IN THE SUPREME COURT
OF FLORIDA

GARY ELLIS MATHIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 69,746

# REPLY BRIEF OF PETITIONER

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## 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, FAILS TO SATISFY THE STANDARDS SET FORTH IN ALBRITTON V. STATE.

The Respondent's argument in the instant case indicates that the trial judge's decision was based upon a careful weighing and consideration of all the factors involved. However, the Petitioner would argue the record reflects otherwise as is indicated in the Respondent's brief, the trial court stated,

> "I am accepting as a basis for departure from the recommended guidelines of seven to nine years as reasons set forth by the State beginning on page 7 in their memorandum. I am going to adopt each of the reasons in numbered paragraphs 1 through 7 as a reason to depart form the guidelines and further make this statement that in my opinion any one of the reasons for departure would be sufficient depart from the guideline sentences. While the law requires only one finding, I think all seven of those are compelling reasons, but any one standing alone, in my opinion, would be sufficent, I would so find, to depart from the guidelines in this case. (T. 92-93).

The Respondent goes on to relate to a Black's Law Dictionary definition of boilerplate and indicates that this is not the case in the case at bar. However the Petitioner would submit that the trial court merely followed the reasons set forth in the State's memorandum and in essence, rubber stamped those reasons and that the language that any of the reasons standing alone would be sufficient is simply a catch-all. It is also extremely difficult to imagine the appellate courts reviewing a record and making a

determination as to whether the trial court's conclusion was based upon a conscientious weighing of the relevant factors in the particular case before it. This is a very difficult standard at best. The Petitioner would submit that the interest of justice would best be served by requiring reversal where any of the reasons given are inappropriate thus compelling both the bench and bar to be miticulous in the reasons set forth and eliminating those reasons which should not appear as a basis for departure as set forth in the voluminous number of cases that have been decided since the inception of the guidelines. Judge Barfield, in his concurrence in Griffis vs. State, 11 F.L.W. 2300, 2301 (Fla. 1st DCA October 30, 1986) and Reichman vs. State, 11 F.L.W. 2301, 2302 (Fla. 1st DCA October 30, 1986) alludes to the possibility of trial judges being tempted to include such a statement in all departure sentences. The Petitioner is not in a position to allege or to know whether the trial judge sub judice routinely places this language in all of his departure orders and the failure to make an allegation in the brief is a lack of knowledge in this matter and not knowledge to the contrary. This Court has recently disapproved 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, The Florida Bar Re: Rules of Criminal Procedure, 482 So. 2d 311,312 (Fla. 1985). Allowing the trial court to state that the trial court would have departed for any one of the reasons listed is a matter of semantics with the same result being

accomplished. In essence absent the appellate court finding that the trial court did not conscientiously weigh the factors before it, this would result in all departure sentences being upheld even if other reasons were invalid. The better reasoned decision would seem to be that any time there are invalid reasons given by the Court, the matter would be reversed for resentencing. In the long run this would, in all probability, result in all parties more circumspectly setting forth the reasons for departure and adhering to the case law that has been developed and is being adopted with the ultimate case load of the appellate courts hopefully decreasing rather than increasing.

The Respondent cites several cases in support of the first reason for departure. Decker vs. State, 482 So. 2d 511 (Fla 1st DCA 1986) contains no facts recited in the record as to the time period referred to and therefore is of no help to the Court. In Sabb vs. State, 479 So. 2d 845 (Fla. 1st DCA 1985), the Petitioner was convicted of five armed robberies over a ten day period and is easily distinguishable from the instant offense which occurred in an hour and a half period of time while the Petitioner was under the influence of drugs and alcohol. It is also interesting to note that Sabb, was a departure sentence which was reversed for resentencing, involved the same trial judge as the case at bar. Mincey vs. State, 460 So. 2d 396 (Fla. 1st DCA 1984) involved two armed robberies over a four day period with the participation of an accomplice and the facts were much more aggravated.

The Respondent cites cases in support of the second reason for departure. Cawthon vs. State, 486 So.2d 90 (Fla. 5th DCA

1986) and Morales vs. State, 471 So. 2d 625 (Fla. 2d DCA 1985), have no facts recited in the record as to the nature and degree of force that was used. Morales involved an aggravated battery and one must assume that there was an actual battery committed as opposed to the instant case where mere threats were made. In Smith vs. State, 454 So. 2d 90 (Fla. 2d DCA 1984), the victim was actually struck and had a gun placed to his head during the course of the offense. As to the alleged excessive use of force, the Respondent would again submit that this is an inherent component of the crime at conviction and cannot support an upward departure from the guidelines. Roberts vs. State, 12 F.L.W. 157 (Fla. 4th DCA), involved a robbery where departure had been based upon the fact that the robbery victim was wrestled to the ground and threatened with a gun. The court found that this was an inherent element of the crime and would not justify departure. The facts were that the defendant came up behind the victim and yelled for a bag which the victim was holding. The defendant, Puerto, grabbed Russo, the victim, but he held on to the bag and "...they struggled down to the ground". Russo was just getting on top of Puerto when he put a gun in Russo's stomach. Russo then released a bag and Puerto jumped up and ran away. The Court found that these circumstances were elements of the crime of armed robbery. In the Petitioner's case, Mary Clark indicated that in her opinion he 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 Respondent never physically injured her (R. 94, 95). She said she had been robbed twice previously, once in which two

black males walked in and "laid the back of her head open". She stated that that experience was much worse than this one (R. 99, 100). The victim, Steven Barker, indicated that the Respondent apologized to him saying, "Hey, man, I'm really sorry. Times are hard, times are really hard" (R. 201-203). This is far from threatening and abusive language and in fact, was apologetic. Clearly, the second reason for departure is not supported by the facts in the instant case.

The Respondent indicates that the petition fails to address Parker vs. State, 478 So. 2d 823 (Fla. 2d DCA 1985) in support of the third reason for departure. The opinion in Parker sets forth no facts indicating the time of night at which the offense occurred or the reactions of the victim and most importantly sets forth facts indicating that the victim received moderate injury as a result of the offense. Parker was a case where the female victim was actually physically injured by the male defendant. These facts are easily distinguishable from the instant case.

The Respondent would argue that the last reason found valid by the First District was the trial court's fifth reason for departure. The Respondent has misread the opinion in that this reason was found to be invalid by the First District. The risk or danger to others in this particular case, the victims, is again an inherent element of the crime of robbery. One must assume that this is a factor that has already been considered and serves as a basis for the guideline recommended sentence. The Respondent urges that Scurry v. State, 489 So. 2d 25 (Fla. 1986), is inapplicable to the case at bar and even if it were applicable

that it does not prevent departure on the three third degree felony convictions of use of a firearm during the commission of a felony. The maximum sentence for those three offenses would have been 15 years in prison, whereas the Respondent received an 18 year sentence.

In summary, the Respondent would submit that the numerous mitigating factors were ignored by the trial court and if this decision represented a conscientious weighing of all the factors prior to departure, it is certainly not supported by the record. As a result, each of the four reasons upheld by the First District Court, are not supported in the record by clear and convincing evidence and the First District's opinion sub judice is not sustained.

## CONCLUSION

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

Respectfully submitted,

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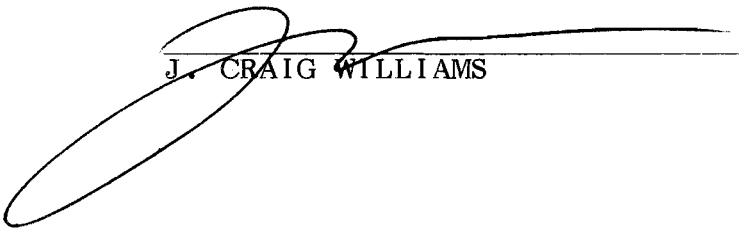
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Patricia Conners, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32399-1050, on this 23rd day of February, 1987.



J. CRAIG WILLIAMS