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IN THE SUPREME COURT OF FLORIDA

ALPHONSO P. SMITH,
Appellant,

v.

CASE NO. 72,862

STATE OF FLORIDA,
Appellee.

SEP 6 1988
m

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

ALPHONSO P. SMITH, :
Appellant, :
v. : CASE NO. 72,862
STATE OF FLORIDA, :
Appellee. :
_____ :

INITIAL BRIEF OF APPELLANT

STATEMENT OF CASE AND FACTS

Appellant was convicted of burglary of a dwelling and sexual battery after being tried by jury in the Circuit Court of Leon County (R-18). The offenses occurred May 23, 1983 (R-29). After being sentenced to 15 years for the burglary and 10 years for the sexual battery, to run consecutively, appellant took an appeal to the First District Court. One of the issues raised was the trial judge's decision to depart from the recommended guideline sentence of three years. Smith v. State, 479 So.2d 804, 806 (Fla. 1st DCA 1985) (R-6). The district court found that only one of six reasons for departure listed by the trial judge was valid and ruled that his reliance on a significant number of invalid factors and the sparsity of supporting particulars for the remaining reason required a remand for resentencing. Smith, at 807 (R-10).¹ The mandate from the

¹The district court applied the test of Albritton v. State,
(Footnote Continued)

district court issued January 3, 1986 (R-1). This court denied a petition for review April 14, 1986 (R-12).

For reasons not explained in the record, appellant was not resentenced until June 23, 1988. By that time the single departure reason which the district court had earlier sustained,² had been rendered invalid by Scurry v. State, 489 So.2d 25 (Fla. 1986). The trial judge declined the state's suggestion to apply other reasons for departure which arguably might have been, but were not, found as reasons to support the original departure sentence (R-73-76).

The trial judge accepted, however, the state's argument that the statute creating the Sentencing Guideline Commission violated the separation of powers provision of Article II, Section 3 of the Florida Constitution. Announcing his ruling orally the court said:

Well, I find that the guidelines as they were enacted in 1983, and as they are until repealed specifically by the legislature are violative of... Article II, Section 3, on branches of government and separation of powers. As I have indicated, I have grave concerns about the composition of the [guidelines] commission. I have grave concerns about the delegation of that responsibility by the legislature, and the coordination or cooperation between branches of government. I find them to be violative of separation of powers (R-71).

(Footnote Continued)

476 So.2d 158 (Fla. 1985) and concluded that it was not shown beyond a reasonable doubt that the trial court would have departed without the invalid reasons.

²"A lesser sentence is not commensurate with the seriousness of the crime."

Subsequently the court entered a written order declaring Section 921.001 Florida Statutes (1983) unconstitutional. The Court said:

1. That the provision of criminal penalties and of limitations upon the application of such penalties is a matter properly within the legislative domain. Booker v. State, 514 So.2d 1082 (Fla. 1987).

2. That the Florida Sentencing Guideline Act, Section 921.001, Florida Statutes, is violative of Article II, Section 3, of the Florida Constitution. The Sentencing Guidelines Commission performs essentially executive and legislative powers; however, five members of said Commission are judicial officers appointed to the Commission by the Chief Justice. Article II, Section 3, prohibits any person belonging to one branch of government from exercising any powers appertaining to either of the other branches. It is the court's conclusion that by including judicial officers as members of the Commission to perform legislative functions, the Sentencing Guidelines Act violates Article II, Section 3, of the Florida Constitution. U.S. v. Brodie, U.S.D.C., Case No. 87-0492, 43 Cr1. 2182 (6-8-88) and U.S. v. Bogle, 2 FLW Fed. D277 (S.D.Fla. 1988) En banc.

3. That the Sentencing Guidelines Act constitutes substantive law and must be enacted into law by the legislature; however, the guidelines applicable to this case allegedly became law upon approval by the Supreme Court and not the legislature. The legislature was without authority to delegate to the judiciary the exercise of legislative powers, Cain v. State, 381 So.2d 1361, 1367 (Fla. 1980); Husband v. Cassel, 130 So.2d (Fla. 1961) and the Supreme Court under Article V, Florida Constitution, is "powerless to promulgate a rule which had the effect of enacting . . . a statute involving . . . substantive law". Petition of Florida State Bar Association, etc., 199 So.

57, 59 (Fla. 1940); Benyard v. Wainwright,
322 So.2d 473 (Fla. 1975).

A timely appeal was taken to the First District Court of Appeal; upon motion of appellant, that court certified that the order appealed required immediate resolution by this court because the issue was of great public importance and had great effect upon the administration of justice throughout the state. See Fla.R.App. P. 9.125. See Appendix.

SUMMARY OF ARGUMENT

The Florida Guidelines Statute, Section 921.001, created a guidelines commission whose function was purely advisory. The trial judge erred by finding the guidelines invalid on the ground that judges served improperly on the guidelines commission.

The legislative purpose in enacting the guideline statute was elimination of unwarranted sentencing disparity. The guidelines rule is predominately procedural, guiding judges in the exercise of sentencing discretion, and was lawfully promulgated as a procedural rule by the Supreme Court.

Even if the guidelines rule is substantive, it was enacted into law by the legislature.

The joint action of the Supreme Court and the legislature in adopting guidelines by rule and statute is supported by precedent and did not violate separation of powers.

The Federal Sentencing Reform Act and the Federal Sentencing Guidelines Commission are entirely different from the Florida Guidelines Act and Guidelines Commission. Consequently, federal court decisions invalidating the federal guidelines are neither controlling nor persuasive.

Appellant was originally sentenced under the guidelines for crimes which occurred before the guidelines became effective. All of the reasons assigned for departure at the time of that sentence were either held invalid on appeal or have since been ruled invalid. Appellant should therefore be given a sentence within the guideline range of 2 1/2 to 3 1/2 years.

If this court finds that the Florida Guidelines Act, Section 921.001, is unconstitutional, the court should expressly declare that the provisions of that act abolishing parole are not severable and therefore are void.

QUESTION PRESENTED

WHETHER THE SENTENCING GUIDELINES STATUTE, SECTION 921.001, AND THE SENTENCING GUIDELINES RULES, FLA.R.CR.P. 3.701 AND 3.988 ARE UNCONSTITUTIONAL AS A VIOLATION OF THE SEPARATION OF POWERS PROVISIONS OF ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION; AND IF THE ACT IS UNCONSTITUTIONAL IS THE RIGHT TO PAROLE RESTORED.

ARGUMENT

The scope of the trial judge's ruling is unclear. Announcing the decision in open court the judge found the "guidelines" to be unconstitutional. In the written order, however, the Court said that the 1983 version of Section 921.001 was unconstitutional. Substantial differences exist, obviously, between the statute and the rule. Presumably the court's ruling affects not only the statute, to which specific written reference was made, but the ensuing guidelines adopted as Florida Rule of Criminal Procedure 3.701 and 3.988 as well.

The trial judge found two major flaws in the guidelines statute and rules. Both were based upon violation of separation of powers. He said that judges could not serve on the guidelines commission because its function was legislative and that the legislature had unlawfully delegated to the court the function of enacting substantive law.

The basis of the trial court's order, regardless of its reach, is the asserted incompatibility of the statute and rule with Article II, Section 3 of the Florida Constitution which states:

"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."

Appellant's argument is that the guidelines were properly adopted by this court as a rule of procedure. Some participation by the legislature was necessary to provide the substantive law adjuncts to the procedures set out in the guidelines rule.

The major purpose of the guidelines was reform of the sentencing process by reducing unwarranted variations.³

In bringing about the guidelines, the legislature in 1982 created a sentencing guidelines commission. The preamble to the Act, Chapter 82-145 Laws of Florida, contained these policy statements:

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 committed 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, and

WHEREAS, disparity in sentencing practices 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, and

* * * *

WHEREAS, the Legislature by its previous act has acknowledged and approved of the continuing work of the Sentencing Study Committee of the Florida Supreme Court, which was charged with identifying the extent and causes of sentence disparity, to explore the range of sentencing reform

³Sundberg, Plante and Braziel, Florida's Initial Experience With Sentencing Guidelines, 11 Fla. St. U. L. Rev. 125, 128 (1983); Senate Staff Analysis and Economic Impact Statement, SB 1140, May 9, 1983.

alternatives available, and to reduce unreasonable and unjustifiable sentence variation, and

* * * *

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

The body of the act created a Sentencing Guidelines Commission to be "responsible for the development of a system of sentencing guidelines on a statewide basis." These guidelines were to be implemented by the Supreme Court but thereafter would be evaluated and changed on a continuing basis by the commission.

Before any guidelines were promulgated by this court, the legislature amended the 1982 law by passing chapter 83-87, Laws of Florida, codified as Section 921.001, Florida Statutes (1983). The new law gave the guidelines needed teeth by requiring written reasons for departures and creating a right of appellate review. Other major changes in 1983 were provisions that (a) the initial set of guidelines to be implemented by the Supreme Court would take effect October 1, 1983, (b) after implementation of the original guidelines, subsequent revisions by the Supreme Court would become effective "only upon adoption by the legislature of legislation implementing the guidelines as then revised," (c) persons sentenced under the guidelines were ineligible for release on parole. Section 921.001 (1983).

The first guidelines were adopted by the court as rules of procedure, designated as Fla.R.Cr.P. 3.701 and 3.988, and were effective October 1, 1983. In Re Florida Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983).

The guidelines are a fusion of legislative and judicial power. On the one hand, the legislature has the constitutional authority to enact laws defining crimes and establishing penalties. Article III, Section I, Florida Constitution; Brown v. State, 13 So.2d 458 (Fla. 1943); Wilson v. State, 225 So.2d 321 (Fla. 1969); Dorminey v. State, 314 So.2d 134 (Fla. 1975). The judiciary has a role in sentencing as well, by determining the penalty to be imposed in individual cases through the exercise of judicial discretion. Wilson, supra, 225 So.2d at 323 (ordinarily the punishments authorized are within the specified limits and discretion is accorded the trial judge to impose the authorized punishment he deems appropriate). In Brown, supra at 461, the court said it was "within the province of the trial court to fix by sentence the punishment within the limits prescribed by statute."

The precise boundaries of the legislature and judiciary in sentencing are not clearly marked. In Wilson, for example, the court said the range of penalties and the alternatives are subject to legislative prescription which may be narrow or broad, or be limited to many or few dispositions or even to just one. 225 So.2d at 323. In State v. Benitez, 395 So.2d 514 (Fla. 1984) the court stated that courts maintain the final discretion to impose sentence,

clearly a recognition that the legislature's control over sentencing is not plenary.

Before the guidelines, the prevailing law in Florida was that sentences imposed within statutory limits were not reviewable on appeal. Booker v. State, 514 So.2d 1079 (Fla. 1979); Wilkinson v. State, 322 So.2d 620 (Fla. 2d DCA 1975); Dickinson v. State, 170 So.2d 594 (Fla. 1st DCA 1965). Sentencing was considered to be within the discretion of the trial judge. Wilkinson, at 622. Legislative action was necessary to create appellate review of sentences.

With both the legislative and judicial branches having powers relating to sentencing, efforts to bring about sentencing reform necessarily involved both of them. The law-making authority of the legislature to set the penalties and the discretionary power of the courts to impose sentences are jointly implicated in sentencing reform. Absent a cooperative effort by both branches the laudable goal of sentence reform would be incomplete. Section 921.001 set in motion the machinery to help eliminate unjustified disparity in sentencing. The guidelines rule was the court's procedural implementation of that goal.

In addressing the issue, it is important to realize that the Florida Supreme Court is constitutionally endowed with the exclusive authority to regulate by rule the "practice and procedure" in all courts. Article V, Section II (a) Florida Constitution.

One rationale of the trial judge's ruling was that the guidelines were substantive law. The state had relied on Miller v.

Florida, ___ U.S. ___, 96 L.Ed.2d 351 (1987), in which the United States Supreme Court ruled that Florida's sentencing guidelines were substantive law and not merely procedural. Miller was a ruling under the ex post facto clause of the United States Constitution. It is not controlling on the separate issue of whether the guidelines are considered procedural under Article V. Section 2(a) of the Florida Constitution.⁴

An argument was made in Vaught v. State, 410 So.2d 147 (Fla. 1982) that Florida's capital sentencing statute was invalid under Florida's constitution because the law was procedural and had not been promulgated as a rule by the Supreme Court. That contention sprang from the ruling in Dobbert v. Florida, 432 US 282 (1975) that under the ex post facto clause changes in the sentencing statute were considered procedural rather than substantive. Vaught's argument did not prevail, because this court distinguished the different constitutional provisions involved and said:

⁴This court has receded from its earlier ruling made in State v. Jackson, 478 So.2d 1054 (Fla. 1985) that the guidelines were procedural. Wilkerson v. State, 513 So.2d 664 (Fla. 1987). The Wilkerson opinion does not settle the question under Article V, Section 2(a) because there the court cited Miller's ex post facto ruling as the basis for its decision. The U.S. Eleventh Circuit Court of Appeals has recently refused to rule on whether the guidelines violate Florida's constitutional provision on separation of powers because that is an issue of state rather than federal law. Pacheco v. Dugger, ___ F.2d ___, 2 FLW Fed. 1065, No. 87-5610, (11th Cir. August 2, 1988). In its discussion of the issue the eleventh circuit observed that it was unclear "whether the [Florida Supreme] court's change in position on the ex post facto question, a matter of federal constitutional law, will affect the court's position on the separation of powers question, which is a matter of state law." Id. at 1066, note 1.

In contending that the capital felony sentencing law regulates practice and procedure, appellant relies upon Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), and Lee v. State, 294 So.2d 305 (Fla. 1974). The critical issue in those cases was the legality of applying Florida's new death penalty law to persons who had committed a murder before the law had taken effect. In holding that the law could be applied to such persons, the United States Supreme Court and this Court referred to the changes in the law as procedural. Those references concerned the manner in which defendants who had committed murder before the new law took effect should be sentenced. They were not meant to be used as shibboleths for deciding whether the new law violates Article V, Section 2(a) of the Florida Constitution by regulating the practice and procedure in the Florida courts. 410 So.2d at 149. (Emphasis added)

The guidelines should not be allowed to fail because of elusive distinctions between the concepts of substance and procedure.⁵ This court has the authority to enact rules to guide trial judges in exercising sentencing discretion. In Huntley v. State, 339 So.2d 194, 196 (Fla. 1976) it was held that "the means to assure the informed exercise of judicial discretion in sentencing is a procedural matter properly determined by court rules."

Among the definitions this court has applied to substance and procedure are these:

Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which

⁵"In some instances it is difficult to determine whether a rule relates to a matter that is substantive or . . . procedural . . ." State v. Garcia, 229 So.2d 236, 238 (Fla. 1969).

a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.

In Re Florida Rules of Criminal Procedure,
supra, 272 So.2d at 66.

* * * *

As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished.
State v. Garcia, 229 So.2d 236, 238 (Fla. 1969).

It can be seen that there is not a clear cut answer to the substance/procedure dichotomy. As noted in Beynard v. Wainwright, 322 So.2d 473, 475 (Fla. 1975) an "argument can be made that the manner of the imposition of sentence is procedural . . ." The court held, however, that a statute prescribing that sentences imposed in separate cases would run consecutively unless directed to run concurrently by the trial judge was a matter of substance. Beynard was cited by the court in this case as support for invalidating the guidelines. In Beynard the court was confronted with a direct conflict between a statute making the sentences consecutive and a rule making the sentences concurrent. In appellant's case conflict between a statute and a rule does not exist. On the contrary both the legislature and the court have adopted the guidelines. Beynard is not controlling in this situation.

The issue squarely before this court is whether the guidelines statute and rule will survive.⁶ The court should uphold Section 921.001 of the statutes, and Rules 3.701 and 3.988 because the substantive law components were enacted by the legislature and the procedural components by the Supreme Court. To make sure, the legislature also adopted the procedural rules.

In the often-repeated words of Justice Adkins in In Re Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972):

The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. (Emphasis added). (Adkins, J., concurring).

To compensate for the lack of certainty demarcating law from procedure, Section 921.001 apportions and overlaps responsibility for the guidelines. The court adopted the guidelines as a rule of procedure without advance approval by the legislature. In its next session the legislature passed Chapter 84-328, Laws of Florida, adopting the guidelines as revised.⁷

Legislative approval was a wise hedge against the possibility that the guidelines might be lost in the twilight of substance

⁶The court previously had an opportunity to decide if the guidelines rule was substantive or procedural but declined review of that certified question. Pacheco v. State, 485 So.2d 1379 (Fla. 3d DCA 1986) rev. den. 494 So.2d 1152 (1986).

⁷The most current adoption of the guidelines is in Chapter 88-131, Laws of Florida, an act that also amends Section 921.001.

versus procedure. This court had taken a similar precaution after the legislative adoption of the evidence code. In In Re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979) the court observed that portions of the evidence code might be procedural and

to avoid multiple appeals and confusion in the operation of the courts caused by assertions that portions of the evidence code are procedural and, therefore, unconstitutional because they have not been adopted by the court under its rule-making authority, the court hereby adopts temporarily the . . . evidence code . . . to the extent they are procedural, as rules of this court

The court had also taken this approach after the 1973 legislature passed several procedural statutes. In In Re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204, 205 (Fla. 1973) the court accepted the statutes as rules of court and said:

The adoption as rules of the court of all statutes which have not been superseded or may be in conflict with the rules is primarily a matter of convenience or administrative expediency. Such adoption avoids the question of whether a matter lies within the field of substantive or administrative law.

With the guidelines, the legislature sought to foreclose possible challenges to the rules based on substance versus procedure arguments with a back up endorsement of the rule initially adopted by the court. This after-the-fact action followed, in reverse order, the precedents set by this court in the instances when the legislature initially adopted what arguably were procedural rules. It would be a mistake to hold that the well-intentioned cooperative

efforts of the legislature and the judiciary to alter unfair sentencing practices were thwarted by the very fact of their mutual participation. No doubt the legislature inserted into the 1983 law the requirement for its later adoption of the guidelines to avoid wrangles over the exact dimensions of the theoretical substance and procedure concepts.

The doctrine of separation of powers "is designed to avoid excessive concentration of power in the hands of one branch." In Re Advisory Opinion to the Governor, 276 So.2d 25, 30 (Fla. 1973). When two branches act in concert to achieve reforms in an area where each have authority, it is hard to imagine that either has acquired an excessive concentration of power at the expense of the other.

In State v. Johnson, 345 So.2d 1069, 1071 (Fla. 1977) the court said:

Separation of powers does not mean that every governmental activity be classified as belonging exclusively to a single branch of government.

Further, quoting from its earlier opinion in State v. Atlantic Coastline Railroad Co., 56 Fla. 617, 47 So. 969, 975 (1908) the court outlined the common sense approach that should apply to this case:

The division of governmental powers into Legislative, executive, and judicial is abstract and general, and is intended for practical purposes. There has been no complete and definite designation by a paramount authority of all the particular powers that appertain to each of the several departments. Perhaps there can be no absolute and complete separation of all the powers of a practical government.

. . .

"A clear violation of the constitutional provisions dividing the powers of government into departments should be checked and remedied; but where a reasonable doubt exists as to the constitutionality of a statute conferring power, authority, and duties upon officers, the legislative will should be enforced by the courts to secure orderly government . . .

In appellant's case, the trial judge made no discernible effort to uphold either the statute or the rule. The court did not appear to give sufficient consideration to the view that both branches approved the guidelines, or that the court on its own had authority to adopt the guidelines. Instead he found an improper delegation of legislative power to the judiciary.

The guidelines rule adopted by this court in response to Section 921.001 is similar to the enactment of the speedy trial rule. The 1971 legislature passed Chapter 71-1(b), Laws of Florida which, in part, said:

The Supreme Court shall, by rule of said court, provide procedures through which the right of a speedy trial as guaranteed by . . . Section 16 of Article I of the state constitution shall be realized.

No standards were contained in this law. The court thereafter promulgated an emergency rule on speedy trial. In Re Florida Rules of Criminal Procedure, 245 So.2d 33 (Fla. 1971). This rule was later held unconstitutional by a trial judge but this court reversed, saying:

The questioned rule merely provides the procedures through which the constitutional right to a speedy trial is enforced in this state, and, as such, is a proper exercise of the court's constitutional power to promulgate rules

of practice and procedure. 254 So.2d at 208.

In State v. Cain, 381 So.2d 1361 (Fla. 1980) the legislature's grant of authority to the state attorney to prosecute a juvenile as an adult was challenged on grounds that the act violated separation of powers by containing no standard for the state attorney's exercise of discretion other than the "public interest." Rejecting this contention in language pertinent here, this court said:

The analogy is not well taken. It is well established that the legislature may, within clearly defined limits, delegate to an administrative agency the authority to provide rules and regulations for the complete operation and enforcement of the law within its express purpose, but 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. E.g., Husband v. Cassel, 130 So.2d 69 (Fla. 1961). Here, however, we are dealing with the long-standing responsibility vested in a prosecutor, as a member of the executive branch, to enforce the criminal laws of the state. As we stated in Johnson v. State, supra, the discretion of a prosecutor in deciding whether and how to prosecute is absolute in our system of criminal justice. That subsection 39.04(2)(4)4 calls for the state attorney to exercise his discretion in the "public interest" merely states a truism, for that obligation is already ascribed to him. 381 So.2d at 1367-68.

As held in Cain, if a branch of government already has the power to act, the legislature need not set forth standards when authorizing or directing that action. That principle applies here; if the court had the power to implement the guidelines, it is immaterial that standards were missing from the enabling

legislation. Even if there was an unlawful delegation, it was cured by legislative adoption of the guidelines.

At the hearing in this case the state argued that decisions of the federal courts finding the federal guidelines unconstitutional should be applied to the Florida guidelines. The trial judge relied on two federal court rulings⁸ in holding the state sentencing guidelines act unconstitutional and said:

[B]y including judicial officers as members of the commission to perform legislative functions, the Sentencing Guidelines Act violates Article II, Section 3, of the Florida Constitution. (R-38)

The federal decisions provide no authority to invalidate Florida's guidelines. The federal guidelines were drafted and adopted by an independent commission established in the judicial branch by Congress, with its membership including at least three Federal judges; all commissioners are appointed by the president and removable by him for good cause. 28 USC Section 991(a). The purposes of the commission included establishing sentencing policies and practices and developing means of measuring the degree to which sentencing, penal and correctional practices are effective. 28 USC Section 991(b). The commission was directed to promulgate sentencing guidelines, general policy statements regarding application of the guidelines, and guidelines for revoking probation

⁸United States v. Brodie, 686 F.Supp. 941, (DCD 1988); United States v. Bogle, ___ F.Supp. ___, 2 FLW Fed. D277 (S.D. Fla. 1988) en banc.

and modifying conditions of supervised release. 28 USC Section 994(a)(1),(2)(3).

Detailed guidance is given the commission on the factors to consider in establishing the guideline ranges. 28 USC Section 994(b) - (m). The guidelines become effective automatically within 180 days of their submission to Congress, unless the effective date is changed or they are disapproved by Congress. 28 USC Section 994(g).

Several important distinctions exist between the sentencing commission and the guideline adoption process of the federal system when compared with Florida's commission and process. The most significant differences are: (1) the federal commission actually adopts the guidelines, subject only to express disapproval by Congress, while Florida's guidelines are effective only after adoption by the Supreme Court, the legislature, or both; (2) the federal commission is an independent agency given broad executive and legislative powers but is placed in the judicial branch and includes judges; the Florida guidelines commission is merely advisory, it lacks the power to promulgate guidelines, and it does not exercise legislative, executive or judicial powers;⁹ (3) Federal judges on the guidelines commission are appointed and removable by the president; Florida judges on the commission are selected by and

⁹The guidelines commission's duties regarding adoption are specified as recommending a plan for initial adoption and thereafter recommending needed changes. Section 921.001(4)(a) and (b).

serve at the pleasure of the Chief Justice of the Supreme Court.
Section 921.001(2)(a) Florida Statutes.

Comparing the composition and functions of the federal and Florida commissions, therefore, exposes more differences than similarities. The closest they come to being alike is sharing the name "guidelines."

Some federal courts have found the guidelines constitutional. The language of those cases supports appellant's position.

In United States v. Macias-Pedroza ___ F.Supp. ___, No. CR 88-13 TUC/RMB 43 CrL 2146, 2147 (DC Ariz. April 18, 1988) the court upheld the guidelines, saying:

The court further holds that rather than impairing the judicial function, the work of the Commission is actually in aid of the primarily judicial function of sentencing. While it is true that sentencing power historically has not been the exclusive province of the court, . . . it is clear that Congress created the Commission for the express purpose of assisting the judiciary in its current sentencing function. The Act authorized the Commission to synthesize congressional sentencing policy so as to assist the judicial branch in carrying out its constitutional function of imposing fair and uniform sentences. Furthermore, just as the court finds that the task of sentencing is primarily - although not exclusively - judicial in nature, so too it concludes that this independent Commission was properly designated within the judicial branch

The District Court for the Northern District of California in United States v. Myers, 687 F.Supp. 1403(N.D. Calif. 1988) said the Sentencing Reform Act and the Guidelines did not violate separation of powers. The Court adopted a "pragmatic" view, in which the task

is to closely examine the legislative purpose of the law and uphold it if it does not (1) prevent another branch from accomplishing its constitutionally assigned functions and (2) if its potential for disruption is justified by an overriding need to promote objectives within the constitutional authority of congress. Id. at 1415. The Court noted that "federal judges presently have nearly unfettered discretion in sentencing. . . . [s]entencing is therefore a judicial function" Ibid. The purpose and effect of the guidelines is "to rationalize the exercise of that discretion upon individual defendants and eliminate a 'shameful disparity' of sentences by guiding judges in their sentencing function" Id. at 1414.

Addressing the effect of the guidelines, the Court said they regulate judicial procedure and while they affect criminal defendants "their primary impact falls upon judges who must follow the guidelines in imposing sentences." 480 F.Supp. at 1414. The Court refused to decide the case solely on the basis of substance versus procedure because it was "too elusive to be useful" Id. at 1415. Rather the court said that since individual sentencing decisions are substantive and the guidelines are intended to rationalize the individual sentences "the fact that the guidelines also have a substantive impact does not in itself render them unconstitutional." Ibid.

Similarly, in United States v. Amesquita-Padilla ___ F.Supp. ___ No. CR 87-246R, 43 CrL 2123, 2124 (W.D. Wash. April 20, 1988) the court said:

It is argued that the guidelines cannot be characterized as being in aid of the judicial function because they directly impact substantive rights of convicted defendants. But the procedure/substance distinction is not essential to separation of powers questions. If it were, prior sentencing law would violate the separation of powers doctrine, for the unfettered exercise of discretion that characterized previous sentencing procedures affected defendants' substantive rights no less than do the guidelines. The commission's authority and guidelines are primarily addressed to the procedural task of structuring individual judges' exercise of discretion. Any substantive effect is the responsibility of Congress, since it has the final word as to whether the guidelines become law.

A comprehensive opinion of the district court of Southern California, United States v. Ruiz-Villaneuva, 680 F.Supp. 1411 (SD Calif. 1988) found the guidelines constitutional because the work of the commission is "in aid of the judicial sentencing function." Id. at 1421. The Sentencing Reform Act did not direct the commission to enact new crimes or penalties. Instead it directed the commission to "synthesize congressionally mandated sentencing policy into a format which would assist judges in imposing fair and uniform sentences." Ibid.

Rebuffing the contention that the guidelines should fail because they were substantive, the court said:

The court's finding is not undermined by the suggestion that the Guidelines are impermissibly "substantive," whereas the various Federal Rules are more properly construed as "procedural." [T]he court first notes the imprecision that necessarily attends a separation of laws or policies into "substantive" and "procedural" realms Notwithstanding

this difficulty in defining these terms, the court is inclined to find that the Guidelines are essentially procedural, even though they represent a distillation of multitudinous "substantive" concepts. Through the text of the Act and its legislative history Congress set out the relevant substance of federal sentencing law, leaving to the Commission the task of putting that substance into a form capable of aiding judges in the process of sentencing. Moreover, even if the Guidelines are properly viewed as somehow "substantive," they are still in aid of the judicial function on sentencing. Finally, it is not clear what bearing the procedure/substance distinction has on the issue of separation of powers. 680 F.Supp. at 1422.

It is evident from the decisions rendered so far that the federal courts are split on the constitutionality of the federal guidelines. Those decisions are not binding on this court primarily because the federal Sentencing Reform Act and the federal commission are so markedly different from the Florida guidelines statute, commission and rules.

The most important distinction is that the United States Congress did not adopt the federal guidelines; they were purely the product of the guidelines commission. If federal guidelines are unconstitutional it is because the commission which created them was unconstitutional. In Florida the commission was merely an advisory body. The judicial and legislative branches adopted the guidelines; the recommendation of the commission was not binding on either branch. In other words, even if the guidelines commission was composed in violation of separation of powers, the guidelines

themselves are unaffected because the commission did not adopt them, the court and the legislature did.

Ruling the guidelines unconstitutional has affected appellant dramatically. His offenses occurred prior to October 1, 1983, but, because his sentence occurred after that date, he was entitled to elect to be sentenced under the guidelines. Section 921.001(5). The First District Court of Appeal has already determined that appellant's presumptive guideline sentence is 3 years.¹⁰ All of the reasons for departure given initially by the trial judge were either rejected by the district court or became invalid by subsequent decisions. The trial judge properly found that on remand he could not, should not, and would not try to justify departure for reasons which were available but not articulated at the original sentencing. See, Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

Instead of a guideline sentence of three years (or any term between the permissible range of 2 1/2 to 3 1/2 years) the trial judge reimposed the original sentences of 15 years plus 10 years, consecutively, for a total of 25 years. These sentences were not departures because the trial judge found the sentencing guidelines unconstitutional. Appellant's position is that the court's ruling was erroneous and this court should remand with directions that he

¹⁰Appellant's counsel at sentencing observed that with all six prior reasons invalid the court "would be obligated to sentence Mr. Smith under the guidelines to a guidelines sentence." (R-65).

be sentenced to no more than the maximum guideline sentence of 3 1/2 years.

Even if the original guidelines promulgated by the court were invalid because they were substantive in nature, (which appellant does not concede) the legislature adopted those guidelines, as revised, effective July 1, 1984.¹¹ Appellant was resentenced on June 23, 1988. At that time he was entitled to elect sentencing under the guidelines which by then had been enacted by both the court and the legislature.

The parole issue was not addressed by the trial judge but it should not be ignored. If the state is correct and the guidelines statute is declared unconstitutional by this court the right to parole will be restored. An integral part of Section 921.001 abolishes parole for all persons who elect to be sentenced under the guidelines and for all persons convicted of crimes occurring after October 1, 1983. Section 921.001(10). Even if there were a severance clause in the statute (and there is not) the guidelines Act is a unified plan with interlocking features. Abolishing parole is inseparable from the other portions of the law.

The test of severability is whether the court can conclude that the legislature would have been content to enact the law without the invalid provision, Barndollar v. Sunset Realty Corp.,

¹¹Chapter 84-328, Laws of Florida. Subsequent revisions by the court were adopted by the legislature in Chapter 86-273, Laws of Florida; Chapter 87-110 Laws of Florida, Section 1; and Chapter 88-131 Laws of Florida.

379 So.2d 1278 (Fla. 1980). In Small v. Sun Oil Co., 222 So.2d 196, 199-200 (Fla. 1969) severability was explained this way:

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

It cannot be said that the legislature intended to abolish parole entirely independent of the scheme of sentence uniformity to be accomplished through the guidelines. The act makes guideline sentencing the disqualification for parole. Those electing the guidelines when sentenced after the effective date of the act for crimes committed before the effective date lose parole eligibility. As born out by that quid pro quo, guideline sentencing was intended to supplant parole. Conversely, without guidelines the right of parole must be reestablished. Appellant would, therefore, have a right to parole consideration if his present sentence is affirmed in this case because Section 921.001 is unconstitutional.

CONCLUSION

The order appealed is erroneous and should be reversed. No competent authority supports the ruling that the guidelines commission was improperly constituted. Even if the commission was improperly constituted that defect was cured by adoption of the guidelines by the Supreme Court and the legislature.

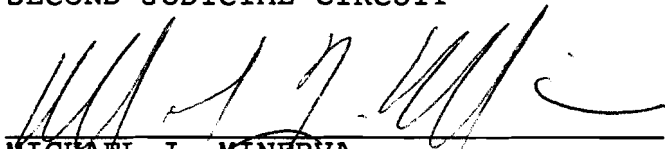
Appellant should have been given a sentence within the guidelines range of 2 1/2 to 3 1/2 years because all the reasons for departure that the trial judge found have been disapproved.

If the original guidelines which the court adopted are invalid, the revised guidelines adopted by the legislature are not invalid and appellant is entitled to elect to be resentenced under those guidelines.

If all the guidelines, those adopted by the court and the legislature, are held unconstitutional by this court, the appellant is entitled to be considered for parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Honorable William N. Meggs, State Attorney, First Florida Bank Building, Tallahassee, Florida; Mr. Raymond L. Marky, Assistant State Attorney, First Florida Bank Building, Tallahassee, Florida; Mr. Richard E. Doran, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy has been mailed to appellant, Mr. Alphonso P. Smith, this 9th day of September, 1988.


MICHAEL J. MINERVA