IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : CASE NO. 65,857

ALFRED FLOYD JACKSON, :

Respondent. :

_____ :

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

		PAGE(S)
TABLE OF CONTENTS		i
TABLE OF CITATIONS		ii, iii
I	STATEMENT OF THE CASE AND FACTS	1
II	ARGUMENT	2
	ISSUE PRESENTED	
	WHETHER THE LOWER COURT ERRED IN RELYING ON DUGGAR v. STATE, 446 So.2d 222 (Fla. 1st DCA 1984), AND REJECTING THE HOLDING IN HARVEY v. STATE, 450 So.2d 926 (Fla. 4th DCA 1984).	2
III	CONCLUSION	19
CERTIFICATE OF SERVICE		20

TABLE OF CITATIONS

CASES:	PAGE(S)
Amendment to Rules of Criminal Procedure, (Sentencing Guidelines), 451 So.2d 824 (Fla. 1984)	18
Barndollar v. Sunset Realty Corp., 379 So.2d 1278 (Fla. 1980)	16
Bouie v. Columbia, 378 U.S. 347 (1964)	9
Dorman v. State, ___ So.2d ___ (Fla. 1st DCA 1984) 9 FLW 1854, on rehearing, 9 FLW 2191	8
Duggar v. State, 446 So.2d 222 (Fla. 1st DCA 1984)	2, 3
Hackney v. State, ___ So.2d ___ (Fla. 5th DCA 1984)	4, 5
Harms v. State, ___ So.2d ___ 9Fla. 1st DCA 1984) 9 FLW 1704	11
Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984)	2, 3, 4, 6
In re Clarification of Rules of Practice and Procedure [Florida Constitution, Article V, Section 2(a)], 281 So.2d 204 (Fla. 1973)	13
Keeley v. State, ___ So.2d ___ (Fla. 5th DCA 1984)	4, 5
May v. Florida Parole and Probation Comm., 435 So.2d 834 (Fla. 1983)	17
Paschal v. Wainwright, ___ F.2d ___ (11th Cir. 1984)	12
Pimentel v. State, 44 So.2d 228 (Fla. 3rd DCA 1983)	6, 7
Small v. Sun Oil Co., 222 So.2d 196 (Fla. 1969)	17
State v. Williams, 397 So.2d 663 (Fla. 1981)	12
Weaver v. Graham, 450 So.2d 24 (1981)	12

STATUTES:

Florida Statutes, Section 921.001	16
Florida Statutes, Section 921.001(4)(a)	8
Florida Statutes, Section 921.001(4)(b)	13
Florida Statutes, Section 921.001(5)	10

TABLE OF CITATIONS
- continued -

STATUTES:	PAGE(S)
Florida Statutes, Section 921.001(6)	5
Florida Statutes, Section 921.001(7)	5
Florida Statutes, Section 921.001(8)	8, 12
Florida Statutes, Section 947.16(3)	12
CONSTITUTIONS:	
Article V, Section 2(a)	13, 18
Article II, Section 3	13
MISCELLANEOUS:	
Florida Rule of Criminal Procedure 3.170(b)(6)	5
Florida Rule of Criminal Procedure 3.170(d)(11)	5, 11
Florida Rule of Criminal Procedure 3.701(d)(14)	9

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RESPONDENT'S BRIEF ON THE MERITS

I STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts.

II ARGUMENT

ISSUE PRESENTED

WHETHER THE LOWER COURT ERRED IN RELYING ON DUGGAR v. STATE, 446 So.2d 222 (Fla. 1st DCA 1984), AND REJECTING THE HOLDING IN HARVEY v. STATE, 450 So.2d 926 (Fla. 4th DCA 1984).

The issue which the District Court certified as the basis of conflict is whether a trial judge's reasons for departing from the sentence recommended under the guidelines established by Fla.R.Cr.P. 3.701 must be in writing or may they be delivered orally and transcribed by a court reporter instead of being written. The state did not, however, frame this as the issue but rather presented an entirely different question for resolution as if the conflict which provided the basis for jurisdiction was immaterial. The question asked by the state is whether the District Court's decision was wrongly controlled by Duggar v. State, 446 So.2d 222 (Fla. 1st DCA 1984) instead of Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984).

The state overlooked the point that Duggar and Harvey reached the same result so that when the court followed one it necessarily followed the other. In Duggar the First District held that a defendant being sentenced following a violation of probation for an offense committed before October 1, 1983 had the right to select guidelines when the sentencing occurred after October 1, 1983. In Harvey the District Court reversed the trial judge who had refused to allow the defendant to be sentenced under the guidelines after a probation revocation when sentencing occurred after October 1, 1983. The opening

paragraph of Harvey states:

> Harvey appeals from an order revoking his probation and sentencing him to three years in state prison. He contends that he was entitled to be sentenced under Florida's new sentencing guidelines, Florida Rule of Criminal Procedure 3.701. We agree and reverse. (Emphasis added) 450 So.2d at 927.

Respondent was denied the right to elect being sentenced under the guidelines just as were the defendants in Duggar and Harvey. In each case the District Courts held that refusal to allow the election was error. The state's suggestion that Duggar reaches a different result than Harvey is wrong; both reached the same result. Because Duggar and Harvey are in accord the District Court in this case could not possibly have followed one of those decisions without at the same time following the other. So the point presented by the state is a phantom.

The point of conflict between Harvey and the First District in this case is whether the reasons for departure must be in writing. In Harvey the Court said:

> As a preliminary matter, we observe that the trial court failed to provide a written statement providing the reasons for departure as required by Florida Rule of Criminal Procedure 3.701(d)(11). However, we do not reverse on that basis because the trial court's reasons were in fact transcribed as part of the record. We believe that oral explanation in the record sufficiently provides the opportunity for meaningful appellate review for purposes of Florida Rule of Criminal Procedure 3.701. 450 So.2d at 927, 928.

The First District disagreed with Harvey on this point, certified the conflict, and said:

> We note that Harvey v. State, ___ So.2d ___ (Fla. 4th DCA 1984), Case No. 83-2344, opinion filed June 13, 1984 [9 FLW 1332], holds that so long as the trial court's oral explanation in the record is transcribed for review, a separate written articulation of reasons for departure from the guidelines is not required. We think the rule rather noticeably emphasizes the requirement of a contemporaneous written statement (rather than an oral statement to be transcribed later) to be made at the time of sentence. See, Rule 3.701b. 6, d.8, d.11, and Committee Note (d)(11), as amended May 8, 1984. We therefore certify conflict under Rule 9.030(2)(A)(vi), Florida Rules of Appellate Procedure.

The Fifth District followed Harvey in Hackney v. State, ___ So.2d ___ (Fla. 5th DCA 1984) 9 FLW 1914 but this holding was later criticized by Judge Sharp, specially concurring in Keeley v. State, ___ So.2d ___ (Fla. 5th DCA 1984) when she said:

> I am bound by this court's view that it is not necessary for a trial judge to file written reasons for departing from the guidelines if his oral reasons are transcribed and presented to us as part of the written record. However, I think the view expressed by the First District Court in Jackson v. State, 9 F.L.W. 1703 (Fla. 1st DCA Aug. 6, 1984), is the better one. The language of Florida Rules of Criminal Procedure 3.701(d)(11) and 3.701 (b)(6) of the guidelines Statement of Purpose use mandatory language concerning a trial judge's obligation to file written reasons in the record for departing from the presumptive sentence.
>
> Further, a judge's oral statements made at sentencing may be rambling, poorly expressed and may require extrapolation and reconstruction by the appellate court to be sustainable as "clear and convincing." This makes appellate review difficult, and presents a quandary when some of the reasons given are possibly not convincing, or are improperly considered in this context. See Young v.

State, 9 F.L.W. 1792 (Fla. 1st DCA Aug. 17, 1984). (Footnote omitted)

This Court is squarely presented with conflicting rulings on the same point of law: whether reasons for departure must be written.

All the Courts have acknowledged that the rule requires written reasons but the Fourth and Fifth Districts believe this requirement may be disregarded. It cannot. The Fourth District based its reasoning in Harvey upon the alternative of a transcript, prepared by a court reporter, as sufficient to afford appellate review. If that were the only reason for having a written statement, allowing a transcript to substitute might suffice; but see, Judge Sharp's dissent in Keeley.

Appellate review is not the sole purpose of written reasons.[1] The guidelines process is one of constant revision.

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1. The legislature imposed by statute a requirement that "sentencing guidelines shall provide that any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial court judge." §921.001(6), Fla. Stat. (1983). This requirement is incorporated twice, in Fla.R.Cr.P. 3.170(b)(6) and in 3.701(d)(11). The committee note to rule (d)(11) says that the "written statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public, of the reasons for departure." The legislature also imposed on the Guidelines Commission and the Office of State Courts Administrator the obligation to "conduct ongoing research on the impact of sentencing guidelines adopted by the Commission on sentencing practices . . . ." §921.001(7), Fla. Stat. (1983). The manual prepared by the Sentencing Guidelines Commission says that flexibility is a key element in the concept, including "revisions suggested by changing sentencing patterns of the sentencing judges." These changes "are . . . subtle and will be brought to the attention of the guidelines commission primarily by means of the reasons articulated by the trial judge for departing from the guidelines." These reasons are to be "documented and analyzed" in order to "determine the need for adjustments in individual offense categories." The Commission concluded, therefore, that it was "important that

The score sheets are reviewed to determine if the guideline ranges are being applied and, if not, what reasons are given for departure. This process will be stymied without written reasons accompanying the score sheet. The reporting mechanism will be hampered, if not totally immobilized, if the officials who gather this data must search appellate transcripts to learn why a judge departed. In addition, not all departures will be appealed, so in some cases there will be no transcript. The Fourth District in Harvey erred by assuming that appellate review was the only reason for written reasons, overlooking the reporting and monitoring functions.

Even for appellate review purposes, Judge Sharp's opinion indicates written reasons are better. Oral sentencing pronouncements may include statements which are unrelated to reasons relied on for departure. Litigants and appellate courts should not be forced to sift through a judge's sentencing discourse to discover the real basis for departure. Some of the judge's remarks which are not intended to be reasons for departure may be interpreted as being for that purpose. This will make appellate review more uncertain, particularly when some of the remarks refer to factors which are prohibited for departure.

The state's argument that written reasons are not required merely refers to Pimentel v. State, 442 So.2d 228 (Fla.

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1. (cont'd) the sentence imposed and reasons for departure be accurately recorded." The clerk of the court is made responsible for forwarding scoresheets to the Commission. Sentencing Guidelines Manual at p.7.

3rd DCA 1983) "and cases cited therein." Whatever those cases "therein" may say, the guidelines statute and rule are based on more than just furnishing a record for appellate review. Pimentel is not controlling here.

The First District Court correctly held that a written statement was required. Its decision should be affirmed and the conflicting decisions of the Fourth and Fifth Districts should be disapproved.

Much of the state's brief is devoted to the assertion that the trial judge actually departed from the guidelines and since a violation of probation is a valid reason for departure the appellate court should have affirmed. The basic flaw in this argument is that the trial judge did not depart. He refused to honor appellant's election. This point was correctly explained by the District Court as follows:

> The State's argument ignores the language in Section 921.001(4)(a), Florida Statutes (1983), which unambiguously provides that the guidelines shall be applied to all felonies (except capital and life felonies) committed prior to October 1, 1983, for which sentencing occurs after October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to the guidelines. We recognize that a trial judge may go outside the recommended range if he explains in writing the reasons for his departure, Section 921.001(6), Florida Statutes (1983), and Rule 3.701(d)(11), Florida Rules of Criminal Procedure, but this does not give the trial judge the discretion to refuse to apply the guidelines. The trial judge must make an initial determination of the recommended range for a defendant's crime, and only then may he make a determination that circumstances justify departure, giving his reasons in writing. (Footnote omitted) (Emphasis added)

In addition to the reasons given by the District Court, the state's position must be rejected because if its reasoning prevailed there would be no way to determine if respondent was eligible for parole. The state has failed to take into account the difference between sentences imposed under or not under the guidelines. All persons sentenced after October 1, 1983 whose offenses occurred before October 1, 1983 could elect to be sentenced under the guidelines. §921.001(4)(a), Fla. Stat. (1983). One consequence of selecting guidelines was ineligibility for parole. §921.001(8), Fla. Stat. (1983). If guidelines were not selected, parole eligibility was not lost. It is important to know, therefore, whether the person was given a sentence "pursuant to" the guidelines or was denied that sentencing option. The state has confused these two situations. It treats the trial judge's refusal to allow respondent to select the guidelines as if the judge had reviewed a guidelines score sheet and a recommended sentence but then departed. The judge did not do that. He said respondent could not elect the guidelines. That ruling produces different consequences than scoring and departing. If the sentence here was "pursuant to" the guidelines respondent's parole eligibility was lost.

To accept the state's argument means that even though the trial judge ruled that respondent was not entitled to select guidelines sentencing, the respondent is nevertheless saddled with the disability that accompanies a guideline sentence.[2]

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2. In Dorman v. State, ___ So.2d ___ (Fla. 1st DCA 1984) 9 FLW 1854 on rehearing, 9 FLW 2191, the Court held that a defendant sentenced with a recommendation for treatment as a mentally disordered sex offender was not considered as being sentenced under the guidelines and therefore was eligible for parole consideration.

The state should not be allowed to prevail with this patently unconscionable position, which leaves respondent's status unclear at best and enhances the possibility that he has or will be denied his full rights under both the guidelines and the parole laws.

The state's final point is that the District Court was wrong in saying that on remand the trial judge should apply the rule in effect at the time of the sentence being reviewed. The amended rules allow a guidelines sentence following a violation of probation to be increased to the next higher cell without a written reason for departure. Fla.R.Cr.P. 3.701(d)(14).

Respondent has already elected sentencing under the guidelines. Any changes which make the guidelines more disadvantageous should not be applied to respondent because he gave up the right to parole consideration in exchange for resentencing under the guidelines as they then existed. The principle which protects respondent in this situation was announced by the United States Supreme Court in Bouie v. Columbia, 378 U.S. 347, 353, 354 (1964) as follows:

> An expost facto law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that aggravates a crime, or makes it greater than it was, when committed." Calder v. Bull, 3 Dall 386, 390, 1 L ed 648, 650. If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. (Emphasis added)

The changed guidelines which might exist at the time

of respondent's resentencing ought not to be applied to him if they produce a harsher result than the guidelines as they existed at the time of the original sentencing. This is necessary as a matter of due process. Even if the rules are "procedural", respondent relied on them at the time of making his selection. Any change which is disadvantageous to respondent would "aggravate the crime" or "make it greater" in punishment and therefore violate due process if used to compute his sentence.

Under the guidelines which should have been applied to respondent the court could not exceed the recommended sentence without writing a clear and convincing reason for departure. Under the amendment to the guidelines which did not become effective until after respondent's sentencing the trial judge may impose a sentence in the next higher cell without finding and stating a clear and convincing reason for the departure. This increase in potential punishment without any justification by way of a reason for departure makes the guidelines more disadvantageous after the respondent's sentencing proceeding had been completed. It is not correct to say, therefore, as the state has, that the change in the guidelines was merely procedural and that the amended rule could be applied to a resentencing on remand.

The state overlooks the substantive difference between a sentence which is imposed within the guidelines in contrast with a sentence which departs from the guidelines. Section 921.001 (5) states that the failure of a trial court to impose a sentence within the sentencing guidelines "shall be subject

to appellate review . . . .". Rule 3.701(d)(11) authorizes departures from the guidelines if "clear and convincing reasons" are found. Under the guidelines rule in effect at the time of respondent's sentencing a trial judge was required to find and state clear and convincing reasons in order to impose a sentence greater than the guidelines range authorized. If the amendment is applied to respondent the court will be allowed to impose a sentence within the next higher cell without giving a reason. This amendment therefore will deprive respondent of the right to an explanation for a departure which falls within the range of the next higher cell and, more importantly, will deprive respondent of the substantive right to appeal that decision as not accompanied by sufficient clear and convincing reasons. Thus the change in the rule will operate to deprive respondent of the right of appeal and of having a review of the reasons given by the judge as a basis for departure.

The rule requiring an explanation for departures from the guidelines is a limitation on the exercise of the trial judge's discretion. In Harms v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 FLW 1704 the Court said:

> The state inaptly relies on Wilkerson v. State, 322 So.2d 620 (Fla. 3rd DCA 1975), as authority for the same breadth of discretion in deviating from the Rule as Wilkerson recognized in former sentencing process. Such is plainly not the intendment of the rule.

This limitation on the court's discretion was partially lifted by the amendment to the rule allowing a departure to the next higher cell without written explanation demonstrating

clear and convincing reasons. This distinguishes the rule change here from the situation of parole guidelines presented in Paschal v. Wainwright, F.2d ___ (11th Cir. 1984) which were held to be guidelines promulgated by a state agency to guide its discretion. They did not change the Commission's parole decisions which under the old and new statutes "involved the use of discretion and judgment."

Other portions of the sentencing guidelines act demonstrate that unlike parole guidelines sentencing guidelines are substantive.

Section 921.001(8), Fla. Stat. (1983) says that persons sentenced pursuant to sentencing guidelines are not eligible for release under the provision of Chapter 947, which is parole. Undoubtedly, loss of the right to be considered for release on parole is substantive. See, State v. Williams, 397 So.2d 663 (Fla. 1981) which holds that Section 947.16(3), Fla. Stat. (1981), authorizing retention of jurisdiction by the trial judge to vacate a parole order during the first-third of a sentence, had disadvantageous consequences and therefore was a prohibited ex post facto law when applied to persons whose crimes occurred before the effective date of the act.

In Weaver v. Graham, 450 So.2d 24 (1981) the Court held that a statute retroactively decreasing gain time credits violated the Ex Post Facto Clause. The Court commented on the effect of changes in the law which increased punishment, including loss of parole rights, saying:

> [W]e need not determine whether the prospect of the gain time was in some technical sense part of the sentence to conclude that

> it in fact is one determinant of petitioner's prison term - and that his effective sentence is altered once this determinant is changed. [Citations omitted] See also Rodriquez v. United States Parole Commission, 594 F.2d 170 (Ca.7 1979) (elimination of parole eligibility held an ex post facto violation). We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed. (Emphasis added)
>
> 450 U.S. at 31, 32.

Further indications that the guidelines are substantive are found in §921.001(4)(b), which states that guidelines revisisions made by the Supreme Court shall only become effective "upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised."

Article V, Section 2(a) of the Florida Constitution grants the Supreme Court the power to "adopt rules for the practice and procedure in all courts . . . ." Article II, Section 3 of the Florida Constitution states that the powers of state government shall be divided into legislative, executive and judicial branches and "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." This Court interpreted its rule making authority under Article V, Section 2(a) in In re Clarification of Rules of Practice and Procedure [Florida Constitution, Article V, Section 2(a)], 281 So.2d 204 (Fla. 1973) when it said:

> [T]he Supreme Court is given exclusive authority to promulgate rules of practice and procedure in the courts. In other words, under the Constitution the Legislature may veto or repeal, but it cannot amend or supersede a rule by an act of the Legislature.

* * * *

> The fact that this Court may adopt a statute as a rule does not vest the Legislature with any authority to amend the rule indirectly by amending the statute. In other words, an attempt by the Legislature to amend a statute which has become a part of rules of practice and procedure would be a nullity. (Emphasis added)

If the guidelines are procedural any attempt by the legislature to approve or alter them in whole or in part would likewise be a nullity.[3]

The constitutional prohibition against legislative enactment of procedural rules must have been well known to this Court and to the legislature. It is hardly conceivable, therefore, that the guidelines could be labelled procedural when the legislature reserved for itself the right to implement not only the revisions but the entire guidelines as revised. The guidelines cannot be split into substantive or procedural components as was the evidence code. They are either one or the other and are either a law enacted by the legislature or

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3. In the 1984 session the legislature passed Chapter 84-328, Laws of Florida. Section 1 states:

> Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure, as revised by the Florida Supreme Court on May 8, 1984, are hereby adopted and implemented in accordance with s. 921.001, Florida Statutes.

This act would be patently unconstitutional if the guidelines are procedural.

a rule promulgated by the Court, but not both.[4] The constitution does not allow one branch of government to exercise powers of another branch, so the guidelines in their entirety could not have been validly adopted by both the court and the legislature. One branch of government or the other was responsible for passing them. It follows that if the guidelines are procedural rules the legislature did not have the authority to implement them by law.

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4. The reason that the process used for adoption of the procedural portions of the evidence code by the Supreme Court cannot suffice for adoption of the guidelines is that the evidence code had multiple effects, some substantive and others procedural.

> Rules of evidence may in some instances be substantive law and, therefore, the sole responsibility of the legislature. In other instances, evidentiary rules may be procedural and the responsibility of [the] Court. In re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979).

Unlike the evidence code the guidelines are not a mixture of substance and procedure. They are an integrated rule which springs from a single source, the Sentencing Guidelines Commission, and not from a conglomerate source of court decisions, court rules and statutes as did the evidence code. The enabling statute, moreover, specifies that the entire guidelines as revised cannot be effective until approved by the legislature. This means the legislature envisioned passing the same provisions which the Court had, not just whatever portions may have been substantive. Similarly, the Court in adopting the original guidelines and the revisions did not specify that only procedural portions were being adopted. Under the separation of powers doctrine the guidelines as a unit must be categorized as either a law or a rule of procedure but they cannot be both; and depending on which they are they must be passed by either the Supreme Court or the legislature, but not contingently by one subject to approval by the other. That violates separation of powers. With the guidelines the legislature must be deemed to have passed a substantive statute recommended by the court in the form of a procedural rule.

The Attorney General in opinion 84-5, said that the sentencing guidelines were substantive rather than procedural.

> The Florida Supreme Court has held that Section 921.141, F.S., which addresses aggravating and mitigating circumstances in capital cases (in effect, capital sentencing guidelines), is substantive rather than procedural. [citations omitted] I see no distinction between capital sentencing guidelines and the guidelines of Chapter 83-87 [sentencing guidelines promulgated as Florida Rule of Criminal Procedure 3.701], at least as to whether such guidelines are substantive law. (A copy of Attorney General Opinion 84-5 is attached as an appendix to this brief.)

Taken as a whole, therefore, the guidelines are a legislative rather than a judicial product. These are substantive changes made by creating a right to appeal, by requiring written reasons for departure, and by abolishing parole. Any revisions to the guidelines require legislative approval. The guidelines are inseparable from the substantive changes made by the legislature when enacting §921.001, Fla. Stat. and Chapter 84-328 Laws of Florida, approving the guidelines as revised. To say that the guidelines are procedural means that the provision for legislative approval of them is unconstitutional as a violation of this Court's exclusive authority to enact rules of procedure. Yet that ruling would invalidate all of §921.001 because without the authority to approve the revised guidelines it is not reasonable to suppose that the legislature would have passed the other portions of the law.[5]

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5. The test of severability is whether the court is able to conclude that the legislature would have been content to enact the law without the invalid provision. Barndollar v. Sunset Realty Corp. 379 So.2d 1278 (Fla. 1980). In

Being substantive rather than procedural the guidelines cannot be applied retroactively. The parole guidelines cases are not controlling because both before and after those guidelines the parole decision was by law still vested entirely in the Parole Commission and no substantive law changes occurred. The guidelines were merely agency rules. See May v. Florida Parole and Probation Comm., 435 So.2d 834 (Fla. 1983). Sentencing guidelines, by contrast, are changes in substantive law which limit previously unreviewable judicial discretion, create a right to appeal, and abolish parole. Changes to sentencing guidelines cannot be applied retroactively if more disadvantageous because of the prohibition against ex post facto application of the law.

As a final alternative, even if this Court finds that the guidelines are procedural and changes in them may be applied to a resentencing without violating due process or ex post

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5. (cont'd) Small v. Sun Oil Co., 222 So.2d 196, 199, 200 (Fla. 1969) this Court said:

> When . . . the valid and the void parts of a statute are mutually connected with and dependent upon each other as conditions, considerations, or compensations for each other, then a severance of the good from the bad would effect a result not contemplated by the Legislature; and in this situation a severability clause is not compatible with the legislative intent and cannot be applied to save the valid parts of the statute.

To sever the authorization for final approval of the guidelines or their subsequent amendments would undoubtedly produce a result not intended by the legislature. It would allow the guidelines, as revised, to take effect without legislative authorization. While the legislature may in fact approve the product of this Court, it is impossible to conclude that

protections, they should not be so applied. The guidelines are new and surrounded by uncertainty. Lawyers and their clients have enough difficulty in determining what the guidelines mean at any given time without having to predict their future course. The right to appeal will be severely chilled if there are substantial risks that the guidelines will change to the detriment of the defendant during the pendency of an appeal. A defendant who successfully appeals an illegal departure should not have to face a more onerous set of guidelines as a reward for winning his appeal. Exercising the right to appeal should not be turned into a game of guideline roulette. This Court should promote stability in the law by freezing the guidelines to those which existed at the time of the original sentencing for any person appealing from a departure.

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5. (cont'd) the guidelines act, including abolition of parole, would have been passed absent the legislature's ability to reject or modify the guidelines by simple majority vote rather than by the two thirds majority required to repeal a rule of procedure. See Art. V, Sec. 2(a), Fla. Const. Beside, without an effective date being passed by the legislature, the guidelines as revised by this Court would never have been implemented. The revisions approved by the Court on May 8, 1984 had no effective date, obviously because the legislature had the authority to enact them. See, Amendment to Rules of Criminal Procedure, (Sentencing Guidelines), 451 So.2d. 824 (Fla. 1984).

III CONCLUSION

The District Court reached the correct result in finding that the trial court erred by refusing to allow respondent to be sentenced under the guidelines.

The District Court also correctly interpreted Rule 3.701 by requiring reasons for departure from a recommended guideline sentence to be written rather than oral.

Changes in the guidelines enacted after sentencing should not be applied at resentencing following a direct appeal because (1) those who elected guidelines did so in reliance on the guidelines as they then existed (2) the guidelines are a legislative product, are substantive not procedural, and should not be applied retroactively (3) even if procedural, changes in the guidelines should not, as a matter of policy, be applied to resentencing.

The decision and opinion of the First District Court should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Wallace E. Allbritton, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U.S. Mail to Mr. Alfred Jackson, #834657, Post Office Box 37, Chattahoochee, Florida 32324, on this 24th day of October, 1984.

MICHAEL J. MINERVA