

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

FIRST DISTRICT

No. 1D07-4079

L.T. Docket No. 05-CF-2096

MICHAEL J. CRAIGHEAD,

Defendant/Appellant

versus

STATE OF FLORIDA,

Petitioner/Appellee.

Appeal from the First Judicial Circuit in and

for Okaloosa County, Florida

INITIAL BRIEF FOR THE DEFENDANT/APPELLANT

Glenn M. Swiatek
Criminal Defense Attorney, P.A.
Florida State Bar Number: 137499
5 Clifford Drive
Shalimar, Florida 32579
Telephone: (850) 609-0940
Fax: (850) 609-0944
Attorney for Defendant/Appellant

STATEMENT REGARDING ORAL ARGUMENT

The Defendant/Appellant, MICHAEL J. CRAIGHEAD, requests oral argument.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT REGARDING ORAL ARGUMENT	2
TABLE OF CONTENTS	3 - 5
TABLE OF AUTHORITIES	6 - 7
STATEMENT OF THE CASE	8
A. FACTS OF THE CASE	8
B. STATEMENT OF FACTS OF THE CASE AND DISPOSITION IN THE COURT BELOW	9
SUMMARY OF THE ARGUMENT	12
ARGUMENT	13

ISSUE ONE

WHETHER THE TRIAL COURT USE THE INCORRECT BURDEN OF PROOF IN DENYING THE DEFENDANT’S INSANITY DEFENSE. 13

STANDARD OF REVIEW REGARDING ISSUE ONE 15

ISSUE TWO

WHETHER THE TRIAL COURT MISINTERPRETED THE TEST FOR AN INSANITY DEFENSE. 16

STANDARD OF REVIEW REGARDING ISSUE TWO 17

ISSUE THREE

CONTRARY TO THE TRIAL COURT’S RULING THAT IT MUST IMPOSE CONSECUTIVE MINIMUM MANDATORY SENTENCES THE COURT HAD THE POWER TO SENTENCE THE DEFENDANT TO CONCURRENT SENTENCES. 24

STANDARD OF REVIEW REGARDING ISSUE THREE 25

CONCLUSION	33
CERTIFICATE OF SERVICE	34
CERTIFICATE OF COMPLIANCE	35

TABLE OF AUTHORITIES

	<u>Page</u>
 Statutes	
Fla. State. Sec. 775.021	25, 27
Fla. State. Sec. 775.087	27
Florida Jury Instructions 3(a) (2005)	14
 Cases	
<u>Anderson v. State</u> , 276 So.2d 1154 (Fla. 1973)	17
<u>Aguilera v. State</u> , 606 So.2d 1194 (Fla. 1 st DCA 1992)	18
<u>Arutynyan v. State</u> , 863 So.2d 410 (Fla. 4th DCA 2003)	26
<u>Boller v. State</u> , 678 So.2d 319 (Fla. 1996)	26
<u>Brooks v. State</u> , 630 So.2d 527 (Fla. 1993)	26
<u>Bourriague v. State</u> , 820 So.2d 1997 (Fla. 1 st DCA 2002)	15
<u>Cannady v. State</u> , 620 So.2d 165 (Fla. 1993)	17
<u>Daniels v. State</u> , 595 So.2d 952 (Fla. 1992)	27
<u>Davis v. State</u> , 32 So. 882 (Fla. 1902)	17
<u>Dougan v. State</u> , 595 So.2d 1 (Fla. 1992)	18
<u>Duram v. United States</u> , 214 F.2d 862 (D.C. Cir. 1954)	21
<u>Elozan v. State</u> , 872 So.2d 934 (Fla. 5 th DCA 2004)	27
<u>Farrell v. State</u> , 101 So.2d 130 (Fla.1958)	13
<u>Fisher v. State</u> , 506 So.2d 1052 (Fla. 2 nd DCA 1987)	15

<u>Francis v. Francklin</u> , 471 U.S. 507 (1985).....	14
<u>Gurganus v. State</u> , 451 So.2d 817 (Fla. 1984)	17
<u>Hale v. State</u> , 630So.2d 521 (Fla. 1993)	26
<u>Hall v. State</u> , 568.2d 882 (Fla. 1990).....	15
<u>Hansen v. State</u> , 585 So.2d 1056 (Fla. 1 st DCA 1991)	18
<u>Hill v. State</u> , 688 So.2d 901 (Fla. 1996).	18
<u>Jackson v. Cohen</u> , 659 So.2d 1060 (Fla. 1995).	26
<u>Martin v. State</u> , 323 So.2d 666 (Fla. 2 nd DCA 1975).....	13
<u>Mitchell v. State</u> , 678 So.2d 1362 (Fla. 1st DCA 1996)	25
<u>M'Naughten's Case</u> , 8 Eng. Rep.718 (1843)	17, 20
<u>Murray v. State</u> , 890So.2d 451 (Fla. 2 nd DCA 2004).....	26
<u>Palmer v. State</u> , 438 So.2d 1 (Fla. 1983)	27
<u>Pickett v. State</u> , 116 So.2d 626 (Fla. 1959)	17
<u>Robinson v. State</u> , 487 So.2d 1040 (Fla. 1986).	18
<u>Sousa v. State</u> , 868 So.2d 538 (Fla. 2 nd DCA 2003)	26
<u>Sprious v. State</u> , 24 F.2d 796 (C.C.A. 2d 1928)	28
<u>State v. Ames</u> , 467 So.2d 994 (Fla. 1985).	27
<u>State v. Parker</u> , 812 So.2d 495 (Fla. 4 th DCA 2002).....	26
<u>State v. Rolle</u> , 560 So.2d 1154 (Fla. 1990).	14
<u>Stevenson v. State</u> , 495 So.2d 432 (Fla. 5 th DCA 2002).....	25
<u>Thomson v. State</u> , 83 So.2d 291 (Fla. 1919).	13
<u>Wheeler v. State</u> , 344 So.2d 244 (Fla. 1977).....	17
<u>Young v.State</u> , 631 So.2d 372 (Fla. 2 nd DCA 1994).	25

STATEMENT OF THE CASE

A. Nature of the Case

The Defendant/Appellant appeals the denial by the Circuit Court in and for Okaloosa County of his Judgment and Sentence. The Defendant stipulated to the factual evidence of the case and agreed to try the case to the Court solely on the issue of the defense of insanity at the time of the offense. *See* R. 309. Testimony was taken from two expert witnesses. Dr. Steven Doheny, M.D. was a psychiatrist called by the Defendant. Dr. Harry McClaren was the psychiatrist called by the State of Florida. The Defendant also called several fact witnesses to explain to the Court the Defendants history and past instances of bazaar behavior.

The Court Ruled that the Defendant did not meet the evidentiary standard for insanity but did suffer from “some fairly serious mental issues . . .” *See* R. 308-309.

At sentencing the Court sentenced the Defendant to two consecutive minimum mandatory sentences of three years incarceration in the Department of Corrections followed by one year probation. *See* R. 267, 283 – 285.

B. Facts of the Case and Disposition in the Court Below

The Defendant was charged by Amended Information with two counts of Aggravated Assault by Threat of Firearm. *See R.* at 84. The arrest report indicated that the Defendant/Appellant was spotted by four women who were taking a break outside of the North Okaloosa Medical Center in Crestview, Florida. The Defendant/Appellant was moving in a suspicious manner in a wooded area and carrying a rifle. The witness/victims indicated that the Defendant pointed the rifle at them. The witness/victims ducked and hid behind an SUV in the parking lot. They called 911. *See R.* 1-3.

The Crestview Police came to the scene and apprehended the Defendant/Appellant who was lying face down in a ditch with an assault rifle. It was noted that he was wearing three to four pairs of latex gloves. Id.

The Defendant initially gave a story to law enforcement that he had been struck in the

head by a black mail and did not remember anything until waking up in the ditch. He denied pointing a rifle at anyone. When asked about the latex gloves the Defendant/Appellant that he did not put them on but the persons who knocked him out must have put them on his hands. Id.; *see also* R. 148-149.

The Defendant/Appellant had a history of depression and suicide attempts. His earliest was at twelve years of age. He had a history of taking psychotropic medications. He stopped taking them his junior year in high school so that he could join the military which was his life ambition.

The Defendant enlisted in the Marine Corps and was removed from the Corps during basic training. The Defendant told his friends that he had killed a fellow recruit who had threatened a General with a gun.

The Defendant was diagnosed by a psychiatrist chosen by the Defense. Dr. Steven P. Doheny, M.D. concluded that the Defendant was insane at the offense. Dr, Doheny's

diagnostic impression was that the Defendant suffered from Major Depression with Psychotic features. *See* R. 21.

Regarding the issue of his state of mind at the time of the crime, it does appear that he was suffering from a serious mental illness; Major Depression with Psychotic Features. AS a result of suffering from the illness he believed his actions were performed to serve the purpose of taking his life. This belief overshadowed his knowledge that he was behaving in a way that could be interpreted as criminal. Therefore it appears that at the time of the crime that he would be eligible for consideration for an insanity defense based upon the fact that although he knew the nature and the quality of his act, he did not feel it was wrong because he believed that it was in his best interest and I the interest of everyone that he take his life. It is highly unlikely that he had any other malicious thoughts on the night of his arrest.

It is highly recommended that this patient enter immediate and continued psychiatric care. He could have mood swings to the level where he would make serious suicide attempts in the future. * * * the prognosis would be favorable if he enters a program of constant observation and review by mental health providers. *See* R.22-23

SUMMARY OF THE ARGUMENT

The Defendant/Appellant seeks to have his judgment and sentence vacated and conviction reversed on well founded grounds. The Defendant cites as error the trial court's interpretation of Dr. Doheny's diagnosis. The trial court stated that Doheny's testimony and diagnosis was that the Defendant suffered from an irresistible impulse. The Defendant's position is that he met the Mc'Naughten test for insanity at the time of the crime. The Defendant is therefore entitled to have trial court's ruling on the issue of insanity reversed and the judgment and sentence vacated.

As an additional argument the Defendant cites as error the trial court's ruling that the court had no choice but to sentence the Defendant to two consecutive minimum mandatory sentences. *See* R. 275. The trial court sentenced the defendant to two consecutive three year sentences. R. 277 – 278. The trial court is only restricted to “stacking” minimum mandatory sentences when there are separate cases involving separate events. Imposing minimum mandatory stacked sentences for a multi-count Information is error. The correct remedy is to instruct the trial court to reconsider the sentence imposed in the absence of a sentencing restriction or for this Court to correct the Defendant's sentence on its own motion.

ARGUMENT

I. THE TRIAL COURT USED THE INCORRECT BURDEN OF PROOF IN DENYING THE DEFENDANT’S INSANITY DEFENSE.

The trial court used a Clear and Convincing standard of evidence in ruling that the Defendant was not entitled to an insanity defense. See R. 282 – 284; 303-306. The standard was beyond a reasonable doubt as set forth in Florida Jury Instructions 3(a) (2005). R.303: 2-10. Said instruction was in effect at the time of the offense, September 4, 2005.

The “presumption of sanity” is a rule that the defendant has the burden of first offering proof of his or her insanity at trial. *See Martin v. State*, 323 So.2d 666, 667 (Fla. 2nd DCA 1975). Where there is testimony sufficient to present a reasonable doubt as to sanity, the presumption of sanity vanishes and the defendant is then entitled to an acquittal if the State does not overcome that reasonable doubt. *Thomson v. State*, 83 So. 291 (Fla. 1919); *Farrell v. State*, 101 So.2d 130 (Fla. 1958). Reasoning

that mens rea or criminal intent is an essential element of most crimes and that legal "insanity" at the time of commission of the acts charged is inconsistent with the formation of such intent, Florida courts have taken the view that a defendant's sanity is a necessary ingredient of criminal responsibility which, when properly made an issue in the case, must be proved by the prosecution as any other element of offense, beyond a reasonable doubt. The general rule is that the State must, where the matter is at issue, prove sanity beyond a reasonable doubt.

It is incorrect to require that the Defendant prove his insanity by clear and convincing evidence. If a specific instruction, both alone and in the context of the overall charge, could have been understood by a reasonable juror to require a finding of the presumed fact if the State proves certain predicate facts, it is a mandatory presumption that shifts the burden of persuasion and fails constitutional inspection. Francis v. Franklin, 471 U.S. 307 (1985). In Florida, most of the Standard Jury Instructions in criminal cases and the statutes providing that one set of facts is prima facie evidence of another fact, are permissive presumptions or inferences. *See, e.g. State v. Rolle*, 560 So.2d 1154, 1157 (Fla. 1990).

Standard of Review

In criminal prosecutions a person is presumed sane, and the burden is on the defense to present evidence of insanity. Hall v. State, 568 So.2d 882, 885 (Fla. 1990). If a defendant introduces evidence sufficient to create a reasonable doubt about sanity, the presumption of sanity vanishes and the state must prove the defendant's sanity beyond a reasonable doubt. Id. If the state does not overcome a reasonable doubt, the defendant is entitled to a finding of not guilty by reason of insanity. Fisher v. State, 506 So.2d 1052, 1054 (Fla. 2d DCA 1987). The reasonable doubt standard of proof has been used by this court in cases since a change in the statute occurred in 2000. *See* Bourriague v. State 820 So.2d 1997 (Fla. 1st DCA 2002)

After the presumption of sanity is rebutted, it is the state's burden, not the defendant's, to meet the reasonable doubt standard. *See* Hall v. State, 568 So.2d 882 (Fla. 1990). In light of the confusion of the trial judge as to the correct legal standard this case must be reversed for a new trial.

II. THE TRIAL COURT MISINTERPRETED THE TEST FOR AN INSANITY DEFENSE.

The Defendant's expert, Steven Doheny, M.D., Ph.D. stated that he believed that the Defendant was insane at the time of the offense and in accord with the insanity test for Florida. Dr. Doheny's diagnostic impression was that the Defendant suffered from Major Depression with Psychotic features. *See* R. 21.

Regarding the issue of his state of mind at the time of the crime, it does appear that he was suffering from a serious mental illness; Major Depression with Psychotic Features. AS a result of suffering from the illness he believed his actions were performed to serve the purpose of taking his life. This belief overshadowed his knowledge that he was behaving in a way that could be interpreted as criminal. Therefore it appears that at the time of the crime that he would be eligible for consideration for an insanity defense based upon the fact that although he knew the nature and the quality of his act, he did not feel it was wrong because he believed that it was in his best interest and I the interest of everyone that he take his life. It is highly unlikely that he had any other malicious thoughts on the night of his arrest.

It is highly recommended that this patient enter immediate and continued psychiatric care. He could have mood swings to the level where he would make serious suicide attempts in the future. * * * the prognosis would be favorable if he enters a program of constant observation and review by mental health providers. *See* R.22-23

The trial court rejected the opinion of Dr. Doheny stating that Florida does not recognize the irresistible impulse defense. *See* R. 306: 25 – 309: 23.. The trial court erred in reaching the conclusion that the Defendant’s actions were due to an irresistible impulse. R. 308: 13-17.

Standard of Review

The legal test for insanity in Florida criminal cases has long been the “M’Naghten Rule.” *See* Cannady v. State, 620 So.2d 165, 168 n. 1 (Fla.1993); Hall v. State, 568 So.2d at 885; Anderson v. State, 276 So.2d 17, 18 (Fla. 1973); Piccott v. State, 116 So.2d 626, 627 (Fla. 1959). Davis v. State, 32 So. 822, 826 (Fla. 1902). Under that rule, an accused is not criminally responsible if, at the time of the alleged crime, the defendant, by reason of a mental disease or defect, (1) does not know of the nature or consequences of his or her act; or (2) is unable to distinguish right from wrong. *See* Gurganus v. State, 451 So.2d 817, 820 (Fla.1984); Wheeler v. State, 344 So.2d 244, 245 (Fla.1977). The “wrong” under M’Naghten, however, is measured by societal standards and not any subjective moral standards set forth by the defendant. *See*

Aguilera v. State, 606 So.2d 1194 (Fla. 1st DCA 1992); Hansen v. State, 585 So.2d 1056 (Fla. 1st DCA 1991); *see also* Hill v. State, 688 So.2d 901 (Fla. 1996); Dougan v. State, 595 So.2d 1 (Fla.1992). Thus, under M'Naghten, if a defendant suffers from some mental infirmity, defect, or disease, but nevertheless understands the nature and consequences of his actions and that his actions are against the law, his actions are punishable.

“Irresistible impulse” can be pleaded only under the defense of diminished capacity and not under the defense of insanity. Thus it operates as a defense to murder, reducing the charge to manslaughter, and giving judges discretion as to length of sentence and whether committal would be more appropriate than incarceration. Robinson v. State, 487 So.2d 1040, 1043 (Fla. 1986).

The Insanity Defense comes in two main forms. First, a defendant may argue that because of mental disease or defect, he or she lacked the capacity to distinguish right from wrong. This is cognitive insanity.

Second, a defendant may argue that because of mental disease or defect, she or he was unable to act in conformance with the law. This is volitional insanity, and it is known as the irresistible impulse defense. Under this defense, a defendant may be found not guilty by reason of insanity even though she or he was capable of distinguishing right from wrong at the time of the offense. However this rule is not followed in Florida.

Under the Model Penal Code definition of irresistible impulse, a person may be found not guilty by reason of insanity if, at the time of the offense, he or she lacked "substantial capacity either to appreciate the criminality of [the] conduct or to conform [the] conduct to the requirements of law" (§ 4.01(1) [1962]). The "lacked substantial capacity" language creates a low threshold for the defendant: in some states, the defendant must allege complete impairment in order to invoke the defense.

By 1840, most jurisdictions had refined the wildbeast test to cognitive insanity and supplemented that with irresistible impulse insanity. However, in 1843, a well-

publicized assassination attempt in England caused Parliament to eliminate the irresistible impulse defense. Daniel M'Naghten, operating under the delusion that Prime Minister Robert Peel wanted to kill him, tried to shoot Peel but shot and killed Peel's secretary instead. Medical testimony indicated that M'Naghten was psychotic, and the court acquitted him by reason of insanity See M'Naghten's Case, 8 Eng. Rep. 718 (1843). In response to a public furor that followed the decision, the House of Lords ordered the Lords of Justice of the Queen's Bench to craft a new rule for insanity.

What emerged became known as the M'Naghten Rule. This rule migrated to the United States within a decade of its conception, and it stood for the better part of the next century. The intent of the M'Naghten rule was to abolish the irresistible-impulse defense and to limit the insanity defense to cognitive insanity. Under the M'Naghten rule, insanity was a defense if at the time of the committing of the act, the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Through the first half of the twentieth century, the insanity defense was expanded again. Courts began to accept the theories of psychoanalysts, many of whom encouraged recognition of the irresistible-impulse defense. Many states enacted a combination of the M'Naghten rule supplemented with an irresistible-impulse defense, thereby covering both cognitive and volitional insanity.

The insanity defense reached its most permissive standard in Durham v. United States, 214 F. 2d 862 (D.C. Cir. 1954). The Durham rule excused a defendant "if his unlawful act was the product of mental disease or mental defect." The Durham rule was lauded by the mental health community as progressive because it allowed psychologists and psychiatrists to contribute to the judicial understanding of insanity. But it was also criticized for placing too much trust in the opinions of mental health professionals. Within seven years of its creation, the rule had been explicitly rejected in 22 states. It is used only in New Hampshire.

In the instant case, the finding of Dr. Doheny was of insanity at the time of the offense due to the Defendant's Major Depression with Psychotic Features.

“[M]y conclusion is, that at the time that he committed the crime his thought process was disturbed because of his mental illness of severe depression. He was disturbed to the point that he had an overriding belief that what he was doing was not wrong. His overriding belief was that he was supposed to die. That he was supposed to kill himself/ He didn’t succeed because he had a degree of ambivalence at the time, which is again often a hallmark of a psychotic thought process. And he was essentially rescued or there was an intervention that occurred. He did try to kill himself in jail shortly afterwards. But he was unsuccessful again.” *See* Deposition of Doheny 29: 20-25, 30: 1-6.

“There is the, I didn’t know it was wrong. And then there is the, I knew it was wrong, but I was thinking on a higher level that what I was doing I had to do and it was the ultimate right. So, that brings you, you know, to the level of the Andrea Yates case in Texas where she killed her children, but she was psychotic and she believed that she was in some way saving them by doing it. But, she never said she didn’t know that it was wrong to kill them.” *Id.* at 33:21-25, 34, 1-4

Q. And he never said he was having delusions, your opinion is; he was delusional, criminally insane at the time, didn't know what he was doing was wrong?

A. In my opinion, that's the most likely explanation of why he behaved the way he did and did what he did that night. Id. at 15-21.

The conclusion that the Defendant crimes were committed by irresistible impulse is incorrect. The trial court must be reversed and the judgment and sentence vacated.

III. CONTRARY TO THE TRIAL COURT'S RULING THAT IT MUST IMPOSE CONSECUTIVE MINIMUM MANDATORY SENTENCES THE COURT HAD THE POWER TO SENTENCE THE DEFENDANT TO CONCURRENT SENTENCES.

The Defendant was adjudicated guilty of two counts of Aggravated Assault By Threat of Firearm. He was sentenced to two consecutive three year sentences. *See* R at 244-49. The trial court announced that it had no choice but to sentence the Defendant in this manner. *See* R. 309: 14-23. The conclusion that the trial court has no choice but to sentence the Defendant in this matter is incorrect. This matter should be sent back to the trial court for reconsideration of the Defendant's sentence.

A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits must serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Stevenson v. State, 495 So.2d 432 (Fla. 5th DCA 1995). However, whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, must be sentenced

separately for each criminal offense and the sentencing judge may order the sentences to be served concurrently or consecutively. *See Fla. Stat. Sec. 775.021 (4)(a).*

Standard of Review

Generally, enhancement sentences arising out of a single criminal episode may not be imposed consecutively. That is, before "stacking" minimum mandatories, the court must first ascertain whether the minimum mandatories are imposed pursuant to a statute of enhancement or as part of the statute prescribing the crime itself, and if all the minimum mandatories originate from a statute of enhancement, such as firearm possession or qualifying as a violent habitual felony offender, then they may not run consecutively unless separate and distinct crimes have occurred. *See Young v. State, 631 So.2d 372 (Fla. 2d DCA 1994).*

In determining whether the charges are sufficiently separate in nature, time, and place to permit the sentences to run consecutively, a court must consider the specific facts in the particular case. Such an analysis permits a court to draw reasonable inferences in determining whether the facts show separate criminal episodes. *Mitchell v. State, 678 So.2d 1362 (Fla. 1st DCA 1996).*

Murray v. State, 890 So.2d 451 (Fla. 2d DCA 2004). held that :

It is well-settled that sentences imposed under a sentencing enhancement statute may not run consecutively if the offenses occurred during a single criminal episode. Staley v. State, 829 So. 2d 400, 401 (Fla. 2d DCA 2002); *see also* Boler v. State, 678 So.2d 319,322 (Fla. 1996). “We have held that enhancement sentences arising out of a single criminal episode may not be imposed consecutively.” Jackson v. State, 659 So.2d 1060 (Fla.1995); *see also* Brooks v. State, 630 So.2d 527 (Fla.1993); Hale v. State, 630 So.2d 521 (Fla.1993); Daniels v. State, 595 So.2d 952 (Fla.1992); Palmer v. State, 438 So.2d 1 (Fla.1983). See generally ' 775.021(4)(a), Fla. Stat. (2001).

In Sousa v. State, 868 So.2d 538 (Fla. 2d DCA 2003), review granted, 870 So.2d 824 (Fla.2004), this court applied this principle to sentences imposed pursuant to section 775.087, Florida Statutes (1999). The trial court was prohibited from imposing consecutive sentences for offenses punishable under the 10/20/life statute that arose from a single criminal episode. Sousa, 868 So.2d at 539; *see also* Elozar v. State, 872 So.2d 934 (Fla. 5th DCA 2004).

Accordingly, the Defendant herein cannot be subjected to consecutive sentences under section 775.087 for any offense that arose from a single episode. *But see* Arutyunyan v. State, 863 So.2d 410, 412 (Fla. 4th DCA 2003) (holding that where defendant was being sentenced for felonies tried within a single prosecution under section 775.087, the trial court was free to choose whether to run sentences consecutively or concurrently).

Perhaps the best explanation of when the stacking of sentences is permissible and impermissible is found in State v. Parker, 812 So.2d 495, 497-498 (Fla. 4th DCA 2002). Parker held that “[a]s a general rule, for offenses arising from a single episode, stacking is permissible where the violations of the mandatory minimum statutes cause injury to multiple victims, or multiple injuries to one victim. The injuries bifurcate the crimes for stacking purposes. The stacking of firearm mandatory minimum terms thus is permissible where the defendant shoots at multiple victims and impermissible where the defendant does not fire the weapon. (*emphasis added*).¹”

Such is the case here. The Appellant did not fire the weapon. The Appellant was charged with two counts of Aggravated Assault By Threat of Firearm. *See* R. 84. It is impermissible to stack his sentence.

¹ *See also* State v. Ames, 467 So.2d 994 (Fla. 1985) (disapproving stacking of two firearm mandatory minimum terms where defendant committed burglary, robbery, and sexual battery on same victim, without firing weapon); Palmer v. State, 438 So.2d 1 (Fla. 1983)(disapproving stacking of thirteen firearm mandatory minimum terms where defendant robbed thirteen mourners in funeral home, without firing weapon) .

The Court of Appeal has the authority to vacate that portion of the sentence that does not comply with law. The Court should exercise its authority to do so. In Sprious v. United States, 24 F.2d 796 (C.C.A.2d 1928)(writ of certiorari denied in 277 U.S. 596 (1928)) the court, after pointing out that in some cases it had reversed and remanded the case to the district court, with instructions to enter a sentence in accordance with the statute, said: "We see no reason, however, why we may not adopt the less cumbersome procedure of correcting the sentence by our own mandate."

CONCLUSION

After the presumption of sanity is rebutted, it is the state's burden, not the defendant's, to prove sanity beyond a reasonable doubt. In light of the confusion of the trial judge as to the correct legal standard this case must be reversed for a new trial.

The conclusion that the Defendant crimes were committed by irresistible impulse is incorrect. It is clear from the evidence that the Defendant's actions were psychotic but not due to an irresistible impulse. The trial court must be reversed and the judgment and sentence vacated.

The Appellant was charged with two counts of Aggravated Assault By Threat of Firearm. It is impermissible to stack his sentence. The sentence should be vacated by this Court and a concurrent sentence imposed.

Respectfully Submitted,

By: _____

GLENN M. SWIATEK

Florida Bar No. 137499

5 Clifford Drive

Shalimar, FL 32579

Tel. (850) 609-0940

Fax (850) 609-0944

Attorney for Appellant

MICHAEL J. CRAIGHEAD

CERTIFICATE OF SERVICE

I, hereby certify that three true and correct paper copies, as well as one original, of the foregoing Initial Brief for the Defendant/Appellant were mailed, to the Honorable Jon S. Wheeler, Clerk, First District Court of Appeals, at 301 Martin Luther King, Jr. Boulevard, Tallahassee, Florida, 32399-1850; and, one noncertified copy to Bill McCollum, Attorney General, The Capital, PL-01, Tallahassee, Florida 32399-1050, by regular U. S. postal delivery postage prepaid.

Dated this the 27th day of February 2009.

By: _____
GLENN M. SWIATEK
Florida Bar No. 137499
5 Clifford Drive
Shalimar, FL 32579
Tel. (850) 609-0940
Fax (850) 609-0944
Attorney for Appellant

FONT CERTIFICATION

The type contained in this Initial Brief is Times New Roman 14 pt.

February 27, 2009

Glenn M. Swiatek

Criminal Defense Attorney, P.A.