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IN THE SUPREME COURT OF FLORIDA

ALPHONSO P. SMITH,

Appellant,

CASE NO. 72, 862

v.

STATE OF FLORIDA,

Appellee.

________________________________/

BRIEF OF AMICUS CURIAE

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Statement of the Case and Facts

The *amicus* accepts the statement of case and facts as stated on pages one through four of Appellant's brief with the following additional comments.

The evidence at trial proved beyond a reasonable doubt that Miss J[redacted] P[redacted] was awakened in her apartment bedroom sometime between 4:00 and 4:30 a.m. on May 23, 1983, by the Appellant, who forced her to perform oral sex on him. After rummaging through Miss P[redacted]' apartment, he returned his attention to the victim, first performing oral sex on her, and then engaging in nonconsentual sexual intercourse. *Smith v. State*, 479 So.2d 804, 805 (Fla. 1st D.C.A. 1985).

The Appellant was found guilty of burglary of a dwelling and one count of sexual battery, although he could have been convicted of three separate sexual batteries.

Appellant apparently elected to be sentenced under the sentencing guidelines promulgated by the Court pursuant to Sec. 4, Chapter 83-87, Laws of Florida (1983), which *amended* Sec. 921.001, Fla. Stat. passed by the Legislature in 1982, Chapter 82-144, Laws of Florida (1982), and was sentenced to 15 years for the burglary and 10 years for the sexual battery on March 4, 1984. (Amicus' Appendix A).

Other facts relevant to a disposition of the appeal will be included in the argument portion of this brief.

QUESTION PRESENTED

WHETHER THE SENTENCING
GUIDELINES ACT AND THE
RULES PROMULGATED PURSUANT
THERETO ARE UNCONSTITUTIONAL
AS A VIOLATION OF THE
SEPARATION OF POWERS AND AN
UNLAWFUL DELEGATION OF
LEGISLATIVE AUTHORITY
AND RESPONSIBILITY

SUMMARY OF THE ARGUMENT

The Florida Sentencing Guidelines Act and the rules promulgated pursuant thereto are unconstitutional. Sentencing guidelines in Florida constitute substantive law and the Legislature was, and is, without authority to delegate that responsibility to the Guidelines Commission or to this Court, which is wholly without constitutional authority to promulgate rules pertaining to substantive rights.

Moreover, the inclusion of judicial officers on the Guidelines Commission and including this Court in the legislative process of developing the guidelines violates the Separation of Powers provision of the Florida Constitution because it requires judicial officers to perform legislative functions and impairs the proper judicial function of the judiciary.

Assuming the guidelines are not unconstitutional, the sentences imposed upon Appellant must nevertheless be affirmed because the crimes of which he was convicted were committed prior to the effective date of Sec. 4 of Ch. 83-87, to-wit: October 1, 1983 and under Art. X, Sec. 9, Fla. Const. the guidelines could not be applied to the Appellant.

ARGUMENT

The Appellant contends that the trial judge erred in holding the Sentencing Guidelines Act, and as a consequence thereof the Rules promulgated thereunder, unconstitutional on the grounds that said Act violated the Separation of Powers provision of the Florida Constitution by unlawfully delegating to the Commission and this Court powers to enact substantive law and by requiring judicial officers to participate on the commission. (App.'s Appendix C).

The Appellant's argument as the Amicus understands it is that the guidelines are "predominately procedural" in that they merely guide the trial judges of this State in the exercise of sentencing discretion and therefore were properly promulgated under the Court's authority to enact rules pertaining to practice and procedure; that assuming they are substantive they were enacted into law by the Legislature; and, that the joint action by this Court and the Legislature was a matter of convenience to effect the salutary purpose of removing disparity in sentencing by cooperative efforts. (App.'s brief at p.17).

The Amicus respectfully disagrees and submits this Court should affirm the trial judge's order declaring the Act unconstitutional. Gubiensio - Ortiz v. Kanahele, ____F.2d ____ (9th Cir., Aug. 23, 1988), Case No. 88-5848, not yet reported, a copy of which is included as Amicus' Appendix B; United States v. Bogle, 2 Fed. L.W. D277 (S.D. Fla., June 15, 1988) (en banc); United States v. Brodie, 686 F.Supp. 941 (D.D.C. 1988); and United States v. Brittman, 687 F. Supp. 1329 (E.D. Ark. 1988).

Indeed, the Amicus submits this Court's duty to maintain and preserve the separation of the three branches of government, Pepper v. Pepper, 66 So.2d 280 (Fla. 1953), compels an affirmance of that order. In Pepper this Court, like the federal courts, has recognized its special duty to insure the separation of governmental departments is maintained. This Court said:

> [2] The courts have been diligent in striking down acts of the Legislature which encroached upon the Judicial or the Executive Departments of the Government. They have been firm in preventing the encroachment by the Executive Department upon the Legislative or Judicial Departments of the Government. The Courts should be just as diligent, indeed, more so, to safeguard the powers vested in the Legislature from encroachment by the Judicial branch of the Government.
>
> The separation of governmental power was considered essential in the very beginning of our Government, and the importance of the preservation of the three departments, each separate from and independent of the other becomes more important and more manifest with the passing years. Experience has shown the wisdom of this separation. If the Judicial Department of the Government can take over the Legislative powers, there is no reason why it cannot also take over the Executive powers; and in the end, all powers of the Government would be vested in one body. Recorded history shows that such encroachments ultimately result in tyranny, in despotism, and in destruction of constitutional processes.
>
> [3] The Judicial Department is not concerned with the wisdom of such legislation as that involved in the present litigation. Whether divorces should be granted, and if granted, only for the cause of adultery; whether the residence requirement should be three months, six months, or two years, are matters for the Legislature to decide; and when the decision has been made, it becomes incumbent upon the Judicial branch to enforce it.

> The tendency to reach out and grasp for power in the sphere of governmental activity; for one branch of the Government to encroach upon, or absorb, the powers of another, is the means by which free governments are destroyed. For those who read and listen with discernment, examples of such despotism and tyranny immediately appear in the world today. It is the duty of the Judicial Department, more than any other, to maintain and preserve those provisions of the organic law for the separation of the three great departments of Government.

Id. at 284.

Given the year that Pepper was written it is clear that the Court was referring to Nazi Germany and what that government meant to individual freedom and liberty.

The Appellant, citing this Court's decision in In Re Advisory Opinion to the Governor, 276 So.2d 25 (Fla. 1973), states that the separation of powers "is designed to avoid excessive concentration of power in the hands of one branch" and that "when two branches act in concert to achieve reforms" there is no "excessive concentration of power at the expense of the other". (App.'s Brief at 18).

The Amicus submits Appellant misunderstands the purposes of the Separation of Powers as conceived by our Founding Fathers. It was not created to protect one branch from the other; it was created to protect the citizens from an arbitrary use of governmental power and tyranny, which is the result of a consolidation of power. James Madison in The Federalist No. 47, at 301 stressed that political power must be separate for

> "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many...may justly be pronounced the very

definition of tyranny..."

As noted by the court in Bogle, supra:

> The aggregation of the legislative and judicial power in the same hands is as unwelcome today as it was when this nation was founded As framed by Madison, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." The Federalist No. 47, at 303 (J. Madison) (emphasis in original). An underlying basis of the separation of powers doctrine, declared by the Framers and reiterated through the case law, is that "[i]t is impossible to keep the judges too distinct from every other avocation than that of expounding the laws." The Federalist No. 73, at 446-47 (A. Hamilton). Hamilton succinctly detailed the essence of the danger that might be encountered by the aggregation of these powers:
>
> From a body which had had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges.
>
> The Federalist No. 81, at 483 (A. Hamilton); see also Buckley, 424 U.S. at 123 ("executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution."
>
> Id at D284

And while it may be convenient for the Legislature to include judicial officers on the Commission and this Court to bring about "reform" "convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government", Bowsher v. Synar, 478 U.S. _____, 92 L.Ed.2d 583,

603, 106 S.Ct. 3181, 3194 (1986); Rather, "convenience is the hallmark of consolidated power." Kanakele, supra, at 12.

The Appellant's contention that the sentencing guidelines are predominately procedural is wholly without merit. The Legislature in the act itself declared that under the Constitution it was "delegated the authority for determining the sentence to be given for the various categories of crimes", Ch. 82-144 Laws of Florida (1982) and in Sec. 921.001(1) it declared that "criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law, and as such is a matter properly addressed by the Legislature".

Of course, such a declaration is consistent with this Court's pronouncement in Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975) wherein it held:

> [5,6] Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions. See In re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204 (Fla. 1973); In re Florida Rules of Criminal Procedure, 272 So.2d 65, amended 272 So.2d 513 (Fla. 1973).
>
> [7,8] The prescribed punishment for a criminal offense is clearly substantive law. State v. Garcia, 229 So.2d 236 (Fla. 1969). An argument can be made that the manner of the imposition of the sentence is procedural; however, it is our opinion that whether a sentence is consecutive or concurrent directly affects the length of time spent in prison and therefore, rights are involved,

> not procedure. A judge should affirmatively state whether a sentence is consecutive or concurrent; when he fails to do so, it necessarily follows that the legislature has the primary authority to determine if the sentence should be consecutive or served concurrently with another sentence.

Id. at 475.

In light of Miller v. Florida, 482 U.S. ____, 96 L.Ed. 2d 351, 107 S.Ct. 2446 (1987) it cannot seriously be contended the sentencing guidelines are procedural in nature. Brodie, at 946; Kanahele, at 12; Brittman, at 687; and Bogle, at D286. All of the aforementioned courts correctly held that under Miller the federal sentencing guidelines which are remarkably similar to Florida's are substantive and could not be sustained under the court's authority to promulgate rules relating to practice and procedure.

In Boyle the Court said:

> These Guidelines ordain and fix punishment for all federal crimes. This sweeping rule-making function does not only "assist" and "channel" the sentencing judge in carrying out his adjudicatory tasks. Far more important, the Guidelines are designed expressly to regulate the conduct of the public, and like all criminal statutes, seek to proscribe wrongful conduct - by implementing distinct policy choices that reflect, inter alia, the seriousness of the crime committed, the general purposes of deterrence and punishment, and the role of the defendant. We are hard-pressed to find a law more practically substantive than one which effectively determines how long an individual will be incarcerated or whether probation will be eliminated as an alternative to imprisonment, or how great a fine the law may exact as a penalty. Indeed, the act of promulgating rules of punishment is by nature as substantive as the act of labeling conduct criminal. Both sets of rules are general, binding and prospective;

> both sets are designed to proscribe wrongful behavior; and both require the maker to choose from among fundamental and often competing theories of penology.
>
> Some guidance is found in the recently decided case of Miller v. Florida, 107 S.Ct. 2446 (1987). In that case the Supreme Court examined whether the application of Florida's sentencing guidelines violated the Ex Post Facto clause. Generally, "no ex post facto violation occurs if a change in the law does not alter 'substantial personal rights,' but merely changes 'modes of procedure which do not affect matters of substance.'" Id. at 2451 (quoting Dobbert v. Florida, 432 U.S. 282, 293 (1977)) (other citation omitted). In determining that the Florida sentencing guidelines were not procedural, a unanimous Court expressly rejected the claim that the guidelines merely channeled the exercise of the judge's discretion, and found that they actually did affect the defendant's substantive rights. Central to this determination was the Court's conclusion that the sentencing guidelines increased the defendant's punishment as well as affected the possibility of appellate review. "[A] change in the law that alters a substantial right can be ex post fact," the Court wrote, "'even if the statute takes a seemingly procedural form.'" Id. at 2543 (quoting Weaver v. Graham, 450 U.S. 24, 29 n.12 (1981)). While Miller presented no separation of powers questions, the clear import of the Court's holding is that the application of sentencing guidelines implies more than a mere alteration in the procedure by which a convicted defendant is sentenced.
>
> Boyle, supra, at D286.

And in Kanahele, the Ninth Circuit Court of Appeals said:

> In addition to common sense and observation of the Commission's actual conduct, we find support for our conclusion that the sentencing guidelines are substantive in Miller v.Florida, 107 S.Ct. 2446 (1987). Petitioner there challenged a revision to a state law remarkably similar to the Commission's sentencing guidelines on the ground that the revision violated the ex post facto clause. While not changing the

> statutory range of permissible punishments for any crime, the revised Florida guidelines increased the presumptive sentence range for the crime of which Miller was convicted. Id. at 2452. In determining the applicability of the ex post facto clause, the Court in Miller had to first decide whether the guidelines were merely procedural, in which case the clause would not apply, or substantive, in which case it would. See id. at 2452-53. Even though the Florida scheme permitted sentencing judges to depart from the guidelines if they found by clear and convincing evidence that the guideline sentences were inappropriate, the Court had no difficulty concluding that the change in sentencing law was substantive. The Court noted that"[although the distinction between substance and procedure might sometimes prove elusive, here the change at issue appears to have little about it that could be deemed procedural. ... [T]he amendment was intended to, and did, increase the 'quantum of punishment' for (certain) crimes." Id. at 2453. Precisely the same can be said about the Commission's guidelines. See p. 24 supra.

Id. at p. 12.

Given the fact that the guidelines constitute substantive law and not procedural, they were matters exclusively for the Legislature and could not be promulgated by this Court under Art. V, Sec. 2(a). Benyard v. Wainwright, supra; Booker v. State, 514 So.2d 1079 (Fla. 1987) ("[t]he power to declare what punishment may be assessed against those convicted of crime is not a judicial power, but a legislative power, controlled only by the provisions of the Constitution."). In Booker this Court recognized that Sec. 921.001(5) was a proper legislative enactment and thus not a violation of Art. II, Sec. 3 because the statute "...recognizes that setting forth the range within which a defendant may be sentenced is a matter of substantive law,

properly within the legislative domain."

Interestingly, Judge Swartz, citing to Benyard, supra, expressed "grave concern as to the constitutional propriety of the determination of such an obviously substantive, legislative matter as criminal sentencing through the medium of a rule of court..." State v. Cardide, 473 So.2d 1362, 1363 (Fla. 3d D.C.A. 1985). The issue was not reached because it was not ripe. Id. at 1363. Later, Judge Swartz retreated solely because of this Court's characterization of the guidelines as procedural in State v. Jackson, 478 So.2d 1054 (Fla. 1985). See Van Horn v.State, 485 So.2d 1381, 1381-83 (Fla. 2d D.C.A. 1986). Of course, in light of Miller supra, this Court receded from Jackson. Wilkerson v. State, 513 So.2d 664 (Fla. 1987).

The Appellant's reliance upon Vaught v. State, 410 So.2d 147 (Fla. 1982) and his analogy to the Court's treatment of the Evidence Code and Speedy Trial Rule are unavailing. Vaught, supra, upheld Florida's death penalty law against a claim that it was unconstitutional because it invaded this Court's rule making power. Vaught actually supports the position of the Amicus because it held the sentencing criteria set forth Sec. 921.141, Fla. Stat. are "matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty". Id. at 149.

The Florida Evidence Code was adopted after the Legislature enacted it, "to the extent that they are procedural"; the Court did not promulgate the code as rules to thereafter be adopted by the Legislature and that distinction is very real indeed.

Moreover, the Ninth Circuit Court of Appeals concluded the rules of evidence, like the rules of civil and appellate procedure were different than sentencing guidelines because the former related to litigation procedures and practice and not essentially substantive matters. Kanahele, supra, at 8.

Appellant claims that the method employed herein is no different than that employed in adopting the Speedy Trial Rule, (App.'s Br. at p. 19), where the Legislature directed this Court to promulgate a rule related thereto. This position is clearly untenable for this Court's Rule 3.191 was nothing more than an exercise of its Constitutional power as defined by Benyard, supra, to-wit: to provide rules of procedure to enforce a right. This Court did not create the right to a speedy trial for that right was already guaranteed by the Florida Constitution. Indeed, this Court in State v. Baker, 254 So.2d 207 (Fla. 1971) recognized this very fact and held the rule came within the orbit of the Court's rule making power under ARt.V, Sec. 3, Fla. Const. In short, the speedy trial rule involved no delegation of legislative authority to this Court: This Court merely exercised its proper constitutional duty to provide a procedural rule to enforce a substantive right that otherwise existed.

In truth and in fact, the sentencing guidelines involve substantive rights that can only be lawfully enacted by the Legislature and the duty to promulgate laws relating to such a fundamental right simply cannot be delegated to another branch or a commission composed of legislators, executive officers and members of the judiciary. As Judge Eisele so eloquently stated

in the Brittman case, supra,

> To sum up, ours is a representative democracy. The people choose their legislative representative and vest in them the powers to make the laws which will govern us. As stated by John Locke the people do not vest their elected legislators with the power to "make [others] legislators; the legislature has no power to transfer their authority of making laws and place it in other hands." At least this is true in core areas, such as this, where the most fundamental of our constitutional rights are implicated. What is more important that our personal freedom and liberty? Who shall determine the conduct that will warrant the loss of the freedom? And who shall determine the penalties that maybe imposed for such acts?
>
> Congress in its understandable frustration has attempted to take itself out of the crime and punishment business. But as unpleasant as the job may be, it is only the Congress-not the President, not some administrative agency (whether called "judicial" or "executive"), not the courts-that under our Constitution may determine what conduct shall constitute a crime and what the penalty shall be. Therefore, the delegation here violates the Constitution.
>
> In a different context, Chief Justice Rehnquist made a statement which this Court finds applicable to the present situation: "It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult if not impossible, to hammer out in the legislative forge." Indust, Union Dept. v. Am. Petroleum Inst., 448 U.S. 607, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980) (Rehnquist J., concurring). The Court holds that Congress, rather than an unelected administrative commission, must decide these crucial issues of Federal law.
>
> Id. at 1340.

Judge Greene in the Brodie case, supra, correctly concluded:

> Here, unlike in almost all the prior instances of delegation of legislative power, the matters being delegated involve not the regulation of economic forces and factors but basic policy decisions of law enforcement of criminal control, and of punishment. That this is a difference in quality and kind is obvious.
>
> "The power to define criminal offenses and to prescribe the punishments..resides wholly with the Congress." Whalen v. United States, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980); United States v. Wilterger, 18 U.S. (5 Wheat) 76, 95, 5 L.Ed. 37 (1820); see also Gore v. United States, 357 U.S. 386, 393, 78 S.Ct. 1280, 1285, 2 L.Ed.2d 1405 (1958). As Justice Brennan said in his concurrence in United States v. Robel, 389 U.S. 258, 276, 88 S.Ct. 419, 430, 19 L.Ed.2d 508 (1967), in the criminal law area, the "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people."
>
> Even under standards more generally applicable to delegation questions, the present Act would probably fail to pass muster, for Congress has given to the Sentencing Commission a mandate of such vagueness that it constitutes no real direction at all.
>
> Id. at 950.

Of course, the Sentencing Guidelines Act provided no standards whatsoever to the Commission and the Appellant concedes that at pages 20 and 21 of his brief, for he states "it is immaterial that standards were missing from the enabling legislation."

In Husband v. Cassel, 130 So.2d 69 (Fla. 1961) this Court said with regard to Legislative power and the delegation of such

power:

> [2] The legislative power of the State is vested in the Legislature and this power it may not delegate. Section 1 of Article III of the Constitution,F.S.A., provides:
>
> "The Legislative authority of this State shall be vested in a Senate and a House of Representatives, which shall be designated The Legislature of the State of Florida and the sessions thereof shall be held at the seat of government of the State."
>
> The Legislature may perform its function by laying down policies and establishing standards while leaving to selected ministerial agencies the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Spencer v.Hunt, 109 Fla. 248, 147 So. 282; Pridgen v.Sweat, 125 Fla. 598, 170 So. 653; Attwood v.State, Fla. 53 So.2d 825; 11 Am.Jur. Constitutional Law 240; Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947.
>
> In recognition of the foregoing principles the Supreme Court in Pridgen v. Sweat, 125 Fla. 598, 170 So. 653, 655 stated:
>
> "The Legislature may expressly authorize designated officials within definite limitations to provide rules and regulations for the complete operation and enforcement of the law within its express general purpose, but it may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying the law.
>
> Id. at 71, 72.

To suggest that the Legislature can delegate its responsibility without setting any standards is absolutely contrary to the law not to mention sound constitutional principles.

Appellant contends there has been no violation of the

Constitution even if sentencing guidelines are substantive law because the Legislature ultimately adopted the guidelines. No authority is cited for this profound statement but that does not eliminate the prohibition against judges performing legislative functions. Moreover, such an approach would make the Commission and this very Court nothing more than legislative sub-committees. The Framers surely did not have that in mind in separate co-equal branches of Government.

Related to the unlawful delegation of Legislative power is the inclusion of judicial officers on the Commission and requiring this Court to participate in the promulgation of sentencing guidelines. Article II, Sec. 3, Fla. Const. provides:

> "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Given the fact that the guidelines involve substantive rights and clearly within the legislative branch a judicial officer can not be privy to the drafting or passage of such laws.

The federal courts have found the Federal Sentencing Reform Act unconstitutional by including Article III judges as members of the Guidelines Commission. Kanahele at 15-19; Bogle at D 291-293; Brittman at 1342-1348; and Brodie at 948-949. The basis for this conclusion is that because the sentencing guidelines are political and legislative in nature the judicial service on the commission "significantly interferes with the impartiality of the judiciary." United States v. Brittman, supra, at 1346.

In Bogle the court specifically enumerated how participation

on the Commission could adversely affect the proper functioning of the judiciary. The Court observed:

> Alternatively, if measured by the two-pronged "functional" test enunciated in Nixon II, supra, we must still reach the conclusion that the involvement of the judiciary violates principles of separation of powers. The "potential" exists that the independence of federal judges may be affected because judges who must impose sentences under the Guidelines may be unable to impartially review them. <u>The Framers' intention that the judges ought not write the very laws they are called upon to interpret</u> and apply remains a real concern. It remains true the "[f]rom a body which had had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application." The Federalist No. 81, at 483 (A. Hamilton). Indisputable the Act blurs the distinction between rulemaking and adjudication. This will be an ongoing concern because the application of the Guidelines will necessarily involve the resolution of many interpretive problems. And, even if individual judges were convinced that their independence and detachment from the rulemaking process was assured, the public and the individual defendant's perception of the judge's role nonetheless maybe tainted. See Scaduto, 763 F.2d at 1197.
>
> The selection of the judges to serve on the Commission raises yet other impartiality concerns. First, <u>because of the power associated with the position, it is not inconceivable that the judge/commissioners may have an important influence over their colleagues' view of how the Guidelines are to be interpreted and applied</u>. This concern is increased by Congress' expressed view that "[j]udges who have had a strong voice in developing the Guidelines will be more likely to consistently and fairly apply them." H.R.Rep. 1017 at 94. We further note that the role of the Commissioners in training judges in the application of the Guidelines raises partiality concerns. Second, the influence of the judge/commissioner may crete the perception that the position is a desirable one. Conduct could be motivated with a view toward a Presidential

appointment. Additionally, a district judge appointed to the Commission would receive an extra stipend for the service.

Perhaps even more fundamental is the appearance of partiality where the judiciary becomes involved with setting the public policy of crime and punishment. As we have seen, fixing the rules of punishment for all crimes calls for the integration of a variety of considerations, including the public's perception of the offense, its "seriousness," and the efficacy of deterrence, as well as resource allocation. These are exactly the types of controversial and changing policy determinations from which the judiciary traditionally has been removed. As one commentator has noted:

Whenever issues that are highly visible and sensitive are entrusted to a public commission for resolution or recommendation, the results are unlikely to satisfy all the critics, perhaps none. Participation in such a process by members of the judiciary is less likely to settle a troublesome public issue than to lend credence to the all-too-common charge the the courts are part of the political process.

McKay, The Judiciary and Nonjudicial Activities, 35 L. & Contemp. Probs. 9, 25 (1970).

Surely it is not too difficult to imagine the judge/commissioners and the judicial branch entangled in complex, protracted and politically controversial assessments as the Guidelines are creatd and amended over time. Nor is it beyond reasonable possibility the the judge/commissioners may be called upon to defend in public debate the difficult choices necessarily made, conceivably in conflict with the positions taken by some of the non-judge commissioners, or by the Attorney General. These problems are necessarily exacerbated where the choices are made regularly in concert with the executive branch of government. See Liman, The Constitutional Infirmities of the United States Sentencing Commission, 96 Yale L.J. 1363, 1386 (1987). Indeed, the antagonistic positions asserted in this very case by the government on the one hand and the Commission

as amicus curiae on the other suggest the real potential for public dispute....

Finally, the presence of the judges on the Commission has an impact on the operation of the judicial system as a whole because the judge/commissioners almost surely will be forced to recuse themselves from any cases which involve the Guidelines, and by increasing the workload for their brethren by their absence from the bench. However, we find this consideration to be less compelling than the potentially infectious influence that judicial participation in the legislative process has on the personal right of litigants to appear before a judge who is divorced from the process of creating the law he is bound to apply.

At a minimum, then a "potential for disruption is present," Nixon II, 433 U.S. at 443 (emphasis added), when judges serve on the Commission, and therefore "we [must]...determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Id. (citation omitted)....

In sum, the power to write the law of punishment is incongruent with the judiciary's constitutional function and is more properly within the sphere of the political branch that is most responsive to the will of the people.

"[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives-or the hallmarks-of democratic government...." Bowsher, 106 S.Ct. at 3193-94 (quoting Chadha, 462 U.S. at 944). President Roosevelt sought Chief Justice Stone for his "Rubber Commission" because he believed that "by naming an investigating commission so thoroughly respectable that few would dare dispute its findings." Mason, supra, 67 Harv. L.Rev. at 201. The rationale underlying the presence of judges on the Commission appears to be similar. Perhaps the imprimatur of the courts is meant to

> convey the soundness of the general policy decisions reached by the Commission. However, the logical extension of the power granted in the Act is to allow the courts to determine the exact character of the conduct proscribed by the criminal code. This premise does not deposit us on "some hypothetical 'slippery slope,'" Schor, 106 S.Ct. at 3258, but in a very real sense represents a substantial step in embroiling the courts in the legislative process. "A healthy respect for the precipice on which we stand is warranted..." Id. at 3266 (Brennan, J. dissenting).

Id. at 291-293.

It should be observed that it is not necessary to have judicial officers on the Commission in order to obtain judicial expertise to create the guidelines. Inclusion of judicial officers on the Commission and this Court in the promulgation of the guidelines to use Judge Greene's words,

> "...does not appear to have been the product of the traditional factors of technical difficulty and efficiency but rather of the desire to insulate the Congress from extended debate and political complaint. But the need for accountability, as discussed in Part V, infra, is precisely the reason why under the Constitution the kinds of decisions encompassed in the guidelines must be made by the Congress..."

U.S. Brodie, supra, at 951.

Judge Greene's discussion regarding the lack of accountability resulting from the mixture of functions merits close reading for it is equally true of our guidelines.

Perhaps the above reasons motivated the Wisconsin Supreme Court to refuse to become embroiled into the process of establishing sentencing guidelines for that State. In the Matter of Judicial Administration: Felony Sentencing Guidelines, 353

N.W. 2d 793 (Wis. 1984).

To be sure some federal courts have held the federal guidelines constitutional, United States v.Sparks, 687 F.Supp. 1145 (E.D. Mich. 1988); United States v. Myers, 687 F. Supp. 1403 (N.D. Cal. 1988); United States v.Smith, 686 F Supp. 1246 (W.D. Tenn. 1988) and United States v. Richardson, 685 F.Supp. 111 (E.D.N.C. 1988); however, the weight of authority is to the contrary and those holding the guidelines violative of the Separation of Powers doctrine represents the better reasoned view and the view that comports with out constitutional heritage. Kanahele, Bogle, Brodie, Brittman, supra; United States v. Rosario, 687 F.Supp. 426 (N.D. Ill. 1988); United States v.Dibiase, 687 F.Supp. 38 (Conn. D.C. 1988); United States v.Smith, 686 F. Supp. 847 (D. Colo. 1988); United States v.Wilson, 686 F. Supp. 284 (w.D. Okl. 1988); United States v. Fonseca, 686 F. Supp. 296 (S.D. Ala. 1988); United States v. Perez, 685 F. Supp. 990 (W.D. Tex. 1988) United States v. Horton 685 F. Supp. 1479 (D. Minn. 1988); United States v. Tolbert, 682 F. Supp. 1517 (D. Kan. 1988); United States v. Estrada, 680 F. Supp. 1312 (D. Minn. 1988); United States v. Frank, 682 F. Supp. 815 (W.D. Pa. 1988); United States v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988); United States v. Allen, 685 F.Supp. 827 (N.D. Ala. 1988), en banc; United States v. Diaz, 685 F.Supp. 1213 (S.D. Ala. 1988) and United States v. Russell, 685 F. Supp. 1245 (N.D. Ga. 1988). Amicus wishes to note that on June 13, 1988, the United States Supreme Court granted certiorari before judgment in United States v. Mistretta, 56 U.S.L.W. 3841, Case

No. 87-1904 and Mistretta v. United Sates, 57 U.S.L.W. 3027, Case No. 87-7028 and will resolve the constitutional question involved. This Court is requested to await that disposition. Amicus would also note that the federal cases relied upon by the Appellant all emanate from district courts within the Ninth Circuit Court of Appeals and are no longer valid authority in light of Gubiensio-Ortiz v. Kanahele supra. Of course, that case is not final since the time for seeking certiorari review has not expired.

The Appellant suggests in his brief that the federal decisions declaring the Sentencing Reform Act unconstitutional are not binding on this Court because that Act and the Florida guidelines statute and rules are "markedly different". (App.'s Br. at p. 26). The Amicus respectfully submits there is not a dime's worth of difference between the two from a constitutional standpoint. The federal guidelines must be submitted to Congress and they became law unless "disapproved or modified by Act of Congress," 28 U.S.C. § 994(P), just as the guidelines promulgated by this Court became effective in the first instance! The other distinctions made by Appellant are distinctions without differences. More importantly, to suggest the Guidelines Commission and the Court does not exercise legislative powers in promulgating the guidelines is pure fiction. Indeed, one need only look at what the Commission is directed to do under the 1988 amendment to Sec. 921.001, Fla. Stat. to see the political judgments it has been asked to make by the Legislature. Chapter 88-131, Sec. 3(c). These "recommendations" apparently will not

be submitted to this Court for revision or other action.

The Amicus respectfully suggests that Judge Hall correctly concluded the Sentencing Guidelines Act and the rules promulgated pursuant thereto were unconstitutional because they violated Article II, Sec. 3 of the Florida Constitution and his order should be affirmed. The Amicus agrees with Appellant that the right of parole eligibility is re-established by any declaration that the guidelines are unconstitutional.

Assuming this Court concludes that the sentencing guidelines are valid and that the trial judge erred in declaring them unconstitutional, the sentences imposed must be affirmed on the grounds that the guidelines could not be applied to the Appellant.

Notwithstanding that this ground was not argued below, if the trial judge reaches the right conclusion albeit for the wrong reason, his order, judgment or decree will be upheld by the appellate court. Caso v. State, 524 So.2d 422, 424 (Fla. 1988); Savage v. State, 156 So.2d 566, 568 (Fla. 1st D.C.A. 1963).

The Appellant committed the crimes of which he was convicted on May 23, 1983. The law on that date was that a trial judge could impose any sentence authorized by law in the exercise of his discretion and that said sentence was not subject to

appellate review. Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943); reaffirmed in Booker v. State, supra, at 1081.

The guidelines, of course, did not become effective until October 1, 1983, and Sec. 921.001(4), which purported to allow persons who committed felonies "prior to October 1, 1983, for which sentencing occurs subsequent to such date" to affirmatively select to be sentenced under the guidelines also became effective October 1, 1983. Sec. 5, Ch. 83-87. It is also clear that Ch. 83-87 amended Sec. 921.001, Fla. Stat.

Art. X, Sec. 9, Florida Constitution, 1968 Revision, provides:

> "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed."

The Amicus respectfully submits that Sec. 921.001, Fla. Stat. is a "criminal statute" as defined by this Court in Washington v.Dowling, 92 Fla. 601, 109 So. 588, 591 (1926) and therefore the Legislature's attempt to apply Sec. 921.001, Fla. Stat. to crimes committed prior to its effective date is unconstitutional. Castle v. State, 330 So.2d 10 (Fla. 1976) affirming Castle v. State, 305 So.2d 794 (Fla. 4th D.C.A. 1975); Washington v. Dowling, supra; Ex parte Browne, 93 Fla. 3323, 111 So. 518 (Fla. 1927); Strachen v. State, 380 So.2d 487 (Fla. 3d D.C.A. 1980) ("Statutes in effect on the date of the crime, as they relate to sentencing, control the amount of sentence given, not those in effect on the date of the sentence"); and Gourley v. State, 432 So.2d 755 (Fla. 5th D.C.A. 1983) ("sentencing statutes in effect at the time of the commission of the crime control the legality

of a sentence.").

In Dowling, supra, the defendant was convicted of first degree murder and sentenced to death by hanging. Subsequently the Legislature changed the penalty to be carried out by electrocution. Washington brought an action to declare his sentence illegal since hanging had been abolished. The circuit court rejected the argument and held under Article 3, Sec. 32, the predecessor of Art. X, Sec. 9, hanging was the form of punishment proscribed by law since it was the punishment called for at the time Washington committed the crime. He appealed and contended that Section 6124, the penalty provision for first degree murder was not a "criminal statute" within the meaning of the relevant constitutional provision.

This Court rejected said claim and held

> We may therefore define the term, "criminal statute," as an act of the Legislature as an organized body relating to crime or its punishment; or by analogy to the definition of the term, "criminal law" which is given by 16 C.J. 49, as "that branch or division of law which defines crimes, treats of their nature, and provides for the punishment," we may define a "criminal statute" as an act of the Legislature as an organized body, defining crime, treating of its nature, or providing for its punishment.
>
> It is sufficiently broad and comprehensive as to include within its scope and meaning all those acts of the Legislature as an organized body which deal in any way with crime or its punishment.
>
> The statute (section 6124), as it was prior to its amendment by chapter 9169, and as it now stands, relating as it does to penal administration, is a legislative enactment for dealing with punishment for crime, and is therefore within the meaning of the term, "criminal statute".

109 So. at 591.

It is therefore indisputable that 921.001, Fla.Stat. is a "criminal statute" as that term is used in Art. X, Sec. 9, Fla. Const., since it directly affected the penalty that could be imposed upon Appellant. Indeed, according to Appellant the trial judge under the guidelines could not sentence him to more than 3 1/2 years incarceration under any circumstances, whereas under the law in effect at the time he committed the crime authorized the trial court to sentence him for a period of thirty years. 775.082 (3)(b), Fla. Stat.

The provision contained in subsection 4 of Sec. 921.0001 wherein the Legislature purported to allow an election to be sentenced under the guidelines is clearly in violation of Art. X, Sec. 9 and thus unconstitutional, even though it purported to mitigate the sentence to be imposed. Castle v. State, supra.

In Castle the defendant was sentenced to ten years imprisonment, the penalty provided for by statute when he committed the crime. At the time of trial and sentencing the statutory penalty had been reduced to a maximum of five years imprisonment. The defendant appealed and contended that he should have been sentenced to no more than five years and relied upon Section 775.12, Fla. Stat. which provided:

> "Limitation of repeal as to criminal cases. No offense committed, and no penalty and forfeiture incurred, prior to the taking effect of these statutes, shall be affected thereby, and no prosecution had or commenced, shall be abated thereby, except that when any punishment, forfeiture or penalty shall have been mitigated by the provisions of these statutes, such provisions shall apply to and

> control any judgment or sentence to be pronounced, and all prosecutions shall be conducted according tot he provisions of law in force at the time of such further prosecution and trial applicable to the case."

The District Court, citing Ex Parte Browne, supra, and other cases rendered by this Court, rejected the defendant's argument and held that to the extent that Sec. 775.12, Fla. Stat.- now repealed, 74-383, Laws of Florida (1974) - attempted to benefit him it was unconstitutional and void. This Court reviewed the decision of the District Court and held:

> "...appellant was not entitled to the benefit of the later enacted lower maximum sentence, and to the extent that Section 775.12 suggests otherwise it would have been unconstitutional. See Florida Constitution Article X, 9..."

330 So.2d at 11.

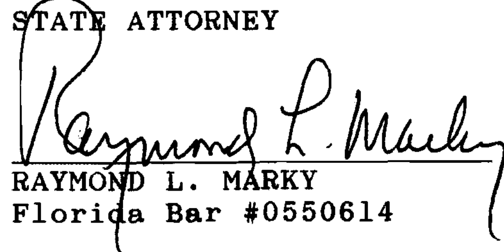
The Amicus submits that subsection 4 of Sec. 921.001, Fla. Stat., being an amendment to Sec. 921.001, which became effective after the commission of the crime, is unconstitutional to the extent that it authorized Appellant to elect to be sentenced under the guidelines. Since he was not entitled to be sentenced under the later enacted guidelines and the sentences imposed are within the statutory maximum authorized by law the sentences imposed herein must be affirmed.

CONCLUSION

For the reasons stated hereinabove and on the authorities cited, the Amicus respectfully urges this Court to affirm the sentences imposed upon Appellant by the trial court.

Respectfully submitted,

WILLIAM N. MEGGS
STATE ATTORNEY



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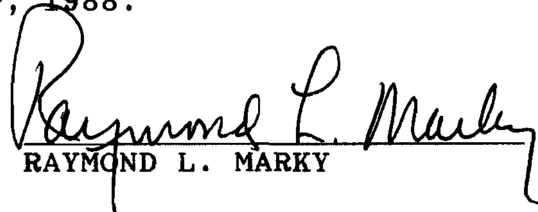
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished Michael E. Allen, Public Defender, Barnett Bank Building, Tallahassee, Florida 32301 and Richard E. Dorn, Assistant Attorney General, Department of Legal Affairs, Criminal Division, 111 Magnolia Parkway, Suite 29, Tallahassee, Florida 32301, this 16th day of September, 1988.



RAYMOND L. MARKY