IN THE SUPREME COURT OF FLORIDA

JOSEPH LEON STOWERS,

Petitioner,

v. Case No. 70,451

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

NORMA J. MUNGENAST
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER

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PRELIMINARY STATEMENT

Respondent, referred to herein as the State, accepts Petitioner's preliminary statement and will use the designations set out therein.

STATEMENT OF THE CASE AND FACTS

The certified question on appeal involves only the issue of the trial judge's imposition of a departure sentence. To the extent Petitioner's facts do not pertain to the certified question, the State initially rejects those facts on the grounds that the bulk of them are irrelevant to the certified question. However, in the event this Court decides to address Petitioner's first three issues which pertain to his conviction and not his sentence, the State will accept Petitioner's statement of the case and facts subject to the following additions and/or clarifications:

Herman Thompkin's testimony at trial indicated Petitioner's car flew in behind his car, and a guy, who was identified by Gwendolyn Marshall as Petitioner, jumped out, came to the driver's side of the car, threw a shotgun in Thompkin's face and said he was an officer. Petitioner asked Thompkins for his license. (T 254). When Thompkins reached for his wallet Petitioner pumped the shotgun and told him to keep his hands where Petitioner could see them. (T 207). Marshall both saw and heard Petitioner pump the shotgun and pull back the trigger. (T 240). Thompkins removed his license from his wallet, gave it to Petitioner and laid his wallet on his lap. Petitioner then asked for Marshall's identification and she explained it was in the trunk. According to Thompkin's testimony, Petitioner told

Marshall to get out of the car, however, Thompkins thought Petitioner had ordered them both out of the car. Thompkins got ready to open the door and Petitioner told him to stay still and not make any sudden movement. At this point Petitioner still had the gun aimed at Thompkins. (T 254-255). When Marshall was going through her purse the man who was with Petitioner came up from behind and snatched her purse. (T 208). Marshall returned to the passenger side of the car and kept repeating to Thompkins "he got my purse, he got my purse." (T 255). Once she was back in the car, the man then reached in and grabbed Thompkin's wallet off his lap. Both of the men then went to the back of the car and told them to sit still and not move. They jumped in their car and as they were backing up it occurred to Thompkins they had been robbed. (T 256-258).

Thompkins described the vehicle that the two men were in the night of the robbery as a 1975 or 1976 Oldsmobile, Delta 88. (T 258).

At the end of March or first of April, Petitioner went into McDuff Appliances on Beach Boulevard and told Michael May that he was from Texas, he was in Jacksonville taking care of his paraplegic aunt and he was shopping around to find the best deal on a VCR which he planned to purchase for her. May described the vehicle Petitioner was driving on that date as a 1977 or 1978 green Oldsmobile. (T 275-276). When Petitioner returned to

McDuff on April 6 May recognized him, but did not wait on him. (T 284). Another employee, Hugh High, waited on Petitioner and his friend on his April 6 visit. After picking out a VCR, High asked them for the money, but they told him they had forgotten the check. The men told High they were bringing a check from the paraplegic and High told them what information was needed and to bring the check back before closing at 9:00 p.m. Around 8:55 p.m. Petitioner called, said he was running late and asked them to stay open. Around 9:05-9:10 p.m. Petitioner and his friend returned with a check that had the word "bonded" perforated on it. The check was completely filled out on the front and contained all the necessary identification information on the back. Petitioner handed High the check. (T 307-310). High wrote on the check a description of the car Petitioner was driving, i.e., a dark green Oldsmobile, two door sedan, and the tag number 001-CGY, Duval County. (T 311, 373-378). Eugene Rochelle, another employee at McDuff who witnessed Petitioner's dealings with High, procured the tag number of the vehicle and made sure High's tag number was correct. Rochelle also described the vehicle as an American made two door sedan, possibly dark green in color. (T 294-302).

Dalton Hill, a detective in the robbery division from Jacksonville Sheriff's Office, learned through his investigation of the March 29, 1985 robbery that the check that was stolen from Marshall during the course of robbery was used in the forgery on

April 6, 1985 at McDuff. High, the McDuff employee, reported the tag number 001-CGY to Hill who then discovered through NCIC that the tag belonged on a vehicle registered to Petitioner. Based on this information, Hill then compiled a photospread with Petitioner's picture and showed it to Marshall and the three McDuff employees: High, Rochelle and May. (T 414-418). On April 29, 1985, Marshall chose Petitioner's picture and stated she was 100% sure that he was the one who had held the shotgun at the robbery. (T 424). Rochelle identified Petitioner as the man who had bought the VCR on April 6 with a forged check and stated he was 60% sure of his choice. May also picked Petitioner's picture out of the photospread stating he was 80% sure of his identification. (T 422). High did not pick out Petitioner's picture, but at trial noted he was reasonably sure that Petitioner, without his glasses, looked very much like the one who had purchased the VCR from him and had paid for it with a forged check. (T 322, 422).

Wilmer Atwell, the custodian of records dealing with transfer of titles and the custodian of applications for car titles in Duval County, testified that tag number 001-CGY, the tag number procured by High, was registered to a two door 1977 Oldsmobile owned by Petitioner. This tag number was valid under September 10, 1985. On June 12, 1985 a replacement tag was bought for this vehicle and a new tag number was issued. Replacement tags can be obtained if a person signs an affidavit

stating his tag is lost, stolen or defaced. (T 385-389).

Terry Roberson, an employee with Duval Appliances, testified the man who said he was from Texas and was shopping around for a TV set for his paraplegic sister asked specifically if Roberson would take his sister's check. This occurred on April 8, 1985. Roberson agreed to take the check on the condition that Petitioner present proper identification. Roberson asked for the name and number of the man's sister. Roberson later called that number, asked for Gwendolyn James (now Gwendolyn Marshall) and was told by this person that the men were coming back to buy the TV set. The men did come back around 6:00 p.m. at closing time and paid for a TV with a check which had the word "bonded" printed on it. The check was filled out on the front and contained the identification information on the back. Roberson obtained the tag number 070-CJC, Duval County, and described the car as a green Buick. The taller of the two men actually gave the check to Roberson. (T 324-332).

Wilmer Atwell's testimony proved that the tag number procured by Roberson belonged to a vehicle owned by a Bernard Bolden and that Bolden bought a replacement tag for this vehicle on July 8, 1985. (R 342-344).

John C. Gainey, manager of McDuff on Edison Avenue, positively identified Petitioner at trial as the man who bought a VCR from one of his salesmen, Charles Dennis, on April 10, 1985

and paid for the VCR with a stolen and forged check. Thd police never requested Gainey to look at a photospread or make an identification. (T 357-358, 364).

Charles Dennis also made an in-court identification of Petitioner. Dennis was sure Petitioner looked very much like the man who paid for the VCR on April 10, 1985 with the forged and stolen check. No one suggested to Dennis who he should pick in court, and no one told him that person would be in court. (T 396, 401-404). The police did not ask him to look at a photospread or make an identification. (T 396). Dennis explained at trial that the check for the VCR was completely filled in when he received it, including the identification information on the back. (T 393-9). Dennis was too late with his attempt to get a tag number to record it on the check. (T 403).

SUMMARY OF ARGUMENT

The State initially urges this Court to refrain from addressing the merits of the issues other than the certified question to ensure that it does not unintentionally usurp the district court's constitutional function as a court of final jurisdiction. In the event this Court reviews the merits, the State summarizes its arguments as follows.

The court did not err in denying Petitioner's motion to sever since all the crimes constituted one continuing episode. Furthermore, any error in the court's ruling constitutes harmless error as there is no reasonable probability that the jury's finding of guilt was affected by the alleged error, particularly in light of the overwhelming amount of evidence supporting a conviction.

Since Petitioner demonstrated force in taking the victim's property, the crime of robbery was established; therefore, denial of Petitioner's motion for acquittal was proper. The State also contends the reinstruction of the robbery charges was not improper due to the court's refusal to reinstruct on assault. A complete reinstruction of robbery was given and that is all that was needed.

Finally, the State submits each of the four reasons supporting departure from the guidelines are clear and

convincing. It is clear beyond all reasonable doubt that an invalid reason would not have affected the judge's decision to depart and to impose a forty-year sentence. Considering the judge's oral statement at the sentencing hearing and his comments in his written order, it is clear the trial judge clearly examined the factors in the case before him and concluded a departure sentence of forty-years was justified even if only one reason was valid. Neither the appellate nor trial judiciary circumvented the mandates of Albritton in approving the statement that the judge would depart for any one of the reasons given.

ISSUE I (RESTATED)

> THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SEVER INASMUCH AS THIS ISSUE IS COLLATERAL AND SEPARATE TO THE CERTIFIED QUESTION ON REVIEW.

The jurisdictional basis for this Court's review of the case sub judice is the certified question stated in Issue IV, infra, which pertains solely to Petitioner's departure sentence. Relying upon four decisions from this Court, Petitioner nevertheless raises three issues which pertain to his convictions, and are therefore separate and collateral to the certified sentencing issue. See 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). For the following reasons, the State contends that none of those cases support Petitioner's request for this Court to exercise its discretion and address the first three issues.

Article V, Section (3)(b)(4) of the Florida Constitution provides that the Supreme Court:

> May review any decision of a district court of appeal that passes upon a question by it to be of great public importance....

This Court has construed this provision to mean once the case has been accepted for review this Court may review any issue arising in the case that has been properly preserved and properly presented. Trushin, supra. In so concluding, however, this

Court in the past has not been unmindful of the need to avoid the usurpation of the district court's constitutional function as courts of final jurisdiction. Specifically, in Trushin, this Court stated:

> While we have the authority to entertain issues ancillary to those in a certified case, Bell v. State, 394 So.2d 979 (Fla. 1981), we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified question.

Id. at 1130 (emphasis added). Distinguishing claims that were not ancillary to the issue that conferred jurisdiction, i.e., the constitutionality of the vote buying statute, this Court in Trushin refused to address issues pertaining to the right to closing argument and the admissibility of a statement made by the defendant to a state attorney. Obviously, these latter issues were separate and collateral to this Court's review of the statute. Likewise, in the case sub sudice, the first three issues allege errors with Petitioner's conviction, and a resolution of those separate and collateral issues will not in any way affect the outcome of this Court's decision on the departure sentence issue.

This Court's decisions in Savoie, supra and Cantor, supra, are easily distinguishable. In Savoie, this Court accepted jurisdiction due to a conflict among district courts. During the

trial Savoie filed a motion to suppress and the trial judge denied it both on its merits and on the grounds that Savoie had waived the issue by failing to file the motion before trial. The appellate court affirmed the trial court's holding that Savoie had waived the motion, but refused to consider the merits. Although conflict jurisdiction was granted on the waiver issue, this Court exercised its discretion to consider the merits of the motion to suppress. In Cantor, this Court exercised its discretion and dealt with the constitutional validity of the statute. Clearly, the issues reviewed in Savoie and Cantor were much more intertwined with the issues that conferred jurisdiction than in the case sub judice. Whether the departure sentence below was valid has absolutely no relationship to the issue of whether a severance should have been granted, whether the reinstruction or robbery should have included an instruction on assault and whether the judgment of acquittal on the robbery charge was improperly denied. Accordingly, Savoie and Cantor should not be considered persuasive authority for Petitioner's argument that this Court should address the first three issues. See also Lee v. State, 12 F.L.W. 80, 82 n.1 (Fla. January 29, 1987).

Finally, the State notes that the validity of the Negron case, which is cited by Petitioner, is questionable in light of this Court's subsequent decision in Jenkins v. State, 385 So.2d 1356 (Fla. 1980). In Negron, a 1974 case, this Court accepted

jurisdiction in a case that had been disposed of by the district court with a per curiam affirmance. In Jenkins, this Court stated that from after April 1, 1980 the Supreme Court of Florida lacked jurisdiction to review per curiam decisions rendered without an opinion. Obviously, Negron is no longer valid law.

In sum, the case law cited above does not support Petitioner's request for this Court to review the first three issues raised in his brief. If this Court truely intends to refrain from usurping the district courts' authority as the courts of final jurisdiction, Trushin, supra at 1130, the State respectfully submits that this Court must avoid the routine acceptance and review of issues separate and collateral to certified questions. As a result, this Court should respect the First District's conclusion in its capacity as a court of final jurisdiction and decline to consider Petitioner's first three arguments pertaining to the alleged errors affecting his convictions. The only issue that should be addressed is Issue IV, infra, dealing with Petitioner's departure sentence.

In the event this Court disagrees with the State's jurisdictional argument, the State makes the following argument in support of the trial judge's denial of Petitioner's motion to sever.

Petitioner contends that the trial court committed reversible error in denying his motion to sever the information

charging two counts of armed robbery from the information charging three counts of forgery, three counts of uttering a check and three counts of grand theft. The armed robberies were consolidated with the nine other charges when the State's motion to consolidate was granted, expressly without objection from Petitioner's first attorney in the case, Mr. Nesbit. (T 21). Petitioner also contends the court erred in denying severance of the nine count information into three separate trials based on the two day difference between the commission of the offenses.

Granting or denying a motion for severance is normally a discretionary matter for the trial court and an order on such a motion will not be reversed except upon a showing of an abuse of discretion. Johnson v. State, 438 So.2d 778 (Fla. 1983); State v. Vasquez, 419 So.2d 1088 (Fla. 1982); Crum v. State, 398 So.2d 810 (Fla. 1981); Menendez v. State, 368 So.2d 1278 (Fla. 1979). It is the State's position that the trial court did not abuse its discretion in denying Petitioner's motion to sever because all of the crimes were based upon two or more connected acts or transactions.

Petitioner relies on the cases of Finlay v. State, 424 So.2d 967 (Fla. 4th DCA 1983); Puhl v. State, 426 So.2d 1226 (Fla. 4th DCA 1983) and Driscoll v. State, 458 So.2d 1188 (Fla. 4th DCA 1984) to support his contention that the armed robbery charges were improperly tried at the same time with the remaining

offenses. In Finlay, supra, the defendant committed an armed burglary and armed robbery on the same day. Eight days later the defendant was stopped for a traffic violation which led to charges of aggravated assault and carrying a concealed firearm. On appeal, the defendant alleged error with the consolidation of the offenses. The State argued that the burglary led to the theft of the car, then to the commission of the traffic infraction which led to the aggravated assault with the gun used in the robbery. The court rejected the State's theory that the burglary led to the commission of the traffic offense, holding that they could discern neither a causal relationship nor a series of connected episodes. In Puhl, supra, the defendant was charged with kidnapping and three other offenses committed against the same victim. The victim escaped and two and one-half hours later the defendant attacked three people, robbed from them and fired shots. This latter activity resulted in eight more offenses against five other victims. The court held that a motion to sever these offenses should have been granted inasmuch as the only similarity between the offense of aggravated kidnapping of one victim and the remaining charges against the five other victims was the use of the handgun. Finally, in Driscoll, supra, the defendant allegedly burglarized an automobile and two hours later was arrested at a different location for loitering and prowling. The court held the two incidents were unrelated and improperly tried together inasmuch

as the sole connecting factor was that the arrest for the loitering and prowling resulted in the arrest for burglary.

Unlike the facts in Finlay, Puhl, and Driscoll, the facts sub judice indicate a causal relationship and a strong connection between the robbery in which Gwendolyn James' (Marshall) checks were stolen, and the forgery and uttering of those checks eight, ten and twelve days later. First, the fact that the stolen checks were the subject of the subsequent forgery and uttering charges demonstrates a connection which is distinguishable from the scenario where a vehicle or handgun is only involved in a subsequent crime. Cf. Finlay, supra; Puhl, supra. Second, in proving the forgeries, it was necessary to prove that the checks were stolen in the first place, i.e., proof of the robbery. Moreover, in proving the robbery, it was helpful in establishing identity to show through the forgery cases who was in possession of the stolen checks on a subsequent day. This is exactly how the investigators developed a case against Petitioner on the robbery charge. Tracing down the car tag number that High and Rochelle procured from the individual presenting the check at McDuff on April 6, 1985 led to the investigator's identification of Petitioner which led to his picture being included in a photospread. The first time the victim of the robbery was shown the photospread, she identified Petitioner as the man who held the shotgun at the robbery. Also, prior to Petitioner's arrest, two of the three McDuff employees identified Petitioner as the

one who had presented the check to them. In addition, Petitioner's handwriting was found to be present on all three of the checks, and his fingerprint was identified on at least one of the checks. All this evidence tended to prove Petitioner's involvement in the robbery. Furthermore, the robbery victim's description of the robber's car matched the McDuff employee's description of the car used when the check was presented. A check on the tag number obtained from the April 6th incident indicated Petitioner owned a car that fit the description of the car involved in the robbery. Finally, although the first forgery, uttering and grand theft did not occur until eight days after the robbery, testimony from Michael May, a McDuff employee, indicated Petitioner had already begun to plan the April 6 offenses a week earlier when he first visited McDuff and told May his story about his paraplegic aunt. Thus, it is clear Petitioner's activities constituted one connected continuing episode from the robbery on March 29 to the first visit to McDuff a week prior to April 6, to the forgery and uttering of the stolen checks on April 6, April 8, and April 10. Accordingly, the trial court did not err in concluding this case demonstrated a strongly connected chain and a continual flow with regard to the use of the property taken in the robbery.

The case, Brown v. State, 12 F.L.W. 499 (Fla. 1st DCA February 11, 1987), expressly relied upon by the First District in rejecting Petitioner's argument, supports the State's position

that the armed robberies and subsequent forgeries etc. involved a single episode such that severance was not mandated. In Brown, the defendant burglarized a dwelling owned by Rudolph Kinard, stealing a .22 caliber firearm, and two days later, shot and killed Kinard. In concluding that severance of the burglary and first degree murder charges were not necessary, the First District explained:

> While the temporal connection of charged criminal acts is always relevant to the question of severance, it is not conclusive in and of itself. Two criminal acts by the defendant may occur within minutes of each other and yet constitute separate episodes; on the other hand, two or more criminal acts by defendant may occur on separate days and still be part of a single episode if sufficiently connected in terms of the victim and connected or related acts. Here, the two crimes charged against the defendant meet this test because the acts surrounding the burglary on Monday were directly connected by the evidence to the murder committed sometime during the following two days. Because the killing occurred shortly after the victim telephoned appellant and discussed his presence at the victim's house on the day of the burglary, it can be inferred that the burglary led directly to commission of the murder and was the motive. These facts are sufficient to show that, even though the acts occurred over a span of two days, the two offenses charged in this case involved connected acts or transactions in an episodic sense; therefore, there was no error permitting joinder of the offenses and denial of the motion for severance. See Warren v. State, 475 So.2d 1027 (Fla. 1st DCA 1985); Brown v. State,

468 So.2d 325 (Fla. 2d DCA)., pet. for rev. denied, 476 So.2d 672 (Fla. 1985); Hamilton v. State, 458 So.2d 863 (Fla. 4th DCA 1984).

Brown, supra at 500. The State notes that Brown is now pending in this Court on the issue of conflict jurisdiction. See Brown v. State, Florida Supreme Court Case No. 70,028. Petitioner does not contend that Brown does not apply in the case sub judice. However, he does argue on page sixteen of his brief that Brown "is analytically flawed for it in effect erroneously applies a 'Williams Rule' type analysis to a severance issue." The State disagrees with Petitioner's analysis of Brown. The two crimes in Brown were simply not "similar" as far as Williams Rule is concerned. However, they were connected in purpose, time, sequence and geographical area. For that reason, severance of the crimes was not mandated. The conclusion in Brown was correct and the First District properly relied upon Brown in its opinion sub judice in affirming the trial judge's denial of Petitioner's motion to sever.

Even if the court did err in allowing the robbery case to be tried with the forgeries, etc., the error only ammounted to harmless error. Petitioner appears to contend that an improper consolidation is reversible per se. See Macklin v. State, 395 So.2d 1219 (Fla. 3d DCA 1981). Pursuant to the United States Supreme Court's opinion in United State v. Lane, 474 U.S. ____, 106 S.Ct. ____, 88 L.Ed.2d 814 (1986), the State submits an

improper consolidation or misjoinder is governed by a harmless error standard. Accordingly, the cases cited by Petitioner rejecting a harmless error argument are no longer valid in light of the Lane decision. Furthermore, Section 924.33 of the Florida Statutes supports a harmless error standard. That statute provides that the harmless error standard is applicable to all judgments regardless of the type of error involved and explicitly states that there is no presumption that errors are reversible unless it can be shown they are harmful. See also Taylor v. State, 455 So.2d 562 (Fla. 1st DCA 1984); Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982) (cases applying harmless error).

Petitioner has not and cannot show that any error in trying the two informations together constituted harmless error or affected the juror's verdict. The evidence of guilt on the robbery charge was overwhelming. Gwendolyn James Marshall picked Petitioner's picture out of a photospread and identified him as one of the robbers. Thompkin's description of the robber's vehicle matched the description of Petitioner's vehicle. Finally, a wealth of evidence proved Petitioner's possession of the stolen property within a week after the robbery. Consequently, any error can only be considered harmless error.

Petitioner next contends the events of April 6, 8, and 10, 1985 should have been tried separately. Petitioner conceded below that there were similarities in the way in which all the

forgery and uttering offenses were committed, and the evidence adduced below supports that concession. (T 54). Petitioner correctly notes that the fact that the offenses are very similar in nature and even occur within a matter of days does not mean they are "related" so as to constitute two or more connected acts or transactions. Had Petitioner in the case sub judice used checks taken from different people and at different times forged them, it would be more difficult to distinguish the cases Petitioner cites to on pages sixteen through eighteen of his brief. The fact that the checks used on these separate dates were stolen at the same time from one person and then forged on three different occasions at three different locations within forty-eight hours demonstrates the "relatedness" absent from Petitioner's cases. See Brown, supra, and Johnson v. State, 222 So.2d 191 (Fla. 1969). In Johnson, the defendant was convicted in one trial of uttering a forged check on September 7 and uttering a check with forged endorsement on September 8. The Supreme Court of Florida held the judge did not abuse his discretion in allowing the offenses to be tried together in light of the fact that the two informations involved the same type offense, the same victim, the same bank, the same defendant and the same modus operandi. See, also Williams v. State, 409 So.2d 253 (Fla. 4th DCA), pet. for rev. denied, 417 So.2d 331 (Fla. 1982). In Williams, the defendant was charged in one information with two counts of sale of cocaine. An informant had purchased

cocaine from the defendant on one occasion and returned six days later and bought more. The defendant's motion to sever was denied. The appellate court applied the principle enunciated in Paul v. State, 385 So.2d 1371 (Fla. 1980), and held:

> Here, the sales of drugs occurred during the course of an ongoing investigation, within a limited period of time and in a limited geographical area. The principle participants to both transactions were the same. Accordingly, we view the transactions, although separated in time, as nevertheless being clearly and directly connected in an "episodic sense."
>
> In the Paul case the appellant committed two separate rapes on two separate victims more than a month apart. Such circumstances are obviously quite different from two drug sales to the same officer during an on-going undercover investigation within a period of one week. We therefore have no difficulty in reconciling the view we express here with the rationale of Paul.

Williams, 409 So.2d at 254. In the case sub judice, the passing of the checks were clearly and directly connected in an "episodic" sense, therefore, the trial court's denial of the severance was proper. Moreover, Petitioner again has not and cannot demonstrate reversible error as the evidence overwhelmingly established Petitioner's guilt on each of the separate occasions (presence of Petitioner's handwriting on checks, Petitioner's fingerprint, witness identifications, car description, and the fact that Petitioner stole the checks that

were forged and uttered). See Lane, supra; Taylor, supra; Harris, supra.

Accordingly, should this Court address this issue, it should uphold the First District's affirmance of the trial court's denial of Petitioner's motion to sever.

ISSUE II (RESTATED)

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE ROBBERY CHARGES INASMUCH AS THIS ISSUE IS SEPARATE AND COLLATERAL TO THE CERTIFIED QUESTION ON REVIEW.

The State relies on its arguments previously made in Issue I that this Court should not address this issue on the grounds that it is completely separate and collateral to the issue of Petitioner's departure sentence. (See infra, pages 10 - 13).

In the event this Court disagrees with the State's jurisdictional position, the State makes the following argument in support of the trial judge's denial of Petitioner's motion to sever.

Petitioner seeks a reversal of his two robbery convictions on the basis that the State failed to prove Petitioner's action did not generate fear of death or great bodily harm in the victims, but rather demonstrated forms of theft such as embezzlement or larceny by trick.

It is the State's position that the victims' failure to testify that they were not in fear does not bar a conviction of robbery. To sustain a robbery conviction it is not necessary to show that the victim was placed in actual fear. Brown v. State, 397 So.2d 1153 (Fla. 5th DCA 1981). The question is not whether the victim actually fears a defendant, but whether a jury could

conclude that a reasonable person under like circumstances would be sufficiently threatened to accede to the robber's demands. Id. at 1155. The facts in this case demonstrate such. Petitioner, relying on this Court's decision in Royal v. State, 490 So.2d 44 (Fla. 1986), argues that the victims were not placed in fear until after their property was taken, and therefore, no robbery occurred. In Royal, the defendants completed a theft, and then while fleeing the premises from which the goods were taken, employed force. Since the force did not precede or was not contemporaneous with the taking of the property, no robbery was committed. In the instant case, the force or intimidation occurred contemporaneous with the taking of the property and not afterwards; therefore, Royal has absolutely no application to the disposition of this appeal.

Even if a reasonable person would not have been placed in fear during the taking of the property, the jury nonetheless could have convicted Petitioner of robbery since robbery may be committed by methods other than by an assault or putting in fear. Mitchell v. State, 407 So.2d 343 (Fla. 4th DCA 1982). The property may be taken by an act of force or violence. Id. at 344. The taking by force may be either actual or constructive. "Constructive force" is anything which produces fear sufficient to suspend the power of resistance and prevent the free exercise of the will. Montsdoca v. State, 84 Fla. 82, 93 So. 157 (Fla. 1922). Any degree of force suffices to convert larceny into a

robbery. McCloud v. State, 335 So.2d 257 (Fla. 1976). For example, the act of "snatching" money from another's hands is force and that force will support a robbery conviction. McCloud, supra; Andre v. State, 431 So.2d 1042 (Fla. 5th DCA 1983). In the case sub judice, Thompkin's wallet was grabbed off his lap and Marshall's purse was snatched from her hands. Pursuant to the authorities cited above, this degree of physical force, in and of itself, is sufficient to constitute the force required to constitute a robbery.

Petitioner has filed a notice of supplemental authority relying upon the Third District's opinion in Dixon v. State, 12 F.L.W. 1110 (Fla. 3d DCA April 28, 1987) to support his contention that judgment of acquittal should have been granted. In Dixon, a uniformed police officer operating a marked vehicle pulled over a bolita operator and, in essence, threatened him with exposure of his illegal activities. In response to that implied threat, the victim parted with his cash. Relying on this Court's decisions in Simmons v. State, 41 Fla. 316, 25 So. 881 (1899) and Montsdoca, supra, the district court reversed the robbery conviction on the grounds that an express or implied threat of arrest did not qualify as the force or fear required to establish a robbery.

The State submits Dixon is factually distinguishable. First, Petitioner falsely represented he was a police officer.

In Dixon, there is nothing to indicate the defendant was not in fact an officer abusing his authority. Second, unlike the case sub judice, Dixon did not enforce his implied threat by use of physical force or threats to inflict bodily injury. Generally, a mere pretense of legal authority does not supply the constructive force, intimidation or putting in fear that in the absence of actual force is essential to constitute the offense of robbery. If, however, in addition to impersonating an officer, the thief enforces his demands by use of physical force or threats to inflict bodily injury, it is robbery. Simmons, supra. In Simmons, the State filed an information against the defendants alleging that in the process of taking property from the victim, the defendant put the victim in fear by falsely representing and pretending that one of the defendants was an officer who was authorized to take her furniture, and by threatening to arrest and take into custody the victim if she resisted them in the taking of her furniture. The information did not charge any force, violence or assault. This Court reversed the robbery conviction on the grounds that the victim was not "put in fear" within the meaning of the statute. In reaching this conclusion, this Court noted that the representations and threats were not alleged to have been accompanied with any show of force or other circumstances calculated to produce terror. The victim's property was not threatened, nor were there any menances against her personal safety other than a threat to arrest and take her

into custody if she resisted the taking of the furniture. Id. at 882.

Both Simmons and Dixon were reversed because the cases lacked facts identical to the one sub judice. The information charged Petitioner with two counts of armed robbery and alleged that Petitioner took property from Gwendolyn Marshall and Herman Thompkins "unlawfully by force, violence, assault or putting in fear." Unlike the facts in Simmons, Petitioner's false representation that he was a police officer was accompanied with a show of force calculated to produce fear sufficient to suspend Marshall's and Thompkin's power of resistance and sufficient to prevent the free exercise of their will.

Petitioner suggests that his use of the shotgun did not demonstrate force, violence, nor an attempt to put the victims in fear since "[a]fter all, all bonafide officers carry guns, including shotguns, and take things from people, such as a wallet or purse containing identification." (Petitioner's Brief at 21). A review of the facts in this case clearly demonstrate force and violence beyond what is common, everyday practice for law enforcement officials and beyond what a reasonable person under similar circumstances would expect from police. The minute Petitioner drove up behind the victim's car in the park, he jumped out and "threw a shotgun" in Thompkin's face. When Thompkins reached for his wallet, Petitioner pumped the shotgun

and pulled back the trigger. Petitioner further told Thompkins, without ever putting him under arrest, that he was to stay still and not make any sudden movement. This command was made with the shotgun still aimed at Thompkins. While the alleged officers asked for some identification from the victims, they did not see fit to ask for the purse or wallet. The purse was snatched from Marshall's hands and the wallet was snatched off Thompkin's lap. While not expressly stating she was in fear, Marshall did display helplessness and a suspension of her resistance power by exclaiming "he got my purse, he got my purse." The "officers" again told Marshall and Thompkins to sit still and not move. Had Petitioner not been aiming and pumping a shotgun during this whole ordeal, perhaps an argument could be made that the victims' power of resistance was not suspended or that the free exercise of their will was not prevented. The facts in this case indicate otherwise and the State submits these facts constitute substantial competent evidence to support the jury's conclusion that Petitioner took the property unlawfully by force, violence, assault or putting in fear.

ISSUE III (RESTATED)

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE TRIAL COURT'S REFUSAL TO REINSTRUCT ON SIMPLE ASSAULT INASMUCH AS THIS ISSUE IS SEPARATE AND COLLATERAL TO THE CERTIFIED QUESTION ON REVIEW.

As has been previously argued, this Court should decline to entertain this issue as it is separate and collateral to Petitioner's departure sentence and would not affect the outcome of this Court's resolution of the sentencing issue. (See infra, pages 10-13). In the event this Court disagrees, the State makes the following argument in support of its position that the trial judge did not err in limiting his reinstruction on robbery to the Florida Standard Jury Instruction.

Prior to jury deliberations the judge instructed the jury on armed robbery, robbery, and lesser included crimes of theft, aggravated assault and assault. (T 715-710). The instructions given were verbatim from the Florida Standard Jury Instructions in Criminal Cases. One and one-half hours after the jury retired for deliberations, the jury requested to be reinstructed on the elements of robbery. Petitioner's attorney requested further instruction on the lesser included assault charge, arguing it was part and parcel of the robbery instruction. The trial judge disagreed and stated he was only going to repeat the standard jury instruction on robbery. (T 738). Prior to reinstructing them with the standard jury robbery instruction, thejudge

emphasized to the jurors that merely because this particular instruction was being repeated, they were to place no greater emphasis on the reinstruction than they did on all of the instructions. The jurors were told the instructions were to be taken in totality and in total context with each other, and again they were cautioned not to place any greater emphasis on this particular instruction just because it was being repeated. (T 739). Thirty minutes after the jury retired for continued deliberations, they returned a verdict of guilty on both counts of robbery with a firearm in the possession of Petitioner. (T 743). Petitioner agrees that it is proper for a judge to limit a reinstruction to the charges requested, and that the repeated charges must be complete on the subject involved. Hedges v. State, 172 So.2d 824 (Fla. 1965). Petitioner's entire argument on pages twenty-three and twenty-four of his brief is based on the erroneous premise that the judge did not give a complete instruction on the robbery charge. The State disagrees.

Nothing in the Florida Standard Jury Instructions in Criminal Cases indicates the pattern instruction for robbery (not its lesser included offenses) must include the pattern instruction on the crime of assault. Furthermore, Petitioner has not cited any case suggesting such. Petitioner is relying entirely on an analogy made with manslaughter cases, holding it is erroneous to fail to instruct on justifiable or excusable homicide. A review of the Standard Jury Instructions,

particularly pages 61 and 62 of the 1981 edition, reveals that the justifiable and excusable homicide instructions must be read in all murder and manslaughter cases. The Supreme Court Committee on Standard Jury Instructions in Criminal Cases has not seen fit to make the assault instruction part and parcel of the robbery instruction and neither should this Court. Furthermore, the assault definition appears to actually be a combination of the "violence" and "put in fear" elements of robbery, and therefore the standard instruction is not deficient for failing to repeat itself.

Finally, the State submits Petitioner has failed to illustrate how the failure to reinstruct on assault injured him or denied him in any way a fair trial on the robbery counts. The facts of this case indicated Petitioner took property by the unlawful use of force. If Petitioner is arguing the jury could have found him guilty of merely assault had it been reinstructed on this point, the State would submit that the facts in the record refute such speculation. Furthermore, the State submits the assault instruction was given once and the jury was expressly cautioned to give the reinstruction merely the same weight as it would give the previous instruction. Certainly, it is speculative to assume the jurors failed to follow this

instruction. As reversible error cannot be based upon conjecture, the State submits this Court should affirm the First District's approval of the judge's reinstruction and deny Petitioner relief on this issue. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

ISSUE IV (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, SATISFIES THE STANDARDS SET FORTH IN ALBRITTON v. STATE.

In the First District Court of Appeal, Petitioner contested the four reasons given to support the trial court's departure from the recommended guidelines range. The First District, without stating which reasons were valid and invalid, simply affirmed the departure and certified the question set out in VanTassell v. State, 498 So.2d 649 (Fla. 1st DCA 1986), which is rephrased in the affirmative by the State in its statement of Issue IV. As previously discussed, the State would urge this Court to refrain from addressing the merits of the departure reasons to ensure that it does not unintentionally usurp the district court's constitutional function as a court of final jurisdiction. In the event this Court decides to review the validity of the four departure reasons, the State makes the following arguments in support of those reasons.

The first reason was written as follows:

> 1. The defendant's first felony arrest was May 7, 1974, for the charge of Uttering a Forged Instrument. Defendant was placed on probation for two years after adjudication of guilt was withheld. Since the time, in Duval County, the defendant has been convicted of Forgery in cases numbered

> 77-89-CF and 77-90-CF, Uttering a Forged Instrument in case number 79-1248-CF, and five counts of Worthless Check charges in cases numbered 83-4624-CF, 83-5887-CF, 83-6607-CF, 83-9865-CF and 84-984-CF. Additionally, the defendant has been arrested for at least thirty-five separate misdemeanor charges, and has been convicted of, among others, Trespassing, Petit Theft, Worthless Checks, Obtaining Driver's License by Fraud, Fraudulent Use of a Credit Card, and Battery. Defendant's prior record shows him to be a non-rehabilitative career criminal which is a clear and convincing reason for departure from the guidelines recommendation.

(R 128). Petitioner first suggests that this reason violates Hendrix v. State, 475 So.2d 1218 (Fla. 1985) in that it considers factors previously accounted for on the scoresheet. Rule (d)(11) of the Committee Note to Rule 3.701 of the Florida Rules of Criminal Procedure provides that facts which are consistent with the statement of purpose of the guidelines may be used by the sentencing judge to depart. One of the statement of purposes provides that the severity of the sentence should increase with the length and nature of the offender's criminal history. Thus, while the scoresheet accounted for Petitioner's previous convictions, it did not account for the nature of the convictions, i.e., that Petitioner was repeating the same type offenses over and over and that despite being given a chance on probation after his first felony offense he committed seven more offenses dealing with checks. Finally, the instant offenses again involved the forgery and uttering of forged checks.

Clearly, the judge's reason was more than a mere reference to the prior convictions, and therefore these facts have not already been accounted for on the scoresheet. This Court has permitted departures where the reason is viewed as more than a mere reference to the previously accounted for prior convictions. Williams v. State, 12 F.L.W. 132 (Fla. March 19, 1987). In Williams, this Court stated that "neither the continuing and persistent pattern of criminal activity nor the timing of each offense in relation to prior offenses and release from incarceration or supervision are aspects of a defendant's prior criminal history which are factored in to arrive at a presumptive guidelines sentence." Petitioner has exhibited a persistent and continuing pattern a committing crimes involving forgery and uttering of forged instruments. Pursuant to Williams, supra, this constitutes a valid departure reason. Petitioner also suggests that the 35 misdemeanors referred to in the written reasons as arrests and not convictions cannot be considered as a valid reason for departure. A review of the sentencing transcript reveals that Petitioner concedes that at least 33 of the misdemeanors are convictions (T 805). The two others are convictions, not merely arrests, but apparently these convictions may have been based on an uncounseled plea and invalid waiver of counsel (T 804). Accordingly, in light of the comments made at sentencing, it is clear the judge's reference to 35 arrests is not improper because they are, in fact, convictions.

The second reason for departure stated:

> As well as being convicted of three counts of Forgery and two counts of Uttering in case number 85-5364-CF, the defendant was convicted of two counts of Armed Robbery with a Firearm in the instant case. An escalating pattern of criminal conduct provides clear and convincing reasons for departure from the sentencing guidelines.

(R 129). The judge's comments at the sentencing hearing indicate he was concerned that the forgery, uttering, and particularly the armed robberies were more serious crimes than Petitioner had committed in the past (T 810). The State also argued that the escalating pattern could also be a pattern such as a crime spree (T 818).

In Keys v. State, 500 So.2d 134 (Fla. 1986) this Court approved "escalating course of criminal conduct" as a valid departure reason. Petitioner has progressed from numerous forgery and uttering of forged instrument charges to committing crime of violence, i.e., armed robberies. Pursuant to Keys, this factor constitutes a clear and convincing reason for departure. See also Ballard v. State, 12 F.L.W. 150 (Fla. March 26, 1987), recently reaffirming Keys, supra.

The third reason given for departure stated:

> Prior convictions and professional manner in which a crime is committed is a proper basis for departure from the guidelines, Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984). Witnesses in the defendant's trial demonstrated that

> the defendant presented himself at the scene of the robbery as a police officer, and seemed to neutralize the victim's activity with police-like commands. In addition, the defendant presented the checks stolen in the robbery to the merchants in such a manner as to convince them that the checks were legitimate, using a "bonded" mark and using a carefully rehearsed story line.

Appellant suggests that Dickey has been implicitly overruled by Hendrix. Smith v. State, 479 So.2d 804 (Fla. 1st DCA 1985). The State disagrees. Smith and Hendrix did not affect that portion of Dickey approving as a basis for departure the professional manner in which the crime was committed. See Young v. State, 502 So.2d 1347, 1348 (Fla. 2d DCA 1987). This reason has consistently been upheld as a valid reason for departure. Mullen v. State, 483 So.2d 754 (Fla. 5th DCA 1986); Brown v. State, 480 So.2d 225 (Fla. 5th DCA 1985). See also Fla.R.Crim.P. 3.701(b)(3), approving more severe sentences based on unique facts and circumstances surrounding the offense. Furthermore, the facts in this case support the factual basis cited above by the judge; therefore, the reason is clear and convincing as it has been proven beyond a reasonable doubt. The fact that less emotional trauma occurred to the victims does not detract from the conclusion that the crimes were committed in a professional manner.

The fourth reason for departure states:

> 4. The presumptive guidelines sentence of twenty-two to twenty-seven years is insufficient to provide appropriate retribution, deterrence, or rehabilitation for seven new felony convictions, including two Armed Robbery with a Firearm. The insufficiency of a guideline sentence to provide that appropriate retribution, deterrence, or rehabilitation is a proper consideration for departure.

Contrary to Petitioner's interpretation, this fourth reason does not reflect merely a disagreement over the wisdom or philosophy of the guidelines. The trial judge here was not merely substituting his opinion as to the appropriate sentence for that of the Sentencing Guidelines Commission; rather, he was expressing his conclusion that based upon the reasons given in this case, departure was justified. See Williams, supra, approving such a conclusion and distinguishing Scurry v. State, 489 So.2d 25 (Fla. 1986).

Based on the foregoing discussion, the State submits all four of the reasons are valid and that a review of the certified question in this case is unnecessary. If this Court finds one reason to be invalid, however, the State makes the following argument in response to Petitioner's request for reversal of his sentence.

The trial judge noted on his written reasons for departure that any one of the four reasons set forth above would justify

exceeding the recommended guidelines. This viewpoint was expressed by the judge at the sentencing hearing also, thereby indicating the judge's express intent to sentence Petitioner to a certain number of years even if one of the reasons was valid (T 817). Furthermore, immediately prior to sentencing Petitioner, the judge indicated the sentence to be imposed was to be a sentence for the primary purpose of punishment (T 830). The judge then imposed the forty-year sentence. The State submits the judge made it clear that he wanted to punish Petitioner and that the degree of punishment he would impose would not depend on appellate review of his reasons for departure. It is clear beyond all reasonable doubt that if up to even three reasons were found invalid by the appellate court the trial judge would still depart and would still impose the forty-year sentence as punishment. Albritton v. State, 476 So.2d 158 (Fla. 1985).

Petitioner argues that the judge's written statement to the effect that he would impose a departure sentence given one valid reason is nothing more than boiler plate language and therefore does not satisfy the Albritton test. Petitioner further submits that this Court's opinion in State v. Mischler, 488 So.2d 523 (Fla. 1986) altered the Albritton test and that such "boiler plate" language is nothing but a method by which trial judges can bypass Mischler. (Petitioner's Brief at 27-29). Petitioner's argument incorrecly presumes that the language utilized by the trial court sub judice was "boiler plate" language, the inclusion

of which in the court's departure order was given little or no consideration by the trial judge in relation to the facts before him. However, Black's Law Dictionary defines "boiler plate" as follows:

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

Sub judice, Petitioner has wholly failed to demonstrate that the trial judge in the instant case routinely places in all of his departure orders the finding that he would depart for any one of the reasons given regardless of whether both valid and invalid reasons are found on review. In fact, the record on appeal affirmatively demonstrates that the trial judge in the instant case specifically made the subject finding based upon his consideration of the facts of the individual case before him. At the sentencing hearing, the judge stated:

> Well, I want to hold off on any question of habitual offender. I don't thinks its an absolute necessity if the Court decides to exceed the guidelines for any one reason, it will be sufficient and that would only be in essence, icing on the cake if we addressed the question in the first place, I believe.

(T 817) (emphasis added)

Judge Barfield's concurring opinion in Griffis v. State, 497 So.2d 296 (Fla. 1st DCA 1986) supports the State's position that

the trial court's use of such language does not violate Albritton. Judge Barfield recognized "the possibility that some trial judges may be tempted to include such a statement in all departure sentences," but concluded nevertheless that

> . . . in some cases it is reasonable for the trial judge to conclude, after conscientiously weighing the relevent factors in his decision to depart, that his decision would not be affected by elimination of one or more of several reasons for departure. A statement such as the one made by the trial judge in this case must be coupled with such a careful determination.

Griffis, supra at 298.

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

To ensure that the trial court's language is based upon a case-by-case approach and is not standard boiler plate language utilized without regard to the facts before the court, Judge Barfield suggests that the following review should be undertaken by appellate courts:

> The issue should be determined in a particular case not merely upon scrutiny of the language used, but upon

> an evaluation of the record to see whether it reflects a carefully considered judgment of the trial judge that he would have departed as he did even if the impermissible reasons were omitted.

Griffis, supra at 296.

Such a "standard of review" in cases such as the instant one would be in absolute conformity with Albritton, supra, because it would still place the burden on the State to prove beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence, i.e., the State would still be required to show that the trial judge made the finding in question in specific consideration of the facts before him. In cases where the appellate court could not determine whether the trial court gave specific consideration to the facts before it in making its finding, the appellate court could, in an abundance of caution, vacate a defendant's sentence and remand for resentencing to ensure that the trial court makes such an examination as to the specific facts before it. However, in cases where the record affirmatively indicates, as here, that the court's finding is not standard boiler plate language, the decision of the trial court to depart should be affirmed.

The State is not unmindful of this Court's recent disapproval of a proposed sentencing guidelines provision which would have allowed the use of what this Court termed "boiler plate" language in sentencing departure orders to the effect that

a departure sentence would still be imposed even if some reasons were invalid. See, The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311, 312 (Fla. 1985). In rejecting the proposed amendment, this Court reasoned that "[t]here is too great a temptation to include this phraseology in all departure sentences and we do not believe it appropriate to approve boiler plate language. The trial judge must conscientiously weigh relevant factors in imposing sentences; in most instances an improper inclusion of an erroneous factor affects an objective determination of an appropriate sentence". Id.

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

The same reasoning employed by Judge Barfield was likewise

set out by Judge Orfinger in Kigar v. State, 495 So.2d 273 (Fla. 5th DCA 1986). There, concluding that the trial judge's determination that he would have departed for any one of his departure reasons was appropriate, Judge Orfinger, writing for the majority, stated:

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

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

Accordingly, contrary to the concerns expressed by

Petitioner, neither the appellate nor the trial judiciary has thus far demonstrated that they are making any attempt to circumvent their responsibilities pursuant to Albritton. The Albritton standard is still met by the appellate court when it does not simply cease its review with recognition of the trial court's finding that elimination of any invalid reasons for departure would not affect the court's decision to depart, but goes on to essentially apply Albritton's reasonable doubt standard by conducting a conscientious review of the record to ensure that the trial court's finding was specifically made with regard to the individual case before it.

In Casteel v. State, 498 So.2d 1249 (Fla. 1986), Justice Ehrlich expounded upon this Court's holding in Albritton, stating:

> In determining whether consideration of the invalid reason was truly harmless beyond a reasonable doubt the reviewing court should consider the relative importance of the invalid reason. Looking to the overall record, the court should consider how substantial or compelling the reasons appear and how much weight the trial court placed on the invalid reasons. In his dissent Judge Zehmer notes that he has "encountered substantial difficulty in applying the 'reasonable doubt' standard to the review of sentencing guidelines departures because that standard, in effect requires the appellate court to discern what was in the mind of the sentencing judge by weighing the relative importance the trial judge placed on the various factors recited for departure from the

> guidelines." 481 So.2d at 75 (Zehmer, J., concurring in part and dissenting in part). As is the case with any determination which is to be made by a reviewing court, the reasonable doubt analysis employed in reviewing a sentencing guidelines departure should be made solely from the record. Resort to "mind reading" is not necessary and, in fact, the need to resort to such mind reading would evidence a reasonable doubt. If a reviewing court cannot discern from the record that there is no reasonable possibility that the absence of the invalid reasons would have affected the departure sentence, the sentencing court's consideration of the improper reasons must be considered harmful and the case should be remanded for resentencing.

Id. at 1252. (Emphasis supplied) Accordingly, by conducting a review of the record to ensure that a trial court's finding to the effect that he would depart on the basis of any one reason was made specifically with regard to the individual case before the court, the appellate courts have complied with Casteel. In this respect, the trial court's finding that the elimination of any of its departure reasons would not affect its departure sentence is only an aid to appellate review and does not usurp the appellate court's function.

As a result, Petitioner's concerns over allowing such a finding as is under review sub judice are completely unfounded and will remain that way if this Court adopts the practical case-by-case analysis set forth by the First and Fifth Districts. See Snelling v. State, 12 F.L.W. 169 (Fla. 1st DCA December 30,

1986); Mathis v. State, 498 So.2d 647 (Fla. 1st DCA 1986); VanTassell, supra, Reichman v. State, 497 So.2d 293 (Fla. 1st DCA 1986), Griffis, supra, and Kigar, supra.

Finally, the State submits Petitioner's argument that this Court's Mischler opinion altered the Albritton standard is without merit. See Daniels v. State, 492 So.2d 449 (Fla. 1st DCA 1986), wherein the First District correctly noted that it could be implied from this Court's disposition in Agatone v. State, 487 So.2d 1060 (Fla. 1986) that Mischler was not intended by this Court to modify the Albritton test.

In sum, if this Court reviews the four departure reasons, the State contends all four reasons were valid such that the Albritton standard does not even apply. In the event one or more reasons are found to be invalid, the State submits based on the judge's written statement as well as his comments at the sentencing hearing, it is clear beyond all reasonable doubt that the trial judge would have imposed the forty-year sentence if only one reason were determined to be valid. Consequently, this Court should affirm Petitioner's sentences.

CONCLUSION

Based on the foregoing, the State respectfully requests this Court to decline to address the issues separate and collateral to the certified question and to hold that the trial court's departure sentence was valid. In the event this Court reviews the first three issues, the State requests this Court to approve the First District Court of Appeal's affirmance of Petitioner's convictions.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Norma J. Mungenast

NORMA J. MUNGENAST
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-0600

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Carl S. McGinnes, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 20th day of May, 1987.

Norma J. Mungenast

NORMA J. MUNGENAST
of Counsel