affects the hippocampus, temporal and parietal lobe where most memories are stored, and it interrupts certain nerve cells in that area and their pattern of in-coding data. Because of the interference of the chemicals, it is never

recorded, and therefore, it is as though it never existed and never happened (R.129).

Dr. Miller initially made a recommendation after an examination on May 9, 1985, indicating that a treatment program was essential to the Petitioner to make a satisfactory adaption to the community, such as, Meyers Act, Jacksonville Drug Abuse, or both (R.130,131). Dr. Miller indicates most cogently as far as this offense is concerned that there is no reason to believe that if he was not intoxicated he would not have committed these acts. "The only explanation I saw for it was he was a man who was intoxicated and let his guard down, his conscience dissolve and judgments not too good and commits an act". He further indicated that is it highly unlikely that with the absence of drugs and alcohol, that this offense would have occurred (R.134). Also, the readily distinguishable nature of the vehicle that the Petitioner was driving was, in Dr. Miller's words, "maladroit", suggesting that there was not a lot of thought, and was not thought out as well as it could have been. The factor of intoxication by use of drugs and alcohol is a circumstance that can cause a person to be unable to form the specific intent to commit a crime (R.136, 137). The fact that he did not make excellent judgment or efforts to disguise himself, the type of vehicle that he used and the fact that he was drinking, and was heavily intoxicated on drugs and alcohol, is an area of compatibility with this theory. The absence of memory corrolates and is consistent with the impression of intoxication at the time of the alleged crime (R.138). He further indicated the statements made by friends and family

members who saw him during this period of time indicating that he was intoxicated and behaving strangely, and also the fact that the arresting officer indicated that he appeared to be intoxicated and he was nodding off or appeared to be asleep in the back of the patrol car are factors consistent with the Petitioner's position (R.140). He further indicated that in his opinion, he would consider someone who committed an offense under the instant circumstances as mitigated from someone who walked in and stole because they wanted the money or because this was the way they normally supported themselves, assuming that the drinking was not done deliberately in order to facilitate the robbery. And in the Petitioner's case, he did not draw the conclusion that it was done for that reason (R. 143). He further stated that, compared to the run of the mill robbery, he considered the Petitioner's situation to be mitigated "as far as alcohol, drug combination is concerned" and that if he were meting out punishment, he would mete out less punishment to that person than others "if he could see mitigation, yes he would". Finally, his team's recommendation was very structured treatment for his drug and alcohol dependency (R. 153).

Vincent O'Hara is the director of the Chemical Dependency Counseling, and had been so employed as program director for the past three and a half years counseling persons and their families with alcohol and drug problems. He has a Masters of Science degree and Allied Health Services Addiction. He has referrals from the Northeast Florida Safety Counsel, which runs the DUI School in the City of Jacksonville (R.237). Mr. O'Hara concluded that the Appellant had had a blackout experience in connection

with the present series of events, and he felt that he was being true in his representations as to lack of memory of the events and offenses. The Petitioner indicated to Mr. O'Hara that he does not remember the robberies, which was consistent with his statement to Dr. Miller in that if he did it, is "wasn't me that done it", meaning that he was not in his right state of mind. Mr. O'Hara concluded that Gary was an alcohol and drug addict. He further concluded that Gary was in a blackout at the time of the commission of the offenses on January 6, 1985, and he was unable to form the specific intent to commit the offenses (R.268,269). The basis of his conclusion was that he was intoxicated before the event and after the event (R.269, 270). He drew particular significance to the fact that the Petitioner had nodded off and passed out in the back of the police car, as testified to by Officer Austeet (R.270).

Dr. Joseph Virzi examined the Petitioner and requested that Dr. Henry Bates conduct certain psychological testing on the Petitioner to determine if he was suffering from organic brain damage. Dr. Bates administered a battery of tests, including the Luria-Nebraska, the Rorsherach, and Wechsler. Dr. Virzi's conclusions were that the Petitioner was a chronic alcoholic and chronic severe polydrug user, suffering from organic brain damage. He determined that the usage was long, extended and involved many different types of drugs. He had described the Petitioner as being a very poorly put together person, that his personality has never become well structured or well defined, that he has poor judgment and his values are impaired, that his ideas are

fragmented in use and the stupidity of his behavior was outstanding, all of which led him to believe that he is suffering from mental illness (R.335-338). A Minnesota multiphasic personality inventory test was administered, which was inconclusive which could also support that position (T.339,340). He was told by the Petitioner that at the time of the robbery, he was drinking three to five fifths of liquor a week. At standard testing done pursuant to the mental status examination, he noted that the Petitioner could not remember any dates of his family history, or his brothers or sisters birth dates including months and years. He could not remember objects after three minutes. He was unable to subtract in a satisfactory manner, serial sevens from a hundred. Based upon these and other tests, Dr. Virzi felt that the Petitioner was brain damaged (R.353). The basis of the conclusion was the interview with the Petitioner, psychological testing and the psychological testing results from Dr. Bates (R. 354). Dr. Virzi concluded that the Petitioner in January, 1985, at the time of the commission of the offense would have been in an acute alcoholic and drug state, exhibiting severe signs of brain damage. He indicated that medically, it seemed reasonable to him that he would have been in a state of fog most of the time, so that his purposefulness of behavior would not meet the criteria of general purposefulness (R.358). Any knowledge of what he might have been doing would have been flippant or inconsequential (R. 359). He further concluded that he would have had major trouble with distinguishing right from wrong, and he did not think that it would be possible for him to do so (T. 359). He was greatly

impaired so that he was not able to tell right from wrong. Dr. Virzi indicated that his medical impression is that his intelligence would be, medically speaking, so impaired at the time that the processes to determine what is right or wrong were absent at the time of his behavior (T. 361). He said he had a high level of drug intake and possible withdrawal and a high level of disorganization of his mental functioning based on poor judgment, impulsive behavior and perseveration in committing the same acts over and over again (T. 362). He would have poor judgment, poor impulse control, poor intelligence, poor understanding of the consequences of what he was doing (T. 363). He indicated that the process one needs to go through in order to make a mental value that what I am doing or what a person is doing is wrong was impaired (T.365). He concluded that at this point the Petitioner had some idea of what he was doing was wrong, but he was not able to appreciate the wrongfulness of his act (T.365).

Dr. Bates, a licensed clinical psychologist practicing out of the St. Augustine General Hospital, examined the Petitioner, and concluded that he was a chronic polydrug user and had been so for many years, and that he had suffered from alcoholic blackouts (R. 387). Based on the Luria-Nebraska neuropsychological test battery, which is a test for brain damage or brain dysfunction, he concluded there was enough indication for dysfunctions in the higher mental processes (R.388). He stated that he was unable to solve verbal analogies such as hand is to glove, or shoe is to foot. He was unable to think abstractly, and his thinking was very concrete. His short term memory was extremely poor, whether

here was interference or not. Dr. Bates showed the Petitioner a design and asked him to count to thirty, then showed him a similar design, and the Petitioner thought it was the same design he had been shown before (R.389). He had problems recalling paragraphs in a thematic text. He had problems with paired words on the Wechsler memory scale, which was a second neuropsychological test that he was given. The Petitioner's test showed left hemisphere problems. The function of the brain associated with the frontal lobes and the parietal lobes were the ones that were affected. Dr. Bates' belief was that no one could fake a pattern like that. The Petitioner could respond to easy questions, but as soon as any complexity was introduced or additional components, he had difficulty (R. 388,389). Of the 269 questions asked, the Petitioner either responded either in the borderline or impaired range on 29% of the items. His responses to the Rorschsach test were consistent with the responses on the Luria, in that he repeated a third of his responses on the Rorschach. This is a calmed perseveration, and it is always a frontal lobe sign (R. 390). The Petitioner did not exhibit schizophrenic or psychotic behavior which led to and confirmed the conclusion there was difficulty with organic brain dysfunction (T.391). Dr. Miller's report, as far as the result of the abnormal EEG for the borderline EEG confirmed Dr. Bates' testing results (R. 391,392). He indicated that as far as the Petitioner's brain functon, that he had difficulty thinking logically, and organizing material, has memory problems and very poor judgment, and is in the low average range of intelligence (R.393). He concluded that someone with

these test results, when taking drugs and alcohol would tend to be thinking not very clearly, confused and illogically, and have poor judgment (R. 393). He indicated that it was highly probable that a person with this disorder, combined with drugs and alcohol would have difficulty in appreciating right from wrong (R.394). Dr. Bates indicated that the Petitioner was not already thinking clearly, and the interaction with drugs would cause him to think even less clearly, and show even poorer judgments (R.394). He indicated that his conclusions were given as brain dysfunction, his actural functioning was quite poor, his ability to size up situations, respond to situations and deal with them effectively was impaired (R.399). He concluded that the Petitioner had moderate cognitive impairment, which is a greater standard than just mild (R.400). He stated that based upon the chronic drug abuse, the brain damage, and the cognitive impairment, that it might make it impossible for a person in the Petitioner's condition to know or distinguish right from wrong (R.405).

Lay witnesses corroborated the Petitioner's condition. Paul Wilson, a friend of the Petitioner's observed him the day of his arrest earlier that morning and in the afternoon. Mr. Wilson had known the Petitioner for approximatley twelve years. He had seen the Petitioner three or four times in a two week period before January 6, 1985, and felt during these periods of times, that he was under the influence of drugs or alcohol. He felt that he was in no shape to have been driving in an automobile. Paul had stated that the Petitioner had told him that he was strung out on cocaine and had been freebasing it. Mr. Wilson had noticed that

'he Petitioner had lost a lot of weight and in his words "was looking pretty rough" (R.469). He indicated that on that date, the Petitioner was drinking liquor and chasing it with beer (R. 464). When he saw the Petitioner on the day of the robberies, he drew the conclusion that he was probably still high from something he had done the night before (R.467). He further stated that the Petitioner's speech was rambling and confused (R.468). When the Petitioner after the fact related to him what had occurred in the robbery, he never made any sense (R.474).

Mary Wilson, Paul Wilson's wife, also saw the Petitioner on the day of his arrest. She stated that the Petitioner was high, based upon her observation of him and her experience with alcoholics, as her father is an alcoholic. Mary indicated that his motor skills were not very good as he was on his knees by the sofa in the living room (R.480). Also, she stated that the Petitioner drank a half pint of Jack Daniels, and was chasing it with beer in her presence (R.481). The Petitioner was stuttering and kept talking, in Mary's works "random like" (R.483). She indicated that normally the Petitioner was the quiet type, but on this occasion, he was using some profanity, which was highly unusual for him to do so in her presence (R.484,485).

The Petitioner's father indicated that he saw his son Saturday afternoon prior to the robbery, and he was in an intoxicated state, and he noticed problems with his speech and his actions. He indicated that he brought a beer to his residence and left it there, which was unusual (R.497). His speech was almost whining or sympathetic (R.498). This fact is further confirmed by

Officer Austett, who transported him immediately after his arrest on Sunday, who indicated that he was kind of crying or whimpering. The Petitioner's father indicated that in conversation with him on Saturday, he would drift off and become involved in matters that were not relevant to the present conversation (R.499).

The Petitioner's mother also confirmed the condition of her son on the date of January 5, 1985. His brother, Myron Mathis, saw him on the morning of the commission of the offense. Myron indicated that he is aware that his brother has had a drug problem and that when he saw him, he was unable to understand what Myron was saying to him, and could not understand what Myron was saying to him, and he could not understand what the Petitioner was saying in return (R.519). Myron stated that his brother wanted him to buy him a beer across the street, but he was unable to do this since the store was closed, yet this fact was not registering with the Petitioner. Myron stated that his brother was "messed up bad" and he had never seen him like that before in his life (R.521).

Mark Fellows, a friend of Myron Mathis, stated that he saw the Petitioner on the same date, and was present with Myron on the morning they encountered the Petitioner. Mark saw the Petitioner leaning against a tree and drop a bag of what he felt to be quaaludes to the ground (R.524,525). He indicated that he was "pretty well messed up" (R.526).

Anthony Pickney was the Petitioner's neighbor in January, 1985, and said that at the time of the commission of the offense, the Petitioner had told him that he was "strung out" (R.541). Mr. Pickney stated that he saw the Petitioner either that day or the

day before, and he was "pretty messed up", and he was "pretty bombed out". Mr. Pickney stated that when he saw the Petitioner that afternoon, the Petitioner was "pretty messed up", so he left (R.542). He also stated that the Petitioner was under the influence to such a point, that he did not want to "socialize with him". He said that the Petitioner was incoherent and talking crazy, and nothing the Petitioner said made sense (R.544). The Petitioner was talking about going out and getting some more drugs, and as messed up as he was, Mr. Pickney considered that to be inappropriate (R.544).

The Petitioner testified at the sentencing hearing that he did not remember committing the robberies and acknowledged his drug and alcohol problem (T.55). He stated his depression was so great upon being arrested that he considered suicide (T.55). Since his incarceration, he participated in his local jail drug program (T.56). In response to questioning by the Court, he indicated he had possessed illegal drugs more than a hundred times (T.58).

SUMMARY OF ARGUMENT

The trial court erred in exceeding the recommended guideline sentence of seven to nine years in imposing an eighteen year sentence which in effect doubled the guideline recommended sentence.

The four reasons given by the trial court and upheld by the Appellate Court were neither clear nor convincing. The robberies committed by the Petitioner were in an ordinary manner without the use of excessive force and were committed while the Petitioner was under the influence of drugs and alcohol. The Petitioner, as a result of prior drug and alcohol usage, has suffered organic brain damage and at the time of the commission of the offenses was greatly impaired. In fact, the Petitioner has no recollection of having committed the offenses.

There are numerous mitigating factors which are thoroughly documented and which were ignored by the trial court. The failure to consider the mitigation and weigh the circumstances surrounding the offenses in light thereof constitutes an abuse of discretion which mandates reversal for a sentence within the parameters of the guidelines. The reasons given by the trial court are not clear and convincing and assuming arguendo they were the extent of departure is unwarranted and constitutes an abuse of discretion subject to review by the Court.

POINT I

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE PETITIONER IN EXCESS OF THE RECOMMENDED GUIDELINE SENTENCE

Florida Rule of Criminal Procedure 3.701(b) states that the sentencing guidelines are "intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense and offender related criteria and defining their relative importance in the sentencing decision". Rule 3.701(d)(11) re-emphasizes that the departure from the guideline range of presumptive sentences should be made only for clear and convincing reasons.

The opinion of the First District Court of Appeals affirmed four reasons given by the trial court for departure. The Petitioner acknowledges that the reasons given have been found to be appropriate in certain cases but asserts that credible evidence does not support the reasons given the facts of the instant case. The facts of the instant case are readily distinguishable and do not support departure for the reasons given.

The first reason for departure was that the crimes constituted a "binge". In Manning v. State, 452 So. 2d 136 (Fla. 1st DCA 1984), the offenses occurred over a two day period in June, 1983. All of the offenses in the instant case were consolidated into one information. Pursuant to Florida Rules of Criminal Procedure 3.152, this can only be done when viewed as the same act or transactions or a series of related acts or transactions. This did not involve an individual committing a series of offenses on separate days at separate times, but all

occurred on the same day within a very short period of time. Clearly this does not constitute a spree or binge. If this rationale were followed, an individual going into a store with six people present, and robbing them all simultaneously, would aggravate the offense because of the "number of victims in the store", even though these had been factored into the guidelines sentence in the first instance with the convictions themselves enhancing the range of the guidelines. The Petitioner's crimes, committed while he was under the influence of drugs and alcohol, were all committed within a relatively short period of time, and certainly cannot constitute a crimewave or binge, and this is readily distinguishable from the case cited by the trial court.

A second reason given for departure in the court's order involved the alleged use of excessive threats and violence. In Thomas v. State, 461 So. 2d 234 (Fla. 1st DCA 1984), the Court said, "the record reflects a burglary and theft which, vile as they may be, were perpetrated in a quite common manner". Section 812.13(1) of the Florida Statutes defines robbery as the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear. Clearly in the instant case the offenses were committed in a common manner and the psychological trauma allegedly suffered by the victims is neither clear nor convincing. None of the victims are presently or have ever received counseling or other treatment. The instant offenses were perpetrated in a common manner and the element of the threat of violence is inherently factored into the guidelines. In Mincey v. State, 460

So. 2d 396 (Fla. 1st DCA 1984), a co-defendant actively participated in the threatening of the victims. The two defendants in that case carried a shotgun and a revolver and the Petitioner would submit that a shotgun is clearly a more imposing weapon than a revolver. A much better example for departure would be the prior robbery in which the victim, Mary Clark's head was split open by the perpetrator (R.99, 100). The instant case is not of that genre and should not be so considered.

Were a threat not communicated or a weapon not used, the Petitioner would not have been charged with armed robbery inclusive of the three year minimum mandatory. It is not unusual nor extraordinary for an individual to threaten to do bodily harm to the victims if they do not comply with his request. There was absolutely no physical harm done to any of the victims in this case. They were not struck, beaten or injured in any manner, as is reflected in the presentence investigation which indicated "none" under the category "Victim Injury". In Mincey supra, the sole female clerk of the liquor store had been ordered to lie on the floor and was threatended with death by means of a shotgun. This is clearly a more aggravated situation. Smith v. State, 454 So. 2d 90 (Fla. 2nd DCA 1984) involved the actual striking of the victim who was offering absolutely no resistance at the time. The gun was also placed to the victim's head. The Petitioner had also committed a first degree murder approximately twelve hours prior to the armed robbery. Clearly in that instance, there was actual physical force used against the victim and injury was sustained by the victim as the result of the actions of the Petitioner. In the

instant case, no one was physically injured and the presentence investigation category accordingly reflected no victim injury stating that each victim "suffered no apparent injury or loss" (Presentence Investigation at page 5).

The third reason for departure is that the victims were female and working alone at night. In Hunt v. State, 468 So. 2d 1100 (Fla. 1st DCA 1985), the Petitioner knew the victim was working alone and ordered the victim to the back of the store. These are circumstances which obviously do not appear in the instant case. There was no movement of any of the victims, nor is there any evidence that the Petitioner, prior to going to the store, knew that the victims were alone. In fact, according to Mary Clark, there were two persons at a phone booth when the Petitioner arrived (T. 78). The fact that the victims were female and alone cannot constitute a basis for departure. The present offenses occurred between 8:30 P.M. and 9:00 P.M., and not in the early morning hours. To adopt the trial court's reasoning, the fact that the victim was female and alone, would constitute a basis for departure. This would result in a departure sentence based solely on gender. It is obvious that the Petitioner did not plan the offenses as evidenced by the photographic exhibits which show the distinctive character and appearance of the automobile he was driving. The side of the car could be readily identified as being covered with duct tape. Secondly committing the offenses within the same general vicinity within a short period of time to a person reasonably calculating his actions would insure that he was going to be arrested. Thirdly, the expert witnesses as well

as lay witnesses have testified that the Petitioner's mental processes were impaired at the time of the commission of the offense. This obviates any "cognizance of and attempt to determine that these were female victims alone" as opposed to male or anyone else that might have been present in the store at the time of the commission of the offense. The Petitioner would submit that this is not a valid basis and under these circumstances it does not constitute a clear and convincing reason or basis for departure.

The last reason that the Petitioner's actions created an unreasonable risk to the safety of others is clearly not borne out by the record. The factual basis of supporting the sixth version is the possibility that Ms. Clark's niece or an innocent customer could have entered one of the three stores between 7:30 and 9:00 P.M. creating the risk of death and injury to innocent victims. If the trial courts are allowed to theorize on what might happen or what could happen and not base their departure on facts and the record, then clearly any hypothetical reason the court might give could be used to sustain a departure. In the instant case trial court in the statement of reasons in the sentencing order indicated, "the possiblity that Ms. Clark's niece or an innocent customer could have been in one of three stores between 7:30 and 9:00 P.M." (R 74). Neither Ms. Clark's nor an innocent customer was physically present and threatened by the Petitioner or in the Petitioner's presence during the commission of the robbery. This type of speculation could occur in any armed robbery to wit: what if an innocent bystander or a third party

entered the store during the commission of a robbery then it could theoretically create a risk to other persons. This is inherent in every armed robbery and is clearly not supported in the instant offense. The Carney case cited by the court involved a clearer example of a situation that could support a departure based upon creation of risk to many people.

The Petitioner would submit that the Appellate Court in this case has found the four reasons to support the Court's departure based upon a laundry list of reasons that may, under the appropriate set of circumstances, justify departure. In the instant case the reasons cited clearly did not justify departure based upon the lack of factual support in the record and the failure of the departure to be supported by credible evidence and with reasons proven beyond a reasonable doubt and in such a way as to produce in the mind of a judge a firm belief without hesitancy that departure is warranted.

Petitioner would submit that there seems to be a general hue and cry against the guidelines from all parties involved in the criminal justice system. The initial purpose of the guidelines was to promote uniformity in sentencing yet the results seem to be anything but uniform. The instant case is a perfect example whereby the trial judge enumerated several reasons, some of which have been found to be valid, others invalid and all of which the Petitioner would submit are not supported by credible evidence and the record. Were the sentence imposed by the Court to be upheld as a practical matter this would necessitate the Petitioner serving at least twelve years in the Florida State Prison System.

his is a significant punishment for an individual who was on the peripheral area of competency at the time of the commission of these offenses. Were the certified question to be answered in the affirmative and the trial court allowed to give any reason for sustaining his departure from the guidelines and have that upheld in spite of the numbers of reasons given, then in essence, the guidelines would become form without substance.

A guideline sentence certainly has a degree of finality in that there is no opportunity for the individual sentence to be paroled or to obtain earlier release with the exception of gain time earned and accrued. To allow the departure to be based upon the whim or caprice of the trial judge or selection from a well documented laundry list of reasons would seem to subvert the initial purpose of the guidelines. Another problem addressed by the count is that when departure occurs, to what extent does it occur and is there any limit upon the extent of departure?

CONCLUSION

The Petitioner would submit that the guideline recommended sentence in the case at bar of seven to nine years was envisioned after careful thought and documentation. The trial judge in the instant case has departed from the guidelines for a variety of reasons, none of which are convincing or substantial. Petitioner would submit that reversal is mandated in the instant case for sentencing within the parameters of the guidelines.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Duval County Courthouse, Jacksonville, Florida, 32202, by mail this 7th day of January, 1987.

Attorney