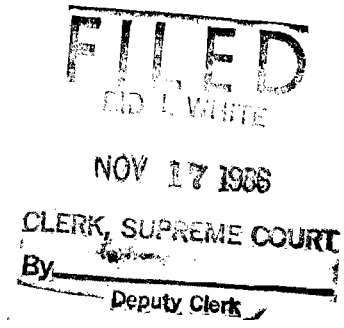
IN THE SUPREME COURT OF FLORIDA

CASE NO. 69, 411

IN Re: RULES OF CRIMINAL PROCEDURE
(Sentencing Guidelines, 3.701, 3.988)



A RESPONSE TO RECOMMENDATIONS
TO REVISE SENTENCING GUIDELINES
BEFORE THE FLORIDA SUPREME COURT

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PREFACE

The Chief Justice of the Florida Supreme Court, by Amended Order dated the 17th day of October, 1986, has requested that persons interested in providing a response to the recommendations of the Sentencing Guidelines Commission provide such response by no later than the 17th day of November, 1986. Not all of the ten separate recommendations pending before the Supreme Court have been addressed in this response. Only those recommendations which the Respondents believe are contrary to advancing the avowed principles and goals of guidelines sentencing are addressed. The five arguments that follow are not submitted in an attempt to advocate any position other than the retention of an effective form of determinate sentencing.

Respondent Sundberg is a member of the Sentencing Guidelines Commission.

Respondent Glickstein is a judge of the District Court of Appeal, Fourth District.

Respondent Moorman is the Public Defender for the Tenth Judicial Circuit, State of Florida and is a member of the Sentencing Guidelines Commission.

ARGUMENT I

WHETHER THE FLORIDA SUPREME COURT SHOULD REVISE THE STATEWIDE SENTENCING GUIDELINES TO CONFORM WITH THE RECOMMENDATION TO WIDEN EXISTING RANGES OF PUNISHMENT

The Sentencing Guidelines Commission has submitted a recommendation to drastically alter the structure of recommended punishments under guidelines sentencing. The effect of the recommendation is to allow a greatly increased range of sanction, both as to type and length, than is currently provided. The apparent rationale upon which this recommendation is founded is the perception that the five District Courts of Appeal are generating five separate interpretations of the guidelines through appellate decision which creates uncertainty in applying guidelines. The proponents of change urge that an expansion of sanctions available in individual ranges will decrease the need to deviate and thereby reduce the conflicting interpretations of the guidelines by making departures an infrequent occurrence.

This rationale may appear tantalizing upon first blush but is based on an insubstantial factual foundation. To begin with, the real problem in deviating, as it appears in the case law, is centered almost exclusively in aggravations. Yet, only 7.2% of the cases sentenced under guidelines involve aggravations.[1] Of the cases sentenced under guidelines, 81%

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[1]Office of The State Courts Administrator, Compliance Rates (July 1, 1986).

result in the recommended sentence being imposed.[2] Those cases involving departures in aggravation do not all result in appellate review.

It is clear that in the vast majority of cases sentenced under guidelines, the existing structure of ranges of punishment are entirely satisfactory, and the need to aggravate is an occasional occurrence rather than a persistent problem. If the existing structure is not "broken", then why "fix" it?

In addition to radically restructuring the ranges of punishment where there is no real justification provided by the experience of implementation, the recommendation carries with it the probability of reinjecting unreasonable disparity into criminal sentencing.

> Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining their relative importance in the sentencing decision.[3]

The method by which unwarranted variation is eliminated is to channel judicial discretion by establishing narrow ranges of punishment which are to be imposed after the specific offense-related and offender-related criteria are weighed in the scoring calculation which occurs when a scoresheet is prepared. The promise of reduction in subjective interpretation and evaluation

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[2] Id.
[3] Fla.R.Crim.P., 3.701(b).

of criteria is empty unless the range of available punishment is limited. Under the recommendation, variation is not only probable, but potentially enormous in consequence.

Variation in sentencing becomes an issue of fairness when similarly situated offenders receive unequal treatment. The recommendation will allow for disparity to take three forms. The first form would be durational disparity by allowing a sentencing court the discretion to impose upon two similarly situated offenders two vastly different sentences in terms of length. In eight of the nine offense categories, the recommendation would restructure the third cell of punishment to range from 7 to 17 years incarceration. Accordingly, of two offenders who receive a recommended punishment of the third cell, one could receive 7 years and the other 17 years. Neither sentence would be a departure but would represent a ten year difference in length. This unfair consequence is offered for the purpose of reducing the espoused confusion generated by appellate review encountered in less than 7% of guidelines sentences.

The second form of disparity is not only durational but qualitative in nature. Under the recommendation, the first cell of punishment of all nine categories would offer the choice of probation, community control, or 12-36 months in the state prison system. Of two similarly situated offenders in this cell, one could remain in the community under probation or community control supervision and the other one could be sentenced to up to

three years in the state prison system. The clearest form of variation in punishment is when one offender remains in the community and another goes to state prison. Those who remain in the community do not suffer the social stigma attached to prison confinement and may even enjoy the benefit of a withholding of adjudication and thereby avoid a formal criminal record. Of the sentences recommended under the guidelines, 81.8% would fall within this expanded first cell.[4] A large number of offenders who receive a recommendation of first cell punishment would be first time offenders. This recommendation allows any felony offender, no matter how low his or her point total, to be sentenced to state prison. Can the State of Florida afford such a policy to exist on financial, as well as social, considerations?

Lastly, this recommendation will allow for an additional form of disparity in the instance of two offenders with point scores falling within the same cell but positioned at opposite ends of the range of points assigned to that particular cell. The disparity occurs when the offender with a larger sum of points at the top level of the range receives the mildest sanction available in the cell and the offender with a lower sum of points at the lowest level of the range receives the maximum sanction available in the cell. The widening of the ranges will

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[4]Office of The State Courts Administrator, Comparison of Distribution of Cases Under Current and Revised Sentence Ranges (August 15, 1986).

enlarge the variation that could occur under our present system. Such an application makes a sham of the process of interpreting criteria and defining their relative importance in the sentencing decision. It allows for a virtual return to the unbridled discretion sentencing guidelines were adopted to limit. This is not truth in sentencing. It is no more than sentencing on ad hoc basis.

The State of Florida has only one criminal code. If we, in fact, are to live by the rule of law then the sentencing response to violation of that code should be consistent for similarly situated offenders regardless of the locale of the offense or the subjective attitudes of the sentencing judge.[5]

The coupling of an objective scoring process which defines and weighs criteria with ranges of punishment that confer extraordinary latitude is not an effective tool to eliminate unwarranted variation. It will invite variation and will result in a sentencing consequence that neither appears nor is, in fact, fair. The Legislature has mandated a system of equity in sentencing under the criminal code.[6] This recommendation will undo that which has been put into place, for the stated goal of reducing uncertainty in less than 7% of the sentences. It is infinitely preferable to have difficulty of application in 7% of the sentences than to allow for wide ranging variations in 100%

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[5] Compare Fla.R.Crim.P., 3.701(b).

[6] See, Legislative Statement of Intent, Ch. 82-145, Laws of Fla.

of the sentences.

The recommendation will further impede the ability to evaluate the potential sanction to be applied in a particular case. This will undercut the goal of "truth in sentencing" by eliminating the predictability narrower ranges of punishment provide. Although adjustments in charges filed can vary the scoring process on a scoresheet, narrow ranges make charge puffing, as well as defense posturing, more manageable by eliminating the uncertainty inherent in wide ranges which confer vast discretion. The establishment of the "going rate" for definable criminal conduct which results in conviction promotes an honest application of a singular criminal code. Efforts to maintain the rule of law should be promoted, not diluted. The process of application of criminal sanctions must not only appear to be fair, but the consequence must also, to the greatest extent possible, be equitable. The pursuit of equal justice requires no less. The recommendation under consideration will so thoroughly undermine the principles upon which determinate sentencing is based that it cannot be supported. The State of Florida cannot indulge in such a course and hold any hope of achieving equity in sentencing.

That disparity will result when vast discretion is allowed cannot be seriously questioned.[7] A recent editorial in the Miami Herald noted than when 50 federal judges were given a

[7]Ch. 82-145, Laws of Fla.

file on an extortion case and asked to recommend a sentence, the results ranged from 3 years in prison to 20 years plus a $65,000 fine.

Another example is found in a draft paper of a research study on disparity in sentencing in the Superior Courts of Maine, presented at the 1986 annual meeting of the Academy of Criminal Justice Sciences in Orlando during March of 1986.[8] The data analyzed consisted of sentences imposed by the 14 Superior Court judges on eight identical criminal cases that had been disposed of previously in Maine's courts. Superior Court judges were chosen as they are the most experienced members of Maine's judiciary in criminal sentencing and are responsible for imposing sentences on felony convictions.[9] The eight cases involved convictions for crimes against persons and were paired into four offense categories, which consisted of manslaughter, vehicular manslaughter, robbery, and assault. Presentence reports provided the judges were the actual reports used at trial. None of the cases involved sentences recommended by prosecutors.

The participants were operating in the same statutory environment, were experienced in criminal sentencing, and were imposing sentences on the same factual set of circumstances. Ideally, substantially the same or at least similar sentences should have resulted. Instead, wide variations occurred. Had

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[8]Donald F. Anspach and S. Henry Monsen, Sentencing Guidelines, A Solution in Search of a Problem? (1986)

[9]Anspach and Monsen, supra at 7.

each of the eight defendants been sentenced by the judge imposing the most severe sanction in each case, a total of 972 months, or 81 years, of incarceration would have been imposed for these eight cases. Had the most lenient judge in each case actually imposed the sentence, a total of 111 months, or 9 years, would have been imposed.[10] This represented a difference of 72 years, or 861 months.

Noting that this analysis did not in itself prove disparity, the researchers next compared the range of variation in sentences by comparing individual sentences with the mean sentence length for each offense sentenced in the experiment. They concluded that of 103 sentences, 50 exceeded the range the researchers established as an indication of reliabilty in sentencing for variation for a particular offense.[11] Moreover, the sentences for all but one of the eight offenses showed that over 30% of the judges exceeded the established range. In 50% of the total cases, over 50% of the judges exceeded the established ranges.[12] (The full text of the draft paper appears in Appendix "A.")

As Judge Frankel has stated:

> The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the divergencies are

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[10]Anspach and Monsen, supra at 11.
[11]Anspach and Monsen, supra at 16.
[12]Anspach and Monsen, supra at 16.

> explainable only by the variations among the judges, not by material differences in the defendants or their crimes. Even in our age of science and skepticism, the conclusion would seem to be among those still acceptable as self-evident. What would require proof of a weighty kind, and something astonishing in the way of theoretical explanation, would be the suggestion that assorted judges, subject to little more than their unfettered wills, could be expected to impose consistent sentences.[13]

Although the proposed recommendation does not mark a return to the scope of discretion that characterized indeterminate sentencing, it possesses so similar a potential to indiscriminately choose a quantum of punishment as to be indistinguishable in consequence, even when engrafted onto an objective scoring system of sentencing that proposes to eliminate unwarranted variation and achieve consistency.

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[13]Frankel, M., 1972 Criminal Sentences, Law Without Order, at 21, New York, NY: Hill and Wang.

ARGUMENT II.

WHETHER THE FLORIDA SUPREME COURT SHOULD CONCUR IN THE RECOMMENDATION THAT THE FLORIDA LEGISLATURE ABOLISH APPELLATE REVIEW OF DEPARTURE SENTENCES WHERE THE SENTENCE IMPOSED IS WITHIN THE MINIMUM AND MAXIMUM LIMITS OF PUNISHMENT ESTABLISHED BY GENERAL LAW.

The Sentencing Guidelines Commission has recommended that the Florida Legislature abolish appellate review of departure sentences. This proposal is in the nature of a substantive law change rather than a procedural law change. Nonetheless, it is a matter for consideration by this Court because of the unique nature of the cooperative effort between the judiciary and the legislature that has resulted in Sentencing Guidelines.[14]

The recommendation is based, in part, upon the perceived confusion existing in the decisions emanating from the appellate courts and, in part, from the frustration experienced by trial courts in being able to identify and articulate a "clear and convincing" reason to depart from a recommended sentence that will be upheld upon appellate review.[15] As was set forth in the previous argument, the need to revise is insignificant in comparison to the potential for damage to the principles and goals which prompted the Legislature to enact sentencing guidelines.

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[14]Ch. 82-145, Laws Of Fla.
[15]Sec. 921.001(1), Fla. Stat. (1985).

The focus is again on departures in aggravation. This form of departure occurs in only 7.2% of all guidelines sentences.[16] Fully 81% of all guidelines sentences impose the recommended punishment.[17] The potential for harm, however, is widespread in consequence.

Accompanying the implementation of sentencing guidelines was the elimination of parole eligibility for offenders sentenced under the guidelines or for offenses committed on or after October 1, 1983.[18] It should be recognized that with the abolition of the right to appellate review of departure sentences, fairness requires that some form of "safety net" be substituted. The obvious choice would be a return to parole release. The need to provide some check against the grossly unfair or disproportionate sentence is necessary to achieve a fair and equitable sentencing system. If the check does not exist in the sentencing process, then it must occur in the release procedure.

A return to parole is not an insubstantial issue. The abolition of parole eligibility for offenses occurring on or after October 1, 1983, was a major policy change in the criminal justice system which occurred only after years of serious debate and consideration by the legislature. A recommendation to

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[16]Office of The State Courts Administrator, Compliance Rates (July 1, 1986).
[17]Id.
[18]Sec. 921.001(8), Fla. Stat. (1985).

eliminate the form of review which was substituted for it must arise from a more substantial basis than the confusion perceived to exist in 7% of guidelines sentences.

Furthermore, "truth in sentencing" will be sacrificed by a return to parole release. The Legislature of Florida has made a clear choice concerning the retention of parole release in conjunction with Sentencing Guidelines.[19] This Court should give due weight to that established policy and reject this ill-conceived and unwarranted recommendation.

The use of clemency as a "safety net" may be advanced as an alternative to parole release. The sheer volume of sentences which would appear before the Governor and the Cabinet for action would consume a substantial amount of the time of that body. It also should be remembered that the parole system came into being, in part, to relieve the Governor and Cabinet from the politically charged responsibility of directly dispensing conditional pardons.[20] The State of Florida should strive to learn from experience, not merely repeat it.

The removal of appellate review will essentially eliminate the ability to ensure that trial judges will impose sentences that are consistent with the applicable guidelines recommendation or, alternatively, that they will articulate

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[19]Ch. 82-145, Laws of Fla.

[20]Senate Committee on Corrections, Probation and Parole, 1985. The Florida Parole and Probation Commission: Its Past and Future. Tallahassee, Florida.

"clear and convincing" reasons to deviate. Without appellate review, sentencing guidelines become descriptive. A comparison of compliance rates existing under the current prescriptive guidelines structure vividly illustrates the potential for undermining the implementation of an equitable sentencing policy if guidelines assume a descriptive form. Under our present form of guidelines, Putnam County aggravates 32.1% of the sentences imposed under guidelines, while Volusia County aggravates only 5.4% of the sentences imposed.[21] St. Johns County aggravates 23.1% of the sentences imposed under guidelines, while Flagler County aggravates only 6.5% of the sentences imposed.[22] These four counties comprise one contiguous judicial circuit. If the device which ensures that either recommended sentences are imposed or that "clear and convincing" reasons are articulated is removed, how much wider will be the variation in the Seventh Judicial Circuit much less the State of Florida at large?

The hope that judges will follow a descriptive form of sentencing guidelines is not realistic. During the test year under the Multijurisdictional Sentencing Guidelines Field Test conducted in four judicial circuits in Florida, the variability of sentences for similarly situated offenses <u>increased</u> over time. Sentences were <u>less</u> uniform in the test and comparison sites during the test year than during the year before. Taken as

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[21]Office of The State Courts Administrator, Compliance Rates (July 1, 1986).

[22]Id.

a whole, sentences in both the test and comparison sites became more severe during the test period. In addition, sentence severity differed among individual sites both before and during the use of guidelines and were amplified during the test year despite the guidelines effort.[23] (See Appendix "B".) The guidelines field test involved voluntary guidelines. If experience is any guide, The hope that judges will follow a descriptive form of guidelines is simply not realistic.

If the goals of determinate sentencing are to be achieved, then the proposal to abolish appellate review must be rejected. The value of equity in sentencing has been recognized as a goal in Florida. The removal of the method to ensure the application of determinate sentencing will invite a disregard for the standards and procedures that were the result of considerable labors.

There are other, practical reasons why this recommendation must not receive the approval of this Court. Appellate review provides more than an enforcement function. It provides The only opportunity to develop a body of sentencing case law to guide the trial courts in the sentence decision making process. If the trial courts are to be able to apply the stated policy of determinate sentencing, the ability of a body of

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[23]Deborah M. Carow and Judith D. Feins, 1985, Guidelines Without Force: An Evaluation of The Multijurisdictional Sentencing Guidelines Field Test, Executive Summary at 19. ABT Associates, Inc., Cambridge, Mass.

interpretive case law to provide the wisdom obtained through the experience of implementation in specific situations must not be lost. Confusion as to the limits of the trial court's discretion to deviate from the punishments recommended under sentencing guidelines will not be resolved by silence but through the development of a body of case law. To eliminate appellate review due to the frustration experienced in "fleshing out" application of an admittedly different approach to sentencing, is to "throw the baby out with the bathwater." How can the elimination of appellate review provide guidance? It will only invite the ad hoc solution of disregarding the recommended punishment when a "clear and convincing" reason is not easily available.

The abolition of appellate review also will have The effect of eliminating a viable mechanism for monitoring the implementation of guidelines sentencing. It will deprive those charged with the responsibility to evaluate and recommend the need for revisions in the existing structure of a valuable tool, a tool that can measure the wisdom, as well as practical viability, of the particular criteria that have been chosen to guide the trial courts in the sentence decision making process. What better method is available to evaluate existing criteria than to be able to examine the application of the reasons relied upon to go outside the punishment recommended by those criteria?

If there is no appellate review, there will be a reduced incentive to identify the reasons necessary to evaluate

the sufficiency of the recommended punishment. It could readily invite reversal of the proper decision making process. That is, the decision to impose a particular sentence could be made, and only then will thought be given to the reasons to justify departure.

The guidelines establish a policy of open and intellectually honest sentencing. This policy also will suffer when an aggrieved party is no longer able to have the decision of the trial court reviewed. Our system of justice allows for an individual to take the judgment of a trial court to an appellate court for review in almost all instances where that individual's interest or rights have been fully adjudicated in a court of law. The consequences of matters so comparatively inconsequential as a damaged automobile fender or a breached promise to perform a service are reviewable. The Commission's recommendation would mandate that any decision to go beyond the limits of punishment recommended by the guidelines be final. The possibility of unwarranted variation in sentencing cannot be eliminated by a descriptive guidelines system. Until such time as adequate reliance on a system of sentencing is ensured, the State of Florida cannot afford to abolish appellate review.

The occurrence of unwarranted variation when compliance with guidelines is not required has been adequately proven. The goal of equity in sentencing will not be promoted unless a method exists to ensure that recommendations for punishment are

prescriptively applied. Appellate review provides that method and multiple benefits in addition to enforcement. The cost of approval of this recommendation is great while the benefit, in comparison, is de minimus.

ARGUMENT III.

WHETHER THE FLORIDA SUPREME COURT SHOULD REVISE THE STATEWIDE SENTENCING GUIDELINES TO CONFORM WITH THE RECOMMENDATION THAT SENTENCES IMPOSED UNDER THE HABITUAL OFFENDER ACT NO LONGER BE SUBJECT TO SENTENCING GUIDELINES

The Sentencing Guidelines Commission has recommended that the guidelines be revised to allow a trial judge to impose a sentence under the Habitual Offender Act[24] without being bound to the recommended sentence. The net effect is that such a sentence will be separate from the guidelines and imposed as if the guidelines were not in existence. Habitual offender status will now be the practical equivalent of a "clear and convincing" reason for departure without there being any need to articulate it as such.

This Court has recently addressed this question and has adopted a position contrary to the recommendation.[25] In Whitehead, the Court reasoned that the language governing application of sentencing guidelines was explicit and unambiguous and did not exempt defendants sentenced under the habitual offender statute.[26] Additionally, this Court found that the guidelines did take into account the considerations of a defendant's prior criminal record and a factual finding that the

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[24]Sec. 775.084, Fla. Stat. (1985).
[25]Whitehead v. State, No. 67,053 (Fla. Oct. 30, 1986).
[26]Id., slip op. at 3.

defendant poses a danger to society.[27] In making these findings, due consideration was given to an attempt to preserve both statutes by reconciling their provisions. The Court found it could not do so.[28]

It is submitted that the recommendations made by the Sentencing Guidelines Commission has in no way altered the considerations upon which Whitehead is based. The revision does not speak to any of the concerns raised in Whitehead and is, on its face, contrary to the intent of the statutes. The adoption of this recommendation would legitimatize a doubling of factors, contrary to the intent of an objective scoring system, and allow for an arbitrary application of a harsher sanction on certain offenders subjected to habitual offender classification, where other offenders possessing a similar sentencing profile would not receive the harsher sanction.[29]

If the Florida Legislature intends to allow the two statutes to coexist, then such a statement will, no doubt, be forthcoming. Only then should the Sentencing Guidelines Commission take action to recommend the relation habitual offender status occupies to departures from a recommended sentence.

Even should such a chain of events occur, this Court should then carefully analyze how the application of the habitual

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[27]Id at 3.
[28]Id. at 1, 2.
[29]Id. at 5.

offender statute would impact on the concept of a uniform set of standards to guide the sentencing judge in the sentence decision making process.[30] Additionally, the issue of whether this type of recommendation makes habitual offender status a clear and convincing reason for departure will need to be revisited.

The recommendation cannot be approved under the current state of the law nor can it survive when balanced against the principles and purposes of our system of guidelines sentencing. The desire to increase the sanction for an offender who has a prior criminal record and who constitutes a danger to society must be realized in the adjustment of sentencing criteria. It cannot be accomodated in a fashion that would allow for an arbitrary application of harsher sanctions as the recommendation provides.

The Commission's belated application for rehearing of the Whitehead decision should be rejected.

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[30]See Fla.R.Crim.P., 3.701(b).

ARGUMENT IV.

WHETHER THE FLORIDA SUPREME COURT SHOULD REVISE THE STATEWIDE SENTENCING GUIDELINES TO CONFORM WITH THE RECOMMENDATION WHICH WOULD ALLOW A DEPARTURE TO BE UPHELD WHERE ANY ONE OF A NUMBER OF MULTIPLE REASONS IS FOUND TO BE CLEAR AND CONVINCING.

One source of resistance to the implementation of guidelines sentencing has been the assertion that sentencing judges have insufficient time to devote to making the sentence decision process an exercise of rational contemplation. However, constructive expenditure of that time is essential and, respondents submit, will be rewarding. Although much attention has been focused on the individual reasons to support a departure, comparatively little attention is paid to the necessary process of considering the sufficiency of a recommended sentence by rationally evaluating the criteria present in an individual case. If there are no criteria beyond those involved in the point calculation that can be identified and articulated, then the recommended sentence should be imposed. All too frequently, the decision as to an "appropriate" sentence is reached and then the scoresheet is consulted to see if the recommended sentence is compatible. The fact that departures occur where no scoresheet has been prepared is the most striking example of this improper approach to the sentence decision making process under guidelines. Another example occurs when a judge imposes a departure sentence but fails to articulate the reasons

for such an action.

These examples are not offered to criticize sentencing judges but to emphasize the potential that presently exists to subsconsciously subvert the deliberative process that is a goal of guidelines sentencing. If we have recognized that sentences are, at times, derived from subjective evaluations based on varying attitudes, then we must also recognize the value of requiring the sentence decision making process to be rationally based on accepted standards.

The purpose of guidelines has never been to straitjacket judges. As the statement of purpose clearly indicates:

> While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.[31]

Intellectual honesty comports well with the concept of equity in sentencing. It requires a decision to result from an objective evaluation of established standards. It also requires that the fuller discretion available under indeterminate sentencing must now be exercised only where "clear and convincing" reasons can be identified and articulated. Although the recommendation to allow any reason found to be "clear and

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[31]Fla.R.Crim.P., 3.701(b)(6).

convincing" to sustain a departure will not eliminate the contemplative nature of this exercise of discretion, it is no more than a "shortcut" intended to reduce the time and effort devoted to the sentence decision making process.

The debate will rage for some time into the future over the sufficiency of punishments recommended under our present system of guidelines. Any particular area of criminal behavior may receive the scrutiny occasioned by public outcry. One area which should never be the subject of emotional or politically driven debate, arising from limited instances of apparent injustice, is the need to assure the continuation of "truth in sentencing." This concept has received a black eye as the public has become increasingly aware of the limitations of finite state and local correctional facilities. At a policy level, there can be no disagreement that equity is a goal which should be vigorously pursued. Any attempt to weaken that pursuit by easing the structure of the decision making process required to assist in the achievement of that goal should be carefully scrutinized

The recommendation seems to view the articulation of reasons as a contest of quantity, where it should, instead, be a measure of quality. It is not a questions of x's or o's; nor is it a process which contemplates a review that weighs right and wrong to determine which has achieved a preponderance. The process should produce a result that will make it appear to an appellate court that the departure was the product of an

evaluation and articulation according to established standards. There are no magic words or numbers. Any attempt to quantify a minimum standard to avoid reversal only detracts from the attempt to assure a linking of the exercise of discretion to the rational deliberation necessary to achieve "truth in sentencing."

The conclusion is inescapable that a trial court in citing multiple reasons does so with the consideration of the impact of each separate reason on the decision to exercise the discretion to depart. If some of those reasons are found to be improperly relied upon, then a review of the action to depart as well as the quantum of punishment ultimately imposed is required on the basis of fairness. Should a reviewing court be required to conclude that the same action would have taken place absent consideration of the impermissible reasons?

Another problem with the recommendation would be the temptation to rely upon reasons which have been approved in other cases where those reasons would not be cited in the decision making process but for the fact that they have received a prior stamp of approval by appellate decisions in prior cases. The application of the recommendation will also weaken the ability to monitor the implementation of guidelines to the extent it manufactures reasons. Those reasons upon which a judge bases his decision may not be disclosed for fear of rejection where the safe choice of a proven, valid reason is available.

The guidelines are at a critical juncture. Although the vast majority of sentences recommended are imposed, attempts continue to be made to weaken the procedure which promote the principles and goals of determinate sentencing. The high compliance experienced to date may not continue if means to "shortcut" the procedures are embraced to ease the burden that arises in the small minority of cases. A continuation of the current procedure will slow this "backslide" that is to be expected in implementing any new policy which departs substantially from the status quo. The recommendation should be rejected.

ARGUMENT V.

WHETHER THE FLORIDA SUPREME COURT SHOULD REVISE THE STATEWIDE SENTENCING GUIDELINES TO CONFORM TO THE RECOMMENDATION TO EXPAND THE APPLICATION OF VICTIM INJURY SCORING.

The Sentencing Guidelines Commission has recommended a major revision in the manner in which victim injury is scored. The recommendation will remove the necessity that physical impact or contact be an element of an offense at conviction and removes the limitation of physical trauma.[32] The problem with this recommendations is in the lack of guidance it provides for application and the potential it carries for abuse of the objective nature of the scoring system.

Previous debate over victim injury scoring centered upon the ability to score psychological injury. The Sentencing Guidelines Commission has now chosen to allow for victim injury to be scored for any injury. An example would be a situation where a merchant is given a worthless check which he deposits into his business account. The merchant then writes a check or checks in reliance upon the presence of funds represented by the check. As a result of the check being dishonored, the merchant finds that he is overdrawn and that certain of his checks are dishonored for insufficient funds. One can rationally argue that the merchant has been the victim of a crime and that he has been injured.[33] Having reached this conclusion, how does the sentencing court evaluate the level of injury? The choices are

none, slight, moderate, and death or severe.[34] If the merchant is impecunious, then the level of injury is greater than if the merchant is of greater financial means. The problem is that the guidelines prohibit sentencing with respect to economic status.[35] Surely this prohibition must apply to the victim as well as the defendant.[36]

Another problem could be encountered with psychological injury. As a practical matter, every victim of crime is injured psychologically to some extent. With the breadth of the recommendation, this method of scoring will be an open invitation to compensate for what may be perceived to be an inadequate assessment of points on other matters. The guidelines represent, to a certain extent, historical sentencing practices.[37] That victim injury was a consideration in historical sentencing practices is a conclusion that needs no citation of authority. Furthermore, the identification of victim injury as a factor in the objective scoring system under guidelines sentencing is only half of the equation. The other half is how victim injury has been weighed. The ability to evaluate the weight to be given this criteria as it appears in individual cases must rest on a definable standard of application.

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[32]Committee note to Fla.R.Crim.P., 3.701(d)(7).
[33]See, Sec. 832.05, Fla.Stat. (1985).
[34]Fla.R.Crim.P., 3.988(f).
[35]See Fla.R.Crim.P. 3.701(b)(1).
[36]See, State v. Mischler, 488 So.2d 523, 526 (Fla. 1986).
[37]Fla.R.Crim.P. 3.701(b).

The need to expand the scoring of victim injury is not inappropriate. The method the Sentencing Guidelines Commission has chosen is. The guidelines should recommend penalties that give consideration to the circumstances surrounding an offense, but must accomplish that by an objective scoring system that is not subject to such a wide ranging and potentially standardless application. The recommendation ignores the consideration given to historical sentencing practices in order to respond, in an overreactive manner, to a valid concern.

Thus, this recommendation should be rejected not on the basis of the purpose sought to be accomplished but upon the means chosen. While some may view the narrow application of criteria in the scoring process as an unwarranted limitation, it is a necessary limitation on the subjectivity in interpreting specific criteria and in defining their relative importance in the sentencing decision.[38]

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[38]Fla.R.Crim.P. 3.701(b).

DATED this 17th day of November, 1986.

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