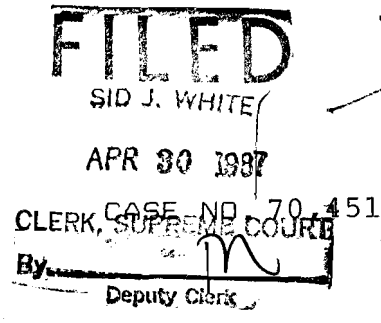
IN THE SUPREME COURT OF FLORIDA



JOSEPH LEON STOWERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,451

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INITIAL BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

JOSEPH LEON STOWERS was the defendant in the trial court and appellant before the District Court of Appeal, First District. He will be referred to in this brief as "petitioner," "defendant," or by his proper name. Reference to Volume I of the record on appeal, containing the pleadings and orders filed in this cause, will be by use of the symbol "R" followed by the appropriate page number in parentheses. Reference to Volumes II through XV of the record on appeal, containing transcripts, will be by use of the symbol "T" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

In Case No. 85-5055, Count I of an amended information containing two charges alleged that petitioner, on March 29, 1985, using a shotgun, robbed a purse and its contents, owned by and from the custody of Gwendolyn James, contrary to Sections 775.087 and 812.13, Florida Statutes (1985). Count II alleged that petitioner, on March 29, 1985, using a shotgun, robbed a wallet and contents, owned by and from the custody of Herman Tompkins, contrary to Sections 775.087 and 812.13, Florida Statutes (1985) (R-59-60).

In Case No. 85-5364, Count I of an amended information containing nine charges alleged that petitioner, on April 6, 1985, forged a check in the amount of $445.43, drawn upon the account of Gwendolyn James, contrary to Section 831.01, Florida Statutes (1985). Count II alleged that petitioner, on April 6, 1985, uttered a forged instrument to Hugh High, a check in the amount of $445.43 drawn upon the account of Gwendolyn James, knowing it was forged, contrary to Section 831.02, Florida Statutes (1983). Count III alleged that petitioner, on April 6, 1985, committed theft of a video cassette recorder worth $100 or more, the property of McDuff Appliances, contrary to Section 812.014(2)(B)(1), Florida Statutes (1985). Count IV alleged that petitioner, on April 8, 1985, forged a check in the amount of $648.95, drawn upon the account of Gwendolyn James, contrary to Section 831.01, Florida Statutes (1985). Count V alleged that petitioner, on April 8, 1985, uttered a

forged instrument to Terry Roberson, a check in the amount of $648.95, drawn upon the account of Gwendolyn James, knowing it was forged, contrary to Section 831.02, Florida Statutes (1985). Count VI alleged that petitioner, on April 8, 1985, committed theft of a television set worth $100 or more, the property of Duval Appliances of Florida, contrary to Section 812.014(2)(B)(1), Florida Statutes (1985). Count VII alleged that petitioner, on April 10, 1985, forged a check in the amount of $472.49, drawn upon the account of Gwendolyn James, contrary to Section 831.01, Florida Statutes (1985). Count VIII alleged that petitioner, on April 10, 1985, uttered a forged instrument to Charles Dennis, a check in the amount of $472.49, drawn upon the account of Gwendolyn James, knowing it was forged, contrary to Section 831.02, Florida Statutes (1985). Count IX alleged that petitioner, on April 10, 1985, committed theft of a video cassette recorder worth $100 or more, the property of McDuff Appliances, contrary to Section 812.014(2)(B)(1), Florida Statutes (1985) (R-69-71).

After the two cases were ordered consolidated (R-34) upon motion of the state (R-29-30), petitioner filed a motion seeking severance of Case No. 85-5055 from Case No. 85-5364. Further, in Case No. 84-5364, the motion sought severance and separate trials for Counts I through III, IV through VI, and VII through IX (R-45-48). After hearing argument on the motion it was denied (T-43-66).

Petitioner proceeded to a trial by jury.

On March 29, 1985, Gwendolyn James Marshall and Herman Tompkins, the first two state witnesses, had a date. At approximately 10:30 p.m., the couple were parked at a very dark secluded area located in Duval County, Florida, when a vehicle pulled behind theirs and left its lights on. Two uniformed persons, whom Marshall and Tompkins believed to be police officers, approached the couple and requested identification. One of the men, holding a shotgun, pumped it and cautioned Tompkins to not do anything foolish. Tompkins procured identification from his wallet and gave it to one of the officers, leaving the wallet next to his leg. Marshall, however, explained that her purse and identification were in the trunk, so she got out of the car, opened the trunk, and procured identification from her purse. The men grabbed Marshall's purse and Tompkins' wallet, and departed. Finally realizing the two men were not police officers, Tompkins and Marshall drove to a convenience store, notified the police, and made a report. A portion of the items taken from Marshall included her personal checks. Marshall subsequently selected petitioner from a photo spread and in court as being the person holding the shotgun. On the day of trial, however, when shown another photo spread, Marshall selected someone other than petitioner. Tompkins did not make either an in-court or out-of-court identification (R-204-270).

A week or so prior to April 6, 1985, a man entered McDuff Appliances on Beach Boulevard and discussed the purchase of a video cassette recorder with Michael May, Store Manager. This

man, whom May identified as petitioner, stated he was from Texas visiting a paraplegic aunt in Jacksonville, and that the aunt wanted to purchase a VCR. On April 6, 1985, May noticed petitioner in the store, accompanied by someone else, talking with a salesman, Hugh High. The next business day May learned that High had sold a VCR to petitioner, who had paid for it with a check later determined to be stolen (T-271-293).

Eugene Rochelle, employed at McDuff Appliances, procured the tag number of the vehicle being operated on April 6, 1985, by the two men who purchased the recorder from the store (T-294-304).

Hugh High, Salesman at McDuff Appliances, testified that a man who looked like petitioner, accompanied by another person, came to the business on April 6, 1985, and discussed purchasing a VCR. The person resembling petitioner stated the recorder was for a paraplegic sister, and that he was visiting from Texas. High told the two men what information was needed in order to cash a check, and the two men left. Shortly after 9:00 p.m. the two men returned with a check already made out for $445.43. The man resembling petitioner gave the check to High. As the two men were leaving, High recorded the tag number of their car (T-305). High selected someone other than petitioner from a photo spread. Neither man wrote anything on the check in High's presence (T-305-322).

Terry Roberson, Manager of Duval Appliances, testified that on April 8, 1985, two black men, the larger of whom identified himself as Bates and stated that he was from Texas,

entered the store and discussed the purchase of a television set for Bates' paraplegic sister. They returned later that day and purchased the set with a check bearing the name Gwendolyn James, that was later discovered to be forged and stolen (T-323-335).

Wilmer Atwell, Manager of Duval County Tag Agency, testified that the tag numbers jotted down by High and Rochelle correspond to a 1971 Ford owned by own Bernard Bolden (T-335-345).

John Gainey testified that on April 10, 1985, he was manager of the McDuff Appliance Store located on Edison Avenue. Gainey testified petitioner visited the store on two occasions. On the first occasion petitioner said he was from Texas visiting his brother. He also mentioned that his son had been bitten by a dog, and that he was going to replace a broken VCR.

On the second occasion, petitioner purchased a VCR from a salesman named Dennis, and paid for it with a check later determined to be forged and stolen (T-345-367).

Hugh High and Wilber Atwell were both recalled as witnesses and testified collectively that the tag number recorded by High corresponds to a 1977 Oldsmobile registered to petitioner (T-367-390).

Charles Dennis, Salesman at McDuff Appliance Store located on Edison Avenue, testified petitioner visited the store twice on April 10, 1985. On the first occasion petitioner stated he was from Texas, that his son broke his brother's VCR, that because he was from Texas he knew the store would not take his

check, and therefore he would get a check from his sister-in-law. Petitioner left but returned a couple of hours later, and purchased a VCR with a check that was already filled out (T-390-404).

Officer Dalton Hill of the Jacksonville Sheriff's Office testified that he displayed photo spreads to Gwendolyn James Marshall, Hugh High, Mr. Rochelle, and Mr. May. Mr. High selected someone other than petitioner. Ms. Marshall selected petitioner. Mr. Rochelle selected petitioner's picture, stating he was 60 percent sure. Mr. May selected petitioner's photograph, stating he was 80 percent sure. After petitioner was arrested he asked to talk to Officer Hill. As Hill entered the room, petitioner stated, "You really did your homework this time; you got me." (T-14-445).

Donna Jones, deemed an expert in identification through fingerprints, testified she examined state exhibits 1, 2, and 3, checks, and found petitioner's print on state exhibit 3, a check made out to McDuff Appliances dated April 10, 1985 (T-455-479).

Sergeant T. L. Elrod, in charge of the inmate records at the jail, identified certain documents as coming from petitioner's jail records. The documents, not admitted into evidence, include writings such as inmate request forms (T-480-510).

John Skycove, a forgery detective, took three sets of handwriting exemplars from petitioner and two from Gwendolyn James Marshall. These exemplars, along with the documents identified by Sergeant Elrod, were at various times submitted

to the crime laboratory for analysis. Defense counsel unsuccessfully objected to the admissibility of two of the three exemplars taken from petitioner, since they were dated prior to the dates of the offenses being tried, and thus suggested unrelated criminal activity (T-511-535).

Debra Dianne McDoughall, deemed an expert in questioned documents, expressed the opinion that, with respect to the three checks admitted into evidence as state exhibits 1, 2, and 3, petitioner authored the date, dollar entry, and entries appearing on the backs of the checks. The witness testified further that she found "indications" that petitioner executed the questioned authorized signatures on the checks (T-535-603).

At this point in the proceedings the state rested (T-603). In Case No. 85-5364, the trial court granted petitioner's motions for judgments of acquittal as to Counts III, V, VI, and IX, and denied it as to Counts I, II, IV, VII, and VIII. The trial court denied the motions for judgment of acquittal as to the robbery charges in Case No. 85-5055 (T-605-626).

The defense did not present any evidence and rested, unsuccessfully renewing the motions for judgments of acquittal (T-631-632, 650). After argument of counsel and the trial court's instructions on the law, the jury commenced deliberations. During deliberation, the jury requested reinstruction "on the elements of robbery." The trial court did as requested, but did not grant defense counsel's request that the jury be instructed on assault (T-736-743).

After further deliberation, the jury returned verdicts finding petitioner guilty of two counts of robbery with a firearm as charged in the amended information bearing Case No. 85-5055. With respect to Case No. 85-5364, the jury also returned verdicts finding petitioner guilty of forgery as charged in Count I, uttering a forged instrument as charged in Count II, forgery as charged in Count IV, forgery as charged in Count VII, and uttering a forged instrument as charged in Count VIII (R-55-111).

In Case No. 85-5055, petitioner was adjudged guilty and sentenced to concurrent 40 year terms for two counts of robbery, with a three year mandatory minimum, and 255 days credit. In Case No. 85-5364, petitioner was adjudged guilty and sentenced to five concurrent five year terms, with 255 days credit, to be served concurrently with the sentences imposed in Case No. 85-5055. The trial court also entered orders setting forth its reasons for departing from the sentence recommended by the guidelines (R-121-139).

Notice of appeal directed to both cases was timely filed (R-142), petitioner was adjudged insolvent (R-141), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

On appeal before the District Court of Appeal, First District, the following issues were raised:

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SEVERANCE OF CASES AND COUNTS, THEREBY DEPRIVING HIM OF DUE PROCESS OF LAW

AS GUARANTEED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS.

ISSUE II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENTS OF ACQUITTAL AS TO THE ROBBERY CHARGES, DEPRIVING HIM OF DUE PROCESS OF LAW AS GUARANTEED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS.

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO REINSTRUCT THE JURY ON SIMPLE ASSAULT.

ISSUE IV

THE TRIAL COURT ERRED IN IMPOSING SENTENCE IN EXCESS OF THAT RECOMMENDED BY THE SENTENCING GUIDELINES.

On March 27, 1987, the District Court of Appeal, First District, entered an opinion providing, in pertinent part, as follows:

> Appellant's convictions and sentences for two counts of robbery with a firearm, three counts of forgery and two counts of uttering a forged instrument are affirmed. Brown v. State, 12 F.L.W. 499 (Fla. 1st DCA Feb. 11, 1987) (and cases cited therein); Andre v. State, 431 So.2d 1042 (Fla. 5th DCA 1983); Brown v. State, 397 So.2d 1153 (Fla. 5th DCA 1981); McCloud v. State, 335 So.2d 257 (Fla. 1976); and Hedges v. State, 172 So.2d 824 (Fla. 1965). We again certify the question set out in VanTassell v. State, 498 So.2d 649 (Fla. 1st DCA 1986), to the Florida Supreme Court as a question of great public importance.
>
> AFFIRMED.

In VanTassell v. State, 498 So.2d 649 (Fla. 1st DCA 1986), the following issue was certified:

> 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 STANDARDS SET FORTH IN ALBRITTON V. STATE.

498 So.2d at 650.

Notice of invoking this Court's discretionary jurisdiction was timely filed Monday, April 27, 1987.

III SUMMARY OF ARGUMENT

[Once this Court has jurisdiction it may, at its discretion, consider any issue affecting the case. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Trushin v. State, 425 So.2d 1126 (Fla. 1982); Savoie v. State, 422 So.2d 308 (Fla. 1982); and, Negron v. State, 306 So.2d 104 (Fla. 1974). Therefore, included within this brief are arguments on issues other than that certified, "affecting the case."]

Petitioner was charged with robbing two people on March 29, 1985. Three checks stolen during the robbery were forged and uttered at three separate businesses on April 6, 8, and 10, 1985. In Issue I, infra, petitioner argues it was error to have tried all of these charges together, and that there should have been four separate trials, because the various charges were not based upon the same act or transaction or upon a series of connected acts or transactions.

The robbery charges were predicated on facts suggesting that petitioner and another person, posing as police officers, requested identification from the two victims and thereby procured a wallet and purse, with which petitioner absconded. In Issue II, infra, petitioner asserts these facts do not constitute robbery.

In Issue III, infra, petitioner asserts the jury should have been reinstructed on assault in response to their desire to receive repeated instructions on the "elements" of robbery. Assault can very well be an element of robbery but the repeated

instructions did not define assault, thus leaving an incomplete reinstruction.

Issue IV, infra, is a sentencing guidelines issue, and includes the issue certified to this Court by the District Court of Appeal, First District. Petitioner contends the trial court improperly relied upon the defendant's prior record as a reason for departure, some of the reasons for departure were not proved beyond a reasonable doubt, arrests without convictions were considered, and the trial court partially relied upon a case that has been implicitly overruled. The case must be remanded for resentencing within the guidelines because none of the reasons for departure are valid. In the event one or more departure reasons are deemed valid, the case must nevertheless be remanded for resentencing, notwithstanding the trial court's statement that it would have imposed a departure sentence with respect to only the valid reasons for departure.

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR SEVERANCE OF CASES AND COUNTS, THEREBY DEPRIVING HIM OF DUE PROCESS OF LAW AS GUARANTEED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS.

It was alleged that, during a robbery occurring March 29, 1985, checks belonging to Gwendolyn James were taken (R-59). On April 6, 1985, one of James' checks was used to procure a video tape recorder from McDuff Appliances. Two days later, on April 8, 1985, another of James' checks was used to obtain a television set from Duval Appliances. Two days later, on April 10, 1985, another of James' checks was used to obtain a video tape recorder from another McDuff Appliances (R-69-70).

Petitioner filed a motion seeking in effect four separate trials, one relating to the events of March 29, another relating to the events of April 6, a third relating to the events of April 8, and a fourth relating to the events of April 10, 1985 (R-45-57). This motion was denied before trial (R-58) and unsuccessfully renewed on the first day of trial (T-161).

Petitioner contends the trial court erred in denying the motion for severance of cases and counts.

The record reflects that the robbery cases were filed under one information while the remaining charges were filed under a second information. These two separate informations were ordered "consolidated" (R-34). Florida Rule of Criminal Procedure 3.151(a). The second information contains nine

charges, which charges are considered "joined." Florida Rule of Criminal Procedure 3.150(a). The test for "joinder" and "consolidation" are the same, namely, for two or more charges to be properly joined or consolidated, they must be "...based upon the same act or transaction or on two or more connected acts or transactions. Florida Rule of Criminal Procedure 3.150(a) and 3.151(a). This test does not concern itself at all with the level of similarity between the various offenses, but rather focuses exclusively upon the episodic and temporal aspects of these several offenses. Paul v. State, 385 So.2d 1371 (Fla. 1980). See also Macklin v. State, 395 So.2d 1219 (Fla. 3d DCA 1981) and McMullen v. State, 405 So.2d 479 (Fla. 3d DCA 1981). If offenses cannot be joined, they cannot be consolidated; and if they cannot be consolidated, they cannot be joined. Macklin v. State, supra. If a defendant timely moves to sever offenses that had been improperly joined or consolidated, severance is mandatory. Florida Rule of Criminal Procedure 3.152(a)(1) and Macklin v. State, supra. Where a trial court fails to grant such a motion, prejudice is conclusively presumed. Rubin v. State, 407 So.2d 961 (Fla. 4th DCA 1982) and Puhl v. State, 426 So.2d 1226 (Fla. 4th DCA 1983).

That the robbery charges were improperly tried at the same time with the remaining offenses occurring 8, 10, and 12 days later, is illustrated by Finlay v. State, 424 So.2d 967 (Fla. 4th DCA 1983). In Finlay, the court held that the burglary and theft of a car eight days prior to the defendant's commission of a traffic infraction with a stolen car, which led to an

aggravated assault with a gun used in a robbery, were unrelated to later offenses and that there was neither a causal relationship nor a series of connected episodes. In Puhl, the appellate court held that offenses occurring only 2 1/2 hours apart were improperly joined, even though the same weapon was used, because they were not based on the same act or transaction or upon two or more connected acts or transactions.

Thus, the fact here that checks stolen in a robbery were used to unlawfully obtain goods 8, 10, and 12 days later is not relevant to a severance analysis for in both Finlay and Puhl there was a connection or relationship among the various offenses in the proof, yet they were deemed separate and unconnected and should have been severed. Brown v. State, 12 FLW 499 (Fla. 1st DCA, opinion filed February 11, 1987) relied upon by the court below, is analytically flawed for it in effect erroneously applies a "Williams Rule," type analysis to a severance issue. Again, the proper test does not concern similarity or any of the other "collateral act" tests of admissibility, but rather deals with temporal or episodic determinations. See also Driscoll v. State, 458 So.2d 1188 (Fla. 4th DCA 1984) (burglary of automobile improperly tried with loitering charge based on events occurring two hours after burglary).

Petitioner contends further that the events of April 6, 8, and 10, 1985, wherein goods were obtained from three appliance stores with forged checks should have been tried separately. In Williams v. State, 439 So.2d 1014 (Fla. 1st DCA 1983),

approved, State v. Williams, 453 So.2d 824 (Fla. 1984) the defendant was charged, in nine informations, with burglary and theft occurring on eight different days within approximately a three week period. The trial court, without explanation, granted the state's motion to consolidate, based upon the prosecutor's assertion that the crimes were "a series of transactions as part of an overall scheme," that there was a common modus operandi, and that there was a commonality of time and witnesses. Referencing Paul, the District Court of Appeal, First District, reversed:

> Reduced to its essentials, the holding in Paul is that Rule 3.151 does not permit joinder unless the offenses are based on "'connected acts or transactions' in an episodic sense, and that the rules do not warrant joinder or consolidation of criminal charges based on similar ... episodes, separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt in ... all instances." 365 So.2d 1063, at 1065, approved and adopted, 385 So.2d 1371, at 1372. By that reasoning, the fact that the offenses are very similar in nature and even occur within a matter of days does not mean that they are "related" as that term is used in Rule 3.151. See McMullen v. State, 405 So.2d 479 (Fla. 3d DCA 1981). An example of a proper denial of severance of trial for two offenses which did arise out of the same episode is found in Green v. State, 408 So.2d 1086 (Fla. 4th DCA 1982), involving defendant's conviction for murder of a man and for an assault on a woman in the same hotel parking lot and within a few seconds of the time of the murder. See also Davis v. State, 431 So.2d 325 (Fla. 3d DCA 1983). The offenses charged in the case before us apparently occurred on different days and involving different victims, none of whom were witnesses to any of the other offenses. We

> conclude that they are not related in the Paul sense.

439 So.2d at 1015.

It is submitted that Williams is compellingly on point and requires reversal. See also Williams v. State, 421 So.2d 663 (Fla. 3d DCA 1982) (trial court improperly joined and denied severance of six similar but separate robberies); Macklin v. State, supra (taxicab holdup which occurred five days previous to second taxicab holdup at location less than one block away, were not "acts or transactions" connected to offenses in second holdup and thus were improperly tried together; sameness of location and class of victims created, at most, a similarity in circumstances which did not justify joinder); Rubin v. State, supra (three factually similar offenses improperly joined); and, McMullen v. State, supra (joinder improper even though five robberies all occurred in same quadrant of county within a nine day period, and four of them involved fast food restaurants).

Based upon the foregoing petitioner requests this Court to reverse the judgments and sentences appealed from, and remand the cause to the trial court with directions to enter an order granting petitioner's motion for severance of cases and counts.

ISSUE II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR JUDGMENTS OF ACQUITTAL AS TO THE ROBBERY CHARGES, DEPRIVING HIM OF DUE PROCESS OF LAW AS GUARANTEED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS.

The record reflects that, at the close of the state's case, petitioner moved for an acquittal on the two robbery charges, noting that neither victim, James nor Tompkins, had been threatened (T-607-608). This motion was denied (T-611), and was later renewed and denied (T-650).

Petitioner contends the trial court erred in denying his motions for judgments of acquittal as to the robbery charges.

The facts of the instant case do not reveal the "ordinary" or "traditional" type of robbery. More particularly, the two victims were out on a date. The man, Herman Tompkins, had persuaded the woman, Gwendolyn James, to go "parking" and specifically inform her that they may very well be checked out by the police officers (T-219). Marshall described the facts as follows:

> Q Okay. What happened to you, specifically?
>
> A We were sitting in the car and a car came up from behind us and Herman and I was kissing and then he said that, damn, the police, and so we turned around and they had the lights on and the guy came with -- with the shotgun came up on the side of us and he told Herman that he needed to see some identification and so Herman was getting his identification out of his back

pocket when the guy pumped the shotgun and told him, he said, keep your hands where I can see them, so he proceeded to give him the identification and then I didn't have my identification in the car so -- in the front of the car, so I told him that my identification was in the trunk, so I got out of my car and went to the back of the trunk and was going through my identification in my purse and as this was happening another guy came up from behind me and he snatched my purse and my driver's license and then went back to the car.

Q What did you do?

A I stood there and I said he snatched my purse.

Q Did you go someplace or did you stay there?

A No, I went back to the passenger side of the car and told Herman again that the guy had snatched my purse.

Q What did two people do?

A When I had got back to the car, the guy with the shotgun had went on back to the car and then they jumped in the car, turned around and speeded off.

(T-207-208).

Tompkins' version of the events, for purposes of this issue, corroborated that of James (T-254-258), and he specifically stated he did not realize what was actually transpiring until after the two men had obtained his wallet and were departing the area (T-258).

Thus, this case deals with a factual scenario suggesting that petitioner and another obtained property of James and Tompkins by impersonating police officers, and that the alleged victims relinquished their property because they actually believed them to be officers.

The robbery statute, Section 812.13(1), Florida Statutes (1985), requires proof that property of another be taken "...by force, violence, assault, or putting in fear." Fear of death or great bodily harm is the gravamen of robbery, which fear or force distinguishes robbery from larceny. Taylor v. State, 190 So.2d 262, 138 Fla. 762 (1939) and McCloud v. State, 335 So.2d 257 (Fla. 1976). Moreover, being a penal statute, it must be strictly construed and the accused must be plainly and unmistakably placed within its scope. Nell v. State, 277 So.2d 1 (Fla. 1973).

To be sure, in this case petitioner was carrying a shotgun and pumped it, and the victims' property was "snatched" from them. But these actions, quite clearly, given the defendant's scheme or plan, were obviously part and parcel of the police officer charade. After all, bonafide officers carry guns, and they take things from people, such as wallets and purses, containing identification. Neither victim testified that they were afraid or that the items were taken by force, as opposed to acquiescence to the directives of a "police officer." The victims in fact requested and received "identification" from the "officer." The facts here, it is argued, show an offense manifestly more akin to forms of theft such as embezzlement or

larceny by trick, as opposed to robbery. It is respectfully submitted that the facts here do not place petitioner's conduct "plainly and unmistakably" within the intended scope of the robbery statute which, as previously noted, was intended to apply to persons who obtain property by generating fear of death or great bodily harm in the victim.

Petitioner also relies upon this Court's decision in Royal v. State, 490 So.2d 44 (Fla. 1986). It was there determined that the "force, violence, assault, or putting in fear" must precede or be contemporaneous with the taking of the property. In the instant case it was not until after the property was taken that the victims, who until after the taking believed petitioner and his associate were police officers acting within the scope of their authority, suddenly realized that they had been the victims of a scam. Royal supports the position taken by petitioner here.

Based upon the foregoing petitioner contends that this Court must reverse the two judgments and sentences imposed for robbery, and remand the cause with directions to enter judgments of acquittal as to those charges.

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO REINSTRUCT THE JURY ON SIMPLE ASSAULT.

During the trial court's jury instructions, the jury was instructed on the offense of robbery (T-715-716) and assault as a lesser offense of robbery (T-720). After deliberations had begun, the jury requested reinstructions on "the elements of robbery." Defense counsel, though not objecting to a reinstruction on robbery, specifically requested further instruction on assault, arguing it is "part and parcel of the robbery instruction." This request was refused. In addition to reinstruction on the statutory definition of robbery, the trial court gave definitional reinstruction on force, violence, and putting in fear (T-736-740).

Petitioner contends the trial court erred in refusing to reinstruct the jury on assault.

While repetition of charges can be limited to those requested, repeated charges must be complete on the subject involved. Hedges v. State, 172 So.2d 824 (Fla. 1965). Repeated instructions cannot reasonably be considered as other language in the basic charge, since the jury will rely more on such instructions than on any single portion of the original charge. Henry v. State, 359 So.2d 864 (Fla. 1978).

In manslaughter cases, it has been held erroneous to fail to instruct or reinstruct on justifiable and excusable homicide, because the statutory definition of manslaughter excludes justifiable and excusable killings, although the jury may have

merely requested an instruction on manslaughter. Hedges v. State, supra, and Kelsey v. State, 410 So.2d 988 (Fla. 1st DCA 1982).

This case is very much analogous to the manslaughter reinstruction cases. The jury's request here was for the "elements" of robbery. The definition of robbery contains the alternative elements of "...force, violence, assault, or putting in fear." Section 812.13(1), Florida Statutes (1985). The trial court's reinstructions in effect included definitional guidance on all of these elements but assault (T-739-740). The jury was more or less left in the dark to figure out for themselves what "assault" was, just as surely as the jurors in Hedges and Kelsey were left to their own devices to figure out what "excusable" and "justifiable" homicide was. The assault instruction given in the original charge sub judice did no more to cure the problem than did the complete definition of justifiable and excusable homicide given originally in Kelsey.

For these reasons petitioner requests this Court to reverse the judgments and sentences imposed for robbery, and remand the cause to the trial court with directions to conduct a new trial on the robbery charges.

ISSUE IV

THE TRIAL COURT ERRED IN IMPOSING SENTENCES IN EXCESS OF THAT RECOMMENDED BY THE SENTENCING GUIDELINES.

This is the issue giving rise to the certified question which confers jurisdiction in this Court. The trial court, in departing from the guidelines recommendation of 22 to 27 years and imposing sentences amounting to 40 years, entered a written order listing four reasons for departure. On appeal the lower appellate court necessarily found at least one reason invalid, and at least one reason valid for otherwise the issue certified would not arise. The lower appellate court did not identify which reasons it found valid, and which were found invalid.

Petitioner contends none of the reasons are valid.

In the first reason for departure, the trial court set out the defendant's record and concluded it showed him to be a "career criminal" (R-128). Since petitioner's past record was scored on the scoresheet, as well as the offenses involved in the instant cases, it was error to consider it again as a reason for departure. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). The trial court also recited the fact that petitioner had been arrested 35 times for misdemeanors, but the written order does not also state he was convicted of all 35 of these offenses. Thus, it appears the trial court improperly considered mere arrests not shown to have led to convictions, a direct and plain violation of Florida Rule of Criminal Procedure 3.701(d)(11), which provides that arrests not leading to

convictions are an improper reason to impose a departure sentence.

The second reason listed was that the petitioner was convicted of two robberies as well as three counts of forgery and two of uttering, thus evidencing an escalating pattern of criminal conduct. Again, all of these offenses have already been scored. Hendrix v. State, supra. And since the check offenses, third degree felonies, were committed after the robberies, punishable by life, the record shows a declining level of criminal conduct, not an escalating one. Thus, assuming arguendo an escalating pattern may in some other case be a valid reason for departure, in the instant case the proof did not show such a pattern. Therefore, this reason was not proved beyond a reasonable doubt as required by State v. Mischler, 488 So.2d 523 (Fla. 1986).

The third reason, based in part upon Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984), concerns the professional manner in which the offenses were committed. However, as was noted in Smith v. State, 479 So.2d 804 (Fla. 1st DCA 1985), Dickey was implicitly overruled in Hendrix. Perhaps more importantly, the manner in which the robberies were committed here had the effect of generating less emotional turmoil in the victim, as opposed to other methods of committing robbery. See Issue II, supra. The victims felt they were dealing with police officers, not robbers. This factor was not proved beyond a reasonable doubt. State v. Mischler, supra.

The last reason, that the guideline sentence does not provide appropriate retribution, deterrence, or rehabilitation, reflects merely a disagreement over the wisdom or philosophy of the guidelines and does not constitute a valid reason for departure. Scurry v. State, 489 So.2d 25 (Fla. 1986) (reason that lesser sentence not commensurate with seriousness of defendant's crime invalid).

In the event this Court agrees with the above and is of the view that none of the reasons for departure are proper, the case must be remanded with directions to impose a sentence within the range recommended by the guidelines. Williams v. State, 492 So.2d 1308 (Fla. 1986) and Hunter v. State, 11 FLW 2508 (Fla. 1st DCA, opinion filed December 2, 1986).

On the other hand, if one or more of the reasons for departure are upheld, and one or more declared invalid, then Albritton v. State, 476 So.2d 158 (Fla. 1985), requires resentencing unless the state can demonstrate beyond a reasonable doubt that the same sentence would have been imposed with respect to the valid reasons only.

The trial court here purported to bypass Albritton by stating that the "...Court further finds that any one of the four reasons set forth above would justify exceeding the recommended guidelines sentencing." (R-129). On its face, this does not satisfy Albritton because that case requires a showing that the same sentence would have been imposed utilizing only valid reasons. To say a departure sentence would be imposed is not the same as saying the same amount of departure would be

imposed. For example, under the instant facts, a 30 year sentence would be a departure, but it would not be the same amount of departure.

Language analogous to that approved by the lower court here and in VanTassel has also been approved in Griffis v. State, 497 So.2d 296 (Fla. 1st DCA 1986) and Reichman v. State, 497 So.2d 293 (Fla. 1st DCA 1986). Petitioner strongly urges this Court to disapprove this line of cases. In The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines 3.701, 3.988), 482 So.2d 311 (Fla. 1985) this Court recognized the danger and temptation resulting from use of boilerplate language, pointing out that in most instances the improper inclusion of an erroneous factor affects the objective determination of an appropriate sentence.

To permit the use of boilerplate language seemingly approved in the instant case would allow a trial judge to overrule or at least bypass Albritton and Mischler. As noted, Albritton held that where an appellate court finds invalid some of the reasons for departure, it must reverse unless the state can show beyond a reasonable doubt that the same sentence would be imposed considering only the valid reasons for departure. The boilerplate language would remove this burden from the state.

In Mischler, it was held that the inclusion of one or more of the three prohibited categories for departure would cause reversible error. It has been recognized that Mischler altered the Albritton test and called for automatic reversal if one of

the prohibited categories is involved. Rousseau v. State, 489 So.2d 898 (Fla. 1st DCA 1986). Again, if the boilerplate language is approved, the sentencing judge will be permitted to bypass Mischler by relying upon a prohibited category and then stating that the sentence would be the same without it.

Petitioner, for the reasons set out here, requests this Court to reverse the sentences appealed from and remand the cause to the trial court for resentencing within the guidelines or, alternatively, for resentencing.

V CONCLUSION

Based upon the preceding analysis and authorities petitioner contends he has demonstrated that the decision of the District Court of Appeal, First District, is erroneous in all respects and should be quashed. As a result of the error discussed in Issue I, supra, petitioner requests this Court to reverse the judgments and sentences appealed from and remand the cause to the trial court with directions to conduct four separate trials. As a result of the error discussed in Issue II, supra, petitioner requests this Court to reverse and vacate the judgment and sentences imposed for robbery, and remand the cause to the trial court with directions to enter judgments of acquittal as to the robbery charges. As a result of the error discussed in Issue III, supra, petitioner requests this Court to reverse the judgments and sentences appealed from and remand the cause to the trial court with directions to conduct a new trial on the robbery charges. Because of the sentences errors discussed in Issue IV, supra, petitioner requests this Court to vacate the sentences appealed from and remand the cause to the trial court with directions to resentence petitioner within the guidelines or, alternatively, remand the cause for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Ms. Norma Mungenast, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Joseph Leon Stowers, #883435, F-47, Post Office Box 500, Olustee, Florida, 32072, this 30th day of April, 1987.

CARL S. MCGINNES