OA 10-3-88

IN THE SUPREME COURT OF FLORIDA

ALPHONSO P. SMITH,

Petitioner/Appellant,

vs. CASE NO. 72,862

STATE OF FLORIDA,

Respondent/Appellee.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Petitioner/Appellant, Alphonso P. Smith, was the defendant in the trial court. In this brief, he will be referred to as Petitioner or by his proper name. Respondent/Appellee, the State of Florida, was the prosecuting authority in the trial court. In the trial court, the State of Florida was represented by the State Attorney of the Second Judicial Circuit, the Honorable William N. Meggs and by Assistant State Attorney Raymond Marky. The State Attorney has asked to be heard in this Court as amicus curiae in support of the order of the trial court declaring a state law to be unconstitutional.[1] Robert A. Butterworth,

[1] The Joint Motion to Permit Intervention by the State Attorney for the Second Judicial Circuit of Florida filed in this Court on August 31, 1988, was denied on September 7, 1988. This Court allowed the State Attorney the opportunity to appear as amicus curiae.

Attorney General of the State of Florida, is required by law to represent the State of Florida in all appellate proceedings as the state's chief legal officer. Section 16.01(4), Fla. Stat. (1987). His duty as chief state legal officer is to defend the laws of the state and he is entitled to be heard in any proceeding in which the constitutional validity of a state statute is at issue. Section 86.091, Fla. Stat. (1987). In order to execute his constitutional and statutory duties, the Attorney General, on behalf of the state, files this brief in support of the validity of Florida Sentencing Guidelines Act, ("SGA").

The record on appeal in this matter is slight. Any reference to it will be by use of the symbol "R". The transcript of proceedings held in the circuit court on June 23, 1988, begins at page 41 of the record.

STATEMENT OF THE CASE AND FACTS

On May 23, 1983, Alphonso P. Smith burglarized a dwelling in Leon County, Florida, and sexually battered the female occupant of the home. The details of his vicious and senseless actions are set forth in Smith v. State, 479 So.2d 804 (Fla. 1st DCA 1985). As a result of his conduct, Smith was convicted of the crimes of burglary of a dwelling and sexual battery. He was sentenced to a term of fifteen years on the burglary of a dwelling count and ten years on the sexual battery count. These terms exceeded the presumptive sentencing guidelines range of three years. Id. at 808. The trial court gave six reasons for departing from the sentencing guidelines range:

> 1. No pretense of moral or legal justification.
> 2. A need of correctional rehabilitative treatment that can best be provided by commitment to a penal facility.
> 3. Has engaged in violent pattern of conduct which indicates a serious danger to society.
> 4. Emotional, as well as physical trauma, suffered by victim.
> 5. A lesser sentence is not commensurate with the seriousness of the (Appellant's) crime.
> 6. Other reasons: State gave notice of intent to pursue enhanced penalty and eschewed same in view of sentence imposed.

Id.

Citing to a number of its own decisions and decisions from

this Court, the First District Court of Appeal reversed the departure sentence and remanded the case for resentencing. The district court of appeal did note "This reversal is without prejudice, however, to the state's right to seek enhanced sentencing under the habitual offender statute, Section 775.084, Fla. Stat. (1983)." (footnote omitted) Id. This Court declined to exercise its discretionary review power over this decision. Smith v. State, 488 So.2d 831 (Fla. 1986).

Between the time of the issue of the mandate of the district court of appeal and Smith's appearance in the circuit court for resentencing, this Court declared the habitual offender statute could not be used as a basis for departing from the sentencing guidelines. Whitehead v. State, 498 So.2d 863 (Fla. 1986). At resentencing, the State Attorney for the Second Judicial Circuit, for the first time raised the question of the constitutionality of the Sentencing Guidelines Act, Section 921.001(1) (1983). See also Fla.R.Crim.P. 3.701(b) 1983.[2] (R 41)

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[2] The question of the constitutionality of the sentencing guidelines act has previously been raised in the trial courts of Florida, and the issue was briefed and argued in the Third District Court of Appeal. In State v. Caride, 473 So.2d 1362 (Fla. 3d DCA 1985), the court declined to reach the merits. However, Chief Judge Schwartz made his views plain in a specially concurring opinion: "I do, however, express my 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. Art. II, section 3, Art. III, section 1, Fla. Const." Id., at 1363. See also, Pacheco v. State, 485 So.2d 1379 (Fla. 3d DCA 1986), rev. denied, 494 So.2d 1152 (Fla. 1986) and Van Horn v. State, 485 So.2d 1381 (Fla. 3d DCA 1986).

On July 20, 1988, the circuit court entered a written order outlining its reasons for declaring the statute unconstitutional. (R 38-40) The court held that the determination of criminal penalties and application of such penalties was a matter of substantive law which should be handled by the legislative branch of government; that the Sentencing Guidelines Act violated Art. II, Section 3 of the Florida Constitution because it created a commission to perform executive and legislative powers but, staffed the commission with judicial officers; and that the act provided for implementation of the recommendations of this commission by the state supreme court, as opposed to the legislature, in contravention of the constitutional prohibition against promulgation of substantive law by the judicial branch of government. The court cited to Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975) and Petition of Florida State Bar Association, etc., 199 So. 57, 59 (Fla. 1948). (R 38-40).

The trial court then declared §921.001 unconstitutional and sentenced the defendant, Mr. Smith, to a term of fifteen years in the state prison for the burglary of a dwelling and ten years in

the state prison for the sexual battery.[3] The court added a provision that the sentences run consecutive to each other and consecutive to another pending sentence. (R 18-22)

The defendant filed timely notice of appeal in the First District Court of Appeal (R 30). On July 22, 1988, the public defender's office, counsel for the Appellant, filed a motion suggesting the district court of appeal certify the question as one of great public importance and pass the case directly to this Court. On August 5, 1988, the district court of appeal granted the motion. On August 29, 1988, this Court accepted jurisdiction and ordered an expedited briefing and argument schedule. This brief follows in accordance with that order.

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[3] What is unclear is why the court and the prosecution originally used a guidelines scoresheet for category 5 (burglary) instead of a guidelines scoresheet for category 2 (sexual offenses). Use of the latter scoresheet would score the defendant a total of 279 points using a 1983 scoresheet. (R 18-22) Such a score falls in the 7-9 year range, a modest improvement, but nonetheless a significant one, over the category 5 scoresheet. Such a result is mandated under former Rule 3.701(d). See In Re Rules of Criminal Procedure, 439 So.2d 448, 450 (Fla. 1983). The Attorney General requests a remand with instructions that the defendant be resentenced under a category two scoresheet. State v. Hutchinson, 501 So.2d 190 (Fla. 5th DCA 1987) and Sulzbach v. State, 13 F.L.W. 635 (Fla. 1st DCA March 10, 1988).

POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DECLARING THAT FLORIDA STATUTES SECTION 921.001 (1983), OTHERWISE KNOWN AS THE SENTENCING GUIDELINES ACT, VIOLATED THE SEPARATION OF POWERS PROHIBITIONS SET FORTH IN ARTICLE II, SECTION 3 OR IN ARTICLE V, SECTION 2 OF THE FLORIDA CONSTITUTION BY PROVIDING FOR THE ESTABLISHMENT OF A SENTENCING GUIDELINES COMMISSION TO REPORT AND RECOMMEND CHANGES IN THE CRIMINAL SENTENCING LAWS TO BE STAFFED IN PART BY JUDGES OF THE STATE COURTS, AND WHERE THE ACT BY PROVIDING THAT ANY SUCH CHANGES IN SENTENCING GUIDELINES LAW WOULD BE PROMULGATED BY THE STATE SUPREME COURT. (RESTATED)

SUMMARY OF ARGUMENT

Section 921.001, Fla. Stat. (1983), is constitutional. The trial court erred in holding otherwise. The law is well established that the coordination of effort by various government branches is not a basis for finding a violation of the doctrine of separation of powers. Moreover, the promulgation of the guidelines as rules of court by the Supreme Court does not contravene Art. V, Section 2 of the Florida Constitution.

The order of the trial court should be reversed and the case remanded for resentencing by use of a 1983 category two guidelines scoresheet, pursuant to Rule 3.701(d)(3), Fla.R.Crim.P. (1983); and State v. Hutchinson, 501 So.2d 190 (Fla. 5th DCA 1987) and Sulzbach v. State, 13 F.L.W. 635 (Fla. 1st DCA March 10, 1988).

ARGUMENT

ISSUE

THE TRIAL COURT ERRED IN DECLARING THAT FLORIDA STATUTES SECTION 921.001 (1983), OTHERWISE KNOWN AS THE SENTENCING GUIDELINES ACT, VIOLATED THE SEPARATION OF POWERS PROHIBITIONS SET FORTH IN ARTICLE II, SECTION 3 OR IN ARTICLE V, SECTION 2 OF THE FLORIDA CONSTITUTION BY PROVIDING FOR THE ESTABLISHMENT OF A SENTENCING GUIDELINES COMMISSION TO REPORT AND RECOMMEND CHANGES IN THE CRIMINAL SENTENCING LAWS TO BE STAFFED IN PART BY JUDGES OF THE STATE COURTS, AND FURTHER PROVIDED THAT ANY SUCH CHANGES IN SENTENCING GUIDELINES LAW WOULD BE PROMULGATED BY THE STATE SUPREME COURT.

The issues before the Court are whether the Florida Sentencing Guidelines Act is unconstitutional due to the composition of the Guideline Commission, or due to the method by which the guidelines recommended by the commission (in an essentially substantive law area) were originally given the effect of law. A careful and studied analysis of federal and state decisional law interpreting the concept of separation of power leads to a conclusion that neither of the trial court's reasons for declaring the statute unconstitutional are correct.

Recently, the federal government has become entangled in its own debate over the constitutionality of sentencing guidelines legislation. The National Law Journal reports that of

the 600 United States District Court judges currently sitting, 140 have declared the federal sentencing guidelines law unconstitutional and 105 have declared it constitutional. Sentencing Confusion Reigns as Court Steps In, The Nat'l L.J., Sept 5, 1988, at 5, col. 1. Furthermore, the United States Court of Appeals, Ninth Circuit, has declared the guidelines unconstitutional in a divided panel opinion that will affect federal courts in nine states. Gubiensio-Ortiz v. Kanalele, etc., _____ F.2d _____ (9th Cir. case nos. 88-5848 and 88-5109, August 23, 1988) 1988 Wl 86794. The controversy in the federal courts has been so pronounced that the United States Supreme Court took the extraordinary step of scheduling expedited briefing and oral argument in a case which will travel directly from a United States District Court to Washington, D.C. United States v. Mistretta, Case No. 87-1904. The Supreme Court will hear oral argument on October 7, 1988.

This information is provided only to suggest that the question of judicial involvement in sentencing guidelines commissions is not easily resolved. Federal jurists of great skill are vigorously debating the question. The factors that go into the analysis are numerous and sometimes quite subtle. It is the Attorney General's view that these subtle distinctions provide the determinative factor in resolving the question of constitutionality in favor of the legislature and the statute.

The starting point for analysis of any piece of legislation is the presumption that acts of the legislature are presumptively constitutional, Ball v. Branch, 16 So.2d 524 (Fla. 1944), and that the courts should go to great lengths to uphold all, or part, of a statute when it is subject to constitutional attack. Department of Legal Affairs v. Rogers, 329 So.2d 257 (Fla. 1976); Holly v. Adams, 238 So.2d 401, 405 (Fla. 1970).

In attempting to provide a cogent analysis of the issues presented in this case, this argument will be broken down into three sections. Each section will address one of the findings set forth in the trial court's order.

(1) The characterization of criminal penalties and their application as predominantly substantive law.

In support of this finding the trial court cited to Booker v. State, 514 So.2d 1079, 1081 (Fla. 1987). In Booker this Court noted:

> The rule in Florida historically has been that a reviewing court is powerless to interfere with the length of a sentence imposed by the trial court so long as the sentence is within the limits allowed by the relevant statute. As we stated in Brown v. State, 152 Fla. 853, 13 So.2d 458 (Fla. 1943):
>
> If the statute is not in violation of the Constitution, then any punishment assessed by a court or jury within the limits fixed thereby cannot be adjudged

> excessive, for the reason that the 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. (cites omitted).
>
> This view is also consistent with the United States Supreme Court's treatment in this issue. In Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958), the court was confronted with the claim that separate sentences for separate offenses was violative of the double jeopardy clause. In rejecting this claim, the court stated: In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believe in its efficacy or its futility . . . these are particularly questions of legislative policy.

Id. at 1081-82. While this assessment of the role of the legislature, vis-a-vis, the courts, in criminal sentencing is generally correct, one should not overlook the recent decisions of the United States Supreme Court that stress the interaction of the three branches of government in the sentencing process. See e.g. Geraghty v. United States Parole Commission, 719 F.2d 1199, 1211 (3d Cir. 1983), cert. denied, 104 S.Ct. 1602, quoting United States v. Grayson, 438 U.S. 41, 47, 98 S.Ct. 2610, 2614, 57 L.Ed.2d 582 (1978). Resolution of the appropriateness of a term of confinement in a particular case or cases now involves input from the legislature, the trial courts, and the parole or

correctional authorities of the executive branch.

The interplay between the three branches of government in this regard is the first of the subtle factors that merit this Court's attention. As Chief Justice Warren observed, "A given policy can be implemented only by a combination of legislative enactment, judicial application and executive implementation." United States v. Brown, 381 U.S. at 443, 85 S.Ct. at 1217, as quoted in Geraghty, supra at 1211.

The Florida legislature recognized the need for this type of cooperative effort when it passed the Sentencing Guidelines Act. In the preamble to Chapter 82-145, Laws of Florida, the legislature specifically set forth that:

> Whereas, the legislature believes that it is in the public interest for a system of sentencing guidelines to be developed and implemented on a statewide basis within the sentencing parameters established by the Florida statutes and in furtherance of this goal it is necessary for the legislature and the courts to join together in a cooperative sentencing reform effort aimed at assuring certainty of punishment for the guilty and equality of justice for all now therefore be it enacted . . .

What was enacted was §921.001. It included a Sentencing Guidelines Commission numbering among its members the Chief Justice of the Supreme Court of Florida (or his designee), three circuit court judges, and one county court judge. These latter judges were to be appointed by the Chief Justice to serve at his

pleasure. See Chapter 82-145(1) and (2).

Two years later the legislature revisited the work of the Sentencing Guidelines Commission and the work of the Supreme Court of Florida in promulgating a sentencing guidelines system. Chapter 84-328, Laws of Florida. The preamble to Chapter 84-328 makes it clear that the legislature had authorized the development of a uniform sentencing policy in the circuit courts; that the Supreme Court had developed guidelines on September 8, 1983 to implement the recommendations of the guidelines commission; and that the previously enacted section 921.001 required legislative action on any proposed changes to the guidelines. Accordingly, the legislature enacted Chapter 84-328 which adopted and implemented Rules 3.701 and 3.988 of the Fla.R.Crim.P. effective June 25, 1984. Thus, by a coordination of effort this Court and the legislature implemented a sweeping change in the policy and procedure behind the criminal sentencing process.

To the extent that it acknowledges the predominantly substantive nature of this process, the trial court's order is indisputable. It is merely suggested that the trial court has omitted from its analysis the recognition of the roles which must be played by the other branches of government in effectuating legislative policy. For as was noted in State v. Hollis, 439 So.2d 947, 948 (Fla. 1st DCA 1983), "It is often difficult to

delineate specially between the three divisions, and some degree of overlap frequently exists . . . ."

The existence of the interdependence and coordination between the three branches in the criminal sentencing process having been confirmed, the next step is a full analysis of the remaining two findings delivered by the trial court.

2. The propriety of judges serving on the sentencing guidelines commission.

In keeping with the theme that governmental functioning is not simplistic, United States District Judge Keton noted in the case of United States v. Seluk, _____ F.Supp. _____ (D.Mass. case no. 88-107-K, July 5, 1988) 1988 Wl 74506:

> At the outset, it may be observed that advocates of contrasting views predictably use different terminology with contrasting tendencies as hidden persuaders. Characterizing power to develop sentencing guidelines as "legislative" power encourages one to conclude that this power belongs only in the legislative branch. Similarly, on the other side, characterizing this power as a "rule making" power encourages one to conclude that it is an inherent power of every court, administrative agency, and commission. Accepting such an intuitive leap from a label adopted without examination of its substantive implications, however, is precisely the kind of formalism in applying the doctrine of separation of powers that the Supreme Court has rejected. Nixon v. Administrator of General Services,

> 433 U.S. 425, 443 (1977); Buckely v. Valeo, 424 U.S. 1, 121 (1976) (per curiam); see also Morrison v. Olson, 1988 U.S. Lexis 3334, 5964. Fidelity to the court's caution against formalism requires an appraisal of the reality of how powers and functions have been allocated and exercised among the three branches in the system that had evolved up to the time of the enactment of the SRA, as well as how they are allocated and will be exercised under the act.

Slip, p. 3.

Consistent with Judge Keton's warning against application of formalism is the view that the separation of powers doctrine does not require a strict formal barrier between the various governmental branches. There is nothing wrong per se with judges sitting on a legislative commission. As the United States Supreme Court most recently noted in Morrison v. Olson, 487 U.S. ____ , 108 S.Ct. ____ , 101 L.Ed.2d 529, 607 (June 29, 1988), "On the other hand, we have never held that the Constitution requires that the three branches of government 'operate with absolute independence.'"

The Morrison decision suggests that a two-fold inquiry be made. First, it should be decided whether the legislative action in question is an attempt to increase its own power at the expense of another branch of government. Second, it should be determined whether the particular legislative action "impermissibly undermines" the powers of the judicial branch. Id., at 101 L.Ed.2d 608.

As to the first inquiry, there can never be a showing that the creation of the sentencing guidelines commission to study and report upon various issues pertaining to criminal sentencing policy acts as an expansion of the judiciary authority at the expense of the legislature. As the trial court indicated in its first finding, these matters are within the legislative purview. The placement of five judges on the commission does not alter this result. Unlike the federal sentencing guidelines scheme, state judges are not required to serve on the commission through the appointment by the executive. See, e.g. Gubiensio-Ortiz v. Kanahele, supra (Dwelling upon the political implications of presidential appointments and/or removals of federal judges from the guideline commission. Noting that although the commission function is characterized as judicial in nature, in reality it is political. Slip, p. 39.) Likewise, the federal guidelines commission is established and characterized as a judicial entity, Seluk, supra at slip, 2. This is not true with respect to the Florida commission. In Florida we have a commission established by the legislature with a mandate for inquiry into matters of predominately substantive law. Third, the Florida commission is set up to allow the Chief Justice of the Supreme Court of Florida to serve on the commission, act as its chairman, and designate four other judges to serve at his pleasure. Nothing in Section 921.001 even faintly hints that the Chief Justice, or any other judicial officer, could be compelled

to serve on the commission or suffer removal from it by a member of another branch of government or by the commission itself.

These organizational distinctions merit careful scrutiny by this Court when it seeks to compare the current situation with that which arises in the federal courts. The order declaring this act unconstitutional is married to a conclusion that these systems can be favorably compared. If that premise is found false, the order must fall. Holly v. Adams, supra, at 404-405 ("Every reasonable doubt must be indulged in favor of the act").

There is no evidence that the legislature was seeking to usurp the judicial function by creating the sentencing guideline commission or permitting the Chief Justice to attend and chair the meetings and assign various judges of the trial courts to assist the commission in its deliberations. The commission handles substantive matters and reports its findings to the legislature for further action.

The rejection of any potential for conflict in the first Morrison inquiry essentially renders discussion of the second inquiry set forth in that case unnecessary. However, it should be said that the Sentencing Guidelines Commission does not, and cannot, impermissibly undermine the powers of the judicial branch or disrupt the proper balance between the coordinating branches by preventing the judiciary from accomplishing its

constitutionally assigned functions. See Morrison, supra at 607 quoting Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977).

For example, the opinion of Judge Marcus, United States of America v. Bogle, et al., 2 F.L.W. Fed. D 277 (July 1, 1988), cited by the circuit court, goes to great length to speculate on the potential for conflict of interest or overreaching by what Judge Marcus characterizes as "judge/commissioners". Judge Marcus showed great concern for the potential perception of bias on the part of the public or an individual criminal defendant involved in the guidelines process. Slip, p. 66-67. In response, undersigned note they are not aware of a single reported case in the State of Florida wherein the type of speculative fear expressed by Judge Marcus has been evidenced by a motion to recuse a judge who has sat on the Florida Sentencing Guideline Commission from a criminal sentencing. This unfounded and speculative fear should not be the basis upon which to strike down the current sentencing process.

While the promulgation of sentencing guidelines strictly limits the wide-ranging discretion to sentence formally held by trial judges, this Court has recognized that the legislature has the ability to prohibit any sentencing discretion from being exercised by a trial judge. See, e.g. State v. Benitez, 395 So.2d 514, 518-19 (Fla. 1981); and McArthur v. State, 351 So.2d

972 (Fla. 1977). Also, the sentencing guideline legislation provides that trial courts would have the ability to depart from a recommended sentencing guideline range. The legislature placed little restriction on that power. It has been this Court and the district courts of appeal which have so strictly limited the ability of the trial judges to exercise their discretion. Thus, if some fault is to be found in the anemic sentence to be given this defendant it should lie within the judicial branch and not with the legislature. Dissatisfaction, however legitimate, with interpretation of a statute should never be confused with fundamental infirmity in the construction of a statute. Holly v. Adams, supra.

Since its 1927 decision of the United States Supreme Court in Hampton, Jr. and Co. v. United States, 276 U.S. 394 , 72 L.Ed. 624 (1927), the United States Supreme Court has struck down less than a half-dozen legislative actions on the grounds that they violated the separation of powers doctrine. In that case the court set the stage to allow cooperative governmental efforts by holding:

> Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the

> legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district. As Judge Ranney of the Ohio supreme court, in Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 77, 88, said in such a case:
>
> "The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made."

72 L.Ed. at 629-30.

By way of example, the United States Court of Appeals, Third Circuit has held that the presence of an active circuit judge on a presidential commission investigating organized crime did not violate the constitutional separation of powers doctrine where the judge's service was voluntary and his membership did not impinge upon his ability to carry out his judicial duties or disrupt the operation of the courts. Matter of President's Commission on Organized Crime, 783 F.2d 370 (3d Cir. 1986); accord Chabal v. Reagan, 841 F.2d 1216 (3d Cir. 1988); see also Application of President's Committee on Crime, 763 F.2d 1191, 1202 (11th Cir. 1985). (Roney, C.J., specially concurring).

Speaking to those subtle factors that have been stressed throughout this brief, the United States Court of Appeals, Third Circuit's decision notes that James Madison's support of the policy behind the separation of powers was predicated upon an apprehension of the situation "where the whole power of one department is exercised by the same hands which possess the whole power of another department, . . ." citing, The Federalist, No. 47, pp. 325-26 (J. Cook ed. 1961) at 374 (emphasis added). Unlike the Federal law, the Florida scheme does not envision the wholesale entrustment of the power of one branch of the government to members of another branch. To the contrary, the Florida commission, with its inclusion of members of each of the branches of government[4], is a good example of effective coordination of government efforts. Section 921.001, in form and substance, is consistent with the Third Circuit's reasoning:

> Nevertheless, the Supreme Court has emphasized that the constitution does not require, or envision, total separation of each of the three essential branches. Only if they function independently within their separate areas, but cooperatively in their relations with each other, may the government, as a whole, perform its constitutional role. Each separate

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[4] As noted in Bogle, supra, at D 279-80, the federal commission is established as an independent commission in the judicial branch consisting of seven voting members of who three must be, and all seven could be active federal judges.

> gear must carry out its assigned task while meshing with the others so that power is delivered where needed. The constitution "enjoins upon (the governments) branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed.2d 1153 (1952) (Jackson, J., concurring).

Id. at 375.

There are two factors to consider in determining whether the duties imposed upon the five judges by the creation of the commission violates the constitution. The first is whether the work of the commission can be characterized as judicial. The second is whether service is controlled by statutory or executive mandate. Id., at 376. Under §921.001 the role of the commission is predominantly substantive in nature. Thus, there is no legislative encroachment upon the work of the judges who sit on the commission. Likewise, judicial participation is controlled by the Chief Judge. This ensures against the type of executive control of judges which concerns jurists such as Judge Marcus. United States v. Bogle, supra at 291.

In reaching its decision the Third Circuit relied upon the special concurring opinion of Judge Roney in the case of Application of President's Commission on Crime, 763 F.2d 1191 (11th Cir. 1985). In this opinion each of the three judges took a different view of the law. Judge Fay found the placement of

judges on the commission violated the constitutionality of the act but found a way to avoid reversal. Specially concurring in the affirmance, Judge Roney found the participation of judges on a president's commission to be constitutionally appropriate. Judge Johnson dissented and voted for reversal believing that the commission was unconstitutional. Given this background its seems fairly clear that this opinion, cited by those who find guidelines unconstitutional, is of little precedential value. However, we urge this Court to scrutinize Judge Roney's concurring opinion as it precisely synthesizes our view of this case. Judge Roney declared:

> The central argument in the case at issue is framed as a question of whether the commission activity of judicial members interferes with their ability to perform their constitutionally required duties in the judicial branch. There is no suggestion that the judges involved would be completely disabled from the judicial duties, only that they would be disqualified, from handling cases involving the scope of the commission activity. We need not decide precisely what disqualification, if any would be in fact appropriate to discern that this argument cannot control the decision. The well known fact that judges frequently are disqualified from handling certain cases and that the judicial branch suffers no power dimunition therefrom simply supports a decision that the disqualifying action of an individual judge in an executive position does not create a separation of powers problem. The question is whether the powers of the executive, legislative, or judicial branch of government are in any way compromised

> by the composition and activities of this commission. No argument has been made that they are diminished in any way. The structure of the judicial branch, particularly, with its easy cross-assignability of judges of equal power undergirds the notion that the loss of one or two judges on a particular case does not infringe the constitutionally required duty of the judiciary.

Id. at 1203-1204. By way of analogy, this Court's decisions on the dual officehold provisions of Art. II, Section 5 of the Constitution stress practical realism over strict formalism. See e.g. Bath Club Inc. v. Dade County, 394 So.2d 110, 113 n. 8 (Fla. 1981).

What remains then is a discussion of the third finding rendered by the trial court.

3. Enactment of the guidelines by the court and not by the legislature.

The trial court has determined that the legislature was without authority to delegate to the judiciary the exercise of legislative powers under Article V of the Florida Constitution. The trial court further held that the Sentencing Guidelines Act as constituted at the time this case reached the trial court was such that the guidelines applicable to the defendant were enacted upon approval by this court and not upon approval by the legislature. The trial court combined these premises to conclude

that the guidelines were a nullity at the time this defendant first appeared before the court and that it would be necessary to sentence him under the formerly discretionary process. (R 38-40)

While the Constitution of the State of Florida expressly enunciates the doctrine of separation of powers, and the courts of Florida have often applied the principles of non-delegation of power, the concept is not absolute. Delegations of legislative power are permissible if accompanied by sufficient legislative guidelines. By reviewing the pertinent case authority the following will be seen: (1) even if the initial adoption of the sentencing guidelines constituted a delegation of power, it was permissible because it was accompanied by sufficient standards and guidelines; and (2) the development of criteria for sentencing and the establishment of recommended ranges for sentencing, within the minimum and maximum parameters established by statute and court authorized departures, did not constitute exclusively legislative functions.

The relation between the doctrines of separation of powers and non-delegation was discussed at length in Askew v. Cross Key Waterways, 372 So.2d 913, 925 (Fla. 1978):

> Accordingly, until the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of nondelegation of legislative power to be viable in the State. Under this doctrine fundamental and primary policy decisions shall be made by members of

> the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program. (Emphasis added).

Thus, the emphasis is on the need for sufficient legislative guidelines and standards. Non-delegation is not an absolute doctrine. The emphasis on standards has been constantly reiterated. Hialeah Inc. v. Gulfstream Park Racing Assn., 428 So.2d 313 (Fla. 4th DCA 1983), Brewster Phosphates v. State, 444 So.2d 483 (Fla. 1st DCA 1984); Dept. of Ins. v. Southeast Volusia Hospital Dist., 438 So.2d 815, 819 (Fla. 1983) (". . . the crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intents."); Fla. Home Builders Assn. v. Division of Labor, 367 So.2d 219, 220 (Fla. 1979); Burgess v. Fla. Dept. of Commerce, 436 So.2d 356 (Fla. 1st DCA 1983); Brewer v. Ins. Commissioner & Treasurer, 392 So.2d 593, 595 (Fla. 1st DCA 1981); Solimena v. State Dept. of Business Reg., 402 So.2d 1240 (Fla. 3d DCA 1981).

As the Florida courts perceive a direct relation between the doctrines of separation of powers and non-delegation, the non-absolute nature of the non-delegation doctrine can be perceived from a consideration of the purpose of the separation of

powers. In Federalist Paper No. 47, cited above, Madison observed:

> From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrate's," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

The Federalist Papers, pp. 325-26 (J. Cooke ed. 1961).

The same purpose for the separation of powers has been acknowledged by this Court on several occasions. Petition of Florida Bar, 61 So.2d 646, 647 (Fla. 1952) and In Re Advisory Opinion to Governor, 276 So.2d 25, 30 (Fla. 1973).

While the state and federal analyses of the separation of powers doctrine are in accord, Cross Key Waterways has noted differences in the state and federal non-delegation doctrines. Of particular interest, however, is "The United States Sentencing Commission: A Constitutional Delegation of Congressional Power," 55 Ind. L.J., 117 (1979), which discussed the delegation

issue in the context of the previously discussed federal legislation establishing sentencing guidelines. The author concluded that the delegation would be permissible, principally because Congress would have enunciated a clearly discernible policy decision. For a more elaborate discussion of the relation between the separation of powers and non-delegation, see generally, Sotirios A. Barber, The Constitution and the Delegation of Congressional Power (U. of Chicago Press 1975). Professor Barber enunciates the view the delegations are proper if "Congress has arrived at a clear policy decision among salient alternatives and that the delegations in question are instrumental to such decisions." Id. at 40-41. Thus, both the separation of powers doctrine and the non-delegation doctrine are consistent with the principle that delegations of legislative power are appropriate if accompanied by adequate legislative standards and guidelines. Such standards and guidelines are consistently found in the entire legislative history of Section 921.001, including Chapters 82-145 and 79-362, Laws of Florida, the 1982 version of §921.001, and the 1983 revision of §921.001.

In the preamble to Ch. 82-145, the legislative purpose is clear. The law was enacted to deal with the "disparity in sentencing practices (that) exists in Florida because of the sentencing discretion our current system gives to our trial judges, leading some judges to give longer or shorter sentences than others for the same crime committed in different localities

. . . ." The preamble further called for the study of statewide empirical data for the purpose of reducing the disparity in sentencing practices. The legislature also expressed the clear intent that the guidelines "reflect enhanced sentences for repeat offenders." The guidelines were further "to be developed and implemented on a statewide basis within the parameters established by the Florida Statutes . . . ."

As discussed above, the preamble to Ch. 82-145 also incorporated by reference the preamble to Ch. 79-362, Laws of Florida, which established the Sentencing Study Committee of the Florida Supreme Court. Ch. 79-362 expressed the legislative goal "that true sentencing reform can only come from a comprehensive and uniform approach based upon an interplay of historical data with the pragmatics and capabilities of the state's fiscal power, the rehabilitative and psychological lessons for the offender, and the protection and vindication of society . . . ."

The legislative guidelines and standards continue in the test of the original, 1982 section 921.001, Florida Statutes (1982):

> (3) In order to develop a system of sentencing guidelines which is representative of current sentencing decisions within the state, the commission shall identify, not only the offense and the offender-related characteristics exerting the greatest influence on sentencing decisions, but also the relative importance assigned to each characteristic by the trial

> judge. For this purpose the commission is authorized to collect and evaluate data on sentencing practices in Florida from each of the judicial circuits.
>
> (4) Upon recommendation of a plan by the Sentencing Commission, the Supreme court is authorized to develop, implement, and revise as appropriate, sentencing guidelines on a statewide basis to provide trial court judges with factors to consider and utilize in determining the appropriate sentences in criminal cases.

Thus, relevant factors were to be determined and weighed based on empirical studies of current sentencing practices. Moreover, pursuant to subsection 7, the development of the guidelines was to be based upon an empirical evaluation of the amount of time actually served by inmates under the then-existing parole system. Further guidance is provided in subsection 6, with the directive that all sentences must fall within the "minimum or maximum sentences provided by statute, and must conform to all other statutory provisions." The introductory language to section 921.001 spelled out the general policy of insuring "certainty of punishment as well as fairness to the offender and citizens of the State."

The legislative standards and guidelines are again evident in the 1983 revision of section 921.001, Fla. Stat. (1983). Subsection 3 of the revision directed the commission to:

> take into consideration current sentencing and release practices and correctional resources, including the capacities of local and state

> correctional facilities, in addition to other relevant factors. For this purpose, the commission is authorized to collect and evaluate data on sentencing practices in the state from each of the judicial circuits.

Moreover, subsection 4(a) directed the Supreme Court to develop a plan "to provide trial court judges with factors to consider and utilize in determining the presumptively appropriate sentences in criminal cases." Subsection 5 again required all sentences to be within the minimum and maximum sentences specified by statute, and subsection 7 called for empirical relations between guideline recommendations and levels of prison population, based in part on historical data of sentencing practices.

The foregoing directives and expressions of intent satisfy the requirement of Cross Key Waterways, supra, that there be "some minimal standards and guidelines ascertainable by reference to the enactment establishing the program." 372 So.2d at 925.

The trial court's order must also fail because the judicial promulgation of the guidelines does not deal with subject matter that is exclusively legislative in nature. The restraints against delegation of legislative power pertain to that "which the constitution assigns exclusively to the legislature itself" or to matters which are exclusively legislative in nature. Fla. State Board of Architecture v. Wasserman, 377 So.2d 653, 655 (Fla. 1979); State v. Atlantic Coast Line Ry. Co., 47 So. 969, 974, 56 Fla. 617 (1908). Thus, in Atlantic Coast Line, the

Supreme Court noted that "all purely legislative power of the state shall be exercised exclusively by the Senate and House of Representatives, that all the purely executive power of the state shall be exercised by the Governor, and that all the purely judicial power of the state shall be exercised exclusively by the tribunals specified." 47 So. at 974. However, "(s)eparation of powers does not mean that every governmental activity be classified as belonging exclusively to a single branch of government," State v. Johnson, 345 So.2d 1069, 1071 (Fla. 1977), and "it is often difficult to delineate specifically between the three divisions, and some degree of overlap frequently exists . . . ." State v. Hollis, supra at 948.

Such is the case with sentencing. The purely legislative aspect of sentencing is limited to the fixing of minimum and maximum terms of imprisonment for particular offenses. Shellman v. State, 222 So.2d 789, 790 (Fla. 2d DCA 1969); Dorminey v. State, 314 So.2d 134, 136 (Fla. 1975); State v. Benitez, supra at 518; and Lightbourne v. State, 438 So.2d 380 (Fla. 1983). What happens within those minimum and maximum statutory parameters is a matter for the judiciary. Brown v. State, 152 Fla. 853, 13 So.2d 458, 461 (1943); Holmes v. State, 342 So.2d 134, 135 (Fla. 1st DCA 1977); Bunting v. State, 361 So.2d 810, 811 (Fla. 4th DCA 1978). The sentencing guidelines do not fix minimum and maximum terms of imprisonment for particular offenses; they deal with what happens within the minimum and maximum terms already

established by statute. The legislature has expressly acknowledged this in the preamble to Ch. 82-145, Laws of Florida:

> WHEREAS, the Legislature, under the provisions of the State Constitution, has been delegated the authority for determining the sentence to be given for the various categories of crimes commited in Florida, and
>
> WHEREAS, the Legislature has accepted this responsibility and exercised this authority by enacting a criminal code, prescribing penalty ranges for each separate class of crimes, and
>
> WHEREAS,under the provisions of the State Constitution, the judiciary has been delegated the authority for determining on a case by case basis each individual's sentence length within the ranges established by the Legislature . . . ."

See also Section 921.001(1), Fla. Stat. (1983). This dichotomy is again noted in section 921.001(5), Fla. Stat. (1983) which directs that:

> Sentences imposed by trial court judges must be in all cases within any relevant minimum or maximum sentences provided by statute, and must conform to all other statutory provisions.

Rhetorically, it must further be asked, how is the judiciary exercising legislative powers when it is the judiciary's previously unbridled discretion which is being curtailed? See Provence v. State, 373 So.2d 783, 786 (Fla. 1976). If prior to the guidelines, every individual judge, for unarticulated reasons, could adopt and enforce, within statutory minimum and

maximum limits, his or her own sentencing philosophy, it would appear that the judiciary's self-imposed restraints on discretion, for articulable reasons, affect the judiciary's power, rather than the legislature's.

The proposition that the guidelines concern what happens within the statutorily fixed minimum and maximum sentences, rather than the actual fixing of the minimums and maximums, is confirmed within the Rule 3.701, Florida Rules of Criminal Procedure. Rule 3.701(d)(8), refers to the guidelines ranges as "presumptive sentences provided in the guideline grids . . . ." Rule 3.701(d)(14) permits departures from the guideline range for clear and convincing reasons, in writing. Rule 3.701(b)(6) notes that "the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion . . . ." In short, the guidelines do not set new minimum and maximum sentences for particular offenses; they attempt to deal logically with what happens within the statutory parameters.

It is further submitted that this Court has implicitly considered the issue of delegation by the mere fact that it performed the tasks delineated in section 921.001. A decision by this Court that there was an unconstitutional delegation would thus contradict the implicit statement that the court had the authority to do what it did. If this Court believed than an

unconstitutional delegation of authority existed, it could and should have refused to perform its designated task and issued an appropriate explanation for the refusal. The adoption of the guidelines, in effect, constitutes a decision or precedent favoring the Appellant.

CONCLUSION

The instant case is certainly one of extreme public importance. The situation wherein a vicious criminal such as Smith is permitted to avoid the maximum possible term in a state prison is the result of a policy determination which is hotly disputed by many citizens of this state. However, it is not a determination that should be corrected by constitutional challenge to the statute itself. As set out above, the case law of this Court, the United States Supreme Court, and the federal circuit courts of appeal indicate that it is only rarest of instances wherein a legislative enactment will result in a violation of the separation of powers doctrine. On this matter reasonable judges and lawyers have fairly split in their views at least as the federal guidelines system is concerned.

A review of the Florida statute suggests that there are some subtle, yet important, differences between the Florida model and the federal model. Given the standards set forth by the United States Supreme Court in cases such as Morrison v. Olson, and by this Court in State v. Johnson, the high standard necessary for declaration of unconstitutionality has not been met in this particular case. Accordingly, the Attorney General prays that this Honorable Court reverse the order of the Honorable Lewis Hall, Chief Judge of the Second Judicial Circuit of Florida and remand this case with directions to sentence the defendant

pursuant to a category two (sexual offense) scoresheet as required under the former version of Rule 3.701(d)(3), Fla.R.Crim.P. (1983).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Michael M. Minerva, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, and Raymond M. Marky, Assistant State Attorney, 500 First Florida Bank Building, Tallahassee, Florida 32302, this 16TH day of September, 1988.

RICHARD E. DORAN