IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO: 73,767

DISTRICT COURT OF APPEAL,
4TH DISTRICT NO: 87-1551

RICHARD DIAL THORP,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER

By: MARY CATHERINE BONNER, ESQ.
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STATEMENT OF THE CASE AND OF THE FACTS

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

The Petitioner Richard Dial Thorp entered his plea of guilty before the Honorable John G. Ferris in the Circuit Court of the Seventeenth Judicial Circuit for Broward County, Florida, on January 9, 1987. He was sentenced on May 4, 1987, to a period of incarceration of twenty years.

Mr. Thorp filed his Notice of Appeal with the Court of Appeal for the Fourth District on June 2, 1987 (R/52) and an Amended Notice of Appeal on June 8, 1987 (R/53).

The Fourth District Court of Appeal, after the preparation of the Record on Appeal, granted the Respondent's request for supplementation of the Record. That supplementation included the docket sheet and indictment returned against Mr. Thorp in the United States District Court for the Southern District of Illinois.[1]

After oral argument the Court of Appeal for the Fourth District filed is opinion January 25, 1989[2], affirming Mr. Thorp's conviction. Mandate from that Court issued February 10,

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1. References to this document will be supplemental record (SR/) and it is also attached herewith as a portion of the Appendix for the Court's convenience.

2. That opinion is included in the Appendix.

1989.

The Petitioner filed with this Court a jurisdiction brief in support of his Petition for Writ of Certiorari on March 3, 1989. This Court entered its Order Accepting Jurisdiction and Dispensing with Oral Argument on Friday, May 12, 1989.

B. STATEMENT OF THE FACTS

The Petitioner was charged by Information by the State of Florida on November 22, 1983, under the name of Andrew Goodman.[3] It was charged that on November 9, 1983, he, along with others, possessed cannabis in an amount in excess of 100 but less than 2000 pounds and that he conspired to traffic in those said amounts of cannabis (R/40-43). He entered his plea of not guilty on December 14, 1983, (R/42), and was brought before the Court again in the late 1986. On December 31, 1986, in anticipation of a guilty plea, he filed a Pre Plea Request for Determination of Guideline Score (R/46-7).[4]

On January 9, 1987, Mr. Thorp appeared on a Motion for Guideline Clarification. At that proceeding the Honorable John

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3. The Information was amended October 24, 1986, to charge the Appellant under his correct name, Richard Dial Thorp (R/43).

4. A clerical error occurred in the preparation of the Record on Appeal. Record entry (R/51) is the front side of the guideline computation form. The reverse of this form was inadvertently omitted. The clerk has supplemented the Record by filing a certified copy of the document which will be referred to, if necessary, in the instant brief as (R/51a).

G. Ferris, after hearing argument of the parties, (R/4-15), ruled that he would allow an Illinois conviction of Mr. Thorp, which was adjudicated subseauent to his arrest in the instant case, to be scored as a portion of Mr. Thorp's "PRIOR RECORD" (R/11-12; 51).

Mr. Thorp then entered his plea of guilty, (R/21-26), which was accepted by the Court, (R/26), and a judgment was entered (R/48).

Prior to the time that Mr. Thorp was charged by the State of Florida in 1983, an indictment had been returned against him in the United States District Court for the Southern District of Illinois. That indictment was returned on or about November 13, 1980 (SR/2). Mr. Thorp entered his plea to the charges lodged against him in the Southern District of Illinois on February 2, 1986 (SR/3) and was brought before the Florida courts for the proceedings on the instant offense in late 1986.

SUMMARY OF ARGUMENT

The sentencing court incorrectly construed the statutory definition of a prior offense, scoring for guideline purposes a charge on which Mr. Thorp made his initial appearance and entered his plea of guilty subsequent to the commission of the Florida offense. This charge was defined as a "prior offense," thus incorrectly raising the Petitioner's appropriate guideline sentence. This upward departure from the guidelines was made without the statutorily mandated written reasons for departure which must be based on "clear and convincing" evidence. The Circuit Court was precluded by statute from factoring in offenses as a part of the Sentencing Guideline Scoresheet which were not resolved until three years after the charges on the primary offense.

ARGUMENT

WHETHER THE SENTENCING COURT ERRED WHEN IT USED, IN THE CALCULATION OF THE GUIDELINE SCORE, OFFENSES ON WHICH THE PETITIONER FIRST APPEARED AND FOR WHICH CONVICTIONS WERE OBTAINED SUBSEQUENT TO THE CHARGE OF THE PRIMARY OFFENSE?

Mr. Thorp was charged with marijuana offenses in 1983 in Broward County. At that time an Indictment had already been returned against him in the Southern District of Illinois but Mr. Thorp had not as yet appeared on those charges. In 1985, he first appeared to answer charges in the Southern District of Illinois. He subsequently pled guilty in the Southern District of Illinois to marijuana offenses which allegedly occurred in the years 1975-79 (R/47) (SR/). In 1986, Mr. Thorp was brought once again before the courts in Florida to answer to the charges filed against him in 1983. The Circuit Court approved the use of the Illinois charges to raise Mr. Thorp's guideline score thereby factoring in a conviction which was obtained after the Broward County case to calculate Mr. Thorp's score (R/47).

It is the position of the Petitioner that his conviction in Illinois which took place after his arrest in Florida but before his sentencing in Florida was not properly included in "prior record" when the pre-sentence guideline computation was complet-

ed.

Since this appeal concerns the use of a conviction in the scoring of the instant offense, the definition of prior record becomes crucial. Currently Rule 3.701(d)(5)(a) of the[5] Florida Rules of Criminal Procedure reads:

> "prior record!! refers to any past criminal conduct on the part of the offender, resulting in conviction, prior to the commission of the primary offense. Prior record includes all prior Florida, federal, out-of-state, military and foreign convictions.

It is beyond question that the Illinois "conviction" did not occur "prior to the commission of the primary offense,!! nor was it !!disposed of!! prior to the commission of the primary offense. Hence, it does not fall within the statutory definition of prior record and should not have been so included.

On July 1, 1985, Rule 3.701(d)(5)(a) was revised, by the deletion of the words "disposed of," (See footnote 5), this Court stated in a footnote to its opinion in The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988--Sentencing Guidelines, 468 So. 2d 220, (Fla. 1985):

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5. Prior to 1985, the definition read:
> "prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, disposed of prior to the commission of the primary offense. Prior record includes all prior Florida, federal, out-of-state, military and foreign convictions. (Emphasis Added).

. . .

> b) Rule 3.701(d)(5)(a) is revised by the elimination of the words @@disposedof." These words are not susceptible of definition within the context of the rule and have generated confusion. The elimination of this wording does not alter the intent of the section.

The stated purpose of the Florida sentencing guidelines is to "eliminate unwarranted variation in the sentencing process." Id. The guidelines are not intended to totally preclude a trial judge from sentencing a particular defendant to a period of incarceration greater or lesser than the guideline range. However, when a judge sentences outside the guidelines, he or she is required to articulate in writing the reasons for so doing. Those decisions will be upheld only if they are supported by clear and convincing reasons and with great frequency sentences outside the guidelines are the subject of appeal.

In the instant case the trial court factored in an offense for which the defendant pled guilty after the charging in this case and thereby circumvented the requirement of articulating his reasons for going outside the guidelines. Thus the trial court precluded review of its decision by an appellate court using the "clear and convincing" standard of review.

The trial court recognized in the pre-plea guideline discussions that it was faced with a conflict of decisions between the District Courts of Appeal, with no decision by the Fourth District Court of Appeal (R/11) and of course no controlling deci-

sion by this Court. Judge Ferris stated that he was:

> impressed with the reasoning of Falzone,[6] a d I am not impressed with the reasoning of Hunt,[7] so on that basis, I will follow the reasoning of the Second District and rule that those convictions can be counted, those prior offenses can be counted in the sentencing guidelines, in the computation.
>
> (R/12).

Based upon that, he factored in Mr. Thorp's conviction in Illinois in guideline computation. It is submitted that the opinion cited by the court, Falzone, supra, should be overturned by this Court because in arriving at the Falzone decision, that court violated rules of statutory construction and intruded upon the province of the Legislature by supplanting legislative mandate with its own reading of how that body should have legislated.

A. General Rules of Statutory Construction

This Court is being squarely faced with a conflict in decisional law between the District Courts of Appeal. It is submitted that this conflict arose because of certain judicial attempts at legislative rewriting. Rather than construe the plain, clear, concise language of a Rule of Criminal Procedure, certain courts have abandoned all notions of statutory construction and have

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6. Falzone v. State, 496 So.2d 894 (Fla. 2d DCA 1986).

7. Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985).

concluded what they believed that the Legislature would have done had it had the outlook which the court possessed.

The language and structure of a statute are the first areas of inquiry when interpreting its meaning. See 2A Sands, Sutherland Statutory Construction, Section 45.01 at 1 (4th ed. 1984). As the Supreme Court has declared, "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1917). Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." Id.

The Rule of Criminal Procedure which is at issue, 3.701, was adopted in a per curium opinion September 8, 1983, by this Court ~~In re~~ Rules of Criminal Procedure (Sentencing Guidelines) 439 So.2d 848 (Fla. 1983), and had as its effective date October 1, 1983, at 12:01 a.m. From that date until the Frank[8] decision in 1986, the interpretation given by trial courts and appellate courts of the term "prior record" was consistent not only with each other but consistent with the plain reading of the rule as

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8. Frank v. State, 490 So.2d 190 (Fla. 2d DCA 1986).

urged by the Petitioner.

In Sutherland, supra, we are taught that there should be no judicial interpretation of language which is plain on its face as written by the Legislature. However, if Courts find that the language is not plain on its face, that there is ambiguity, then they must look to Legislative history, prior enactments dealing with the same matter and the "operation and administration of the statute prior to litigation..." Id., 5.

It is submitted that even if interpretation were necessary with the instant Rule, each of these criteria lead one to the conclusion that prior record includes only convictions which were had prior to the commission of the primary offense. The Committee Notes accompanying the Rule make it clear that prior record was carefully considered[9]. In an analagous situation which dealt with prior record, enhancement statutes, this Court was consist-

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9. There is ample evidence that the Legislature very carefully considered and placed great weight on a defendant's prior record:

> 4. The severity of the sanctions should increase with the length and nature of the offender's criminal history.
>
> Fla.R.Crim. P.3.701(b)(4)

Further evidence that the Committee was very cognizant of prior records is Committee Note (d)(5) from the 1983 adoption of Rule 3.701. The Committee pointed out that each separate felony and misdemeanor in the prior record, which is equivalent to violation of Florida law, should be scored and it went so far as to recognize the fact that adjudications which are withheld or in which the record has been expunged must be noted.

ent in its holding that the prior adjudications had to have been finalized before the enhanced sentence could be imposed for many and varied policy reasons"". Further the "operation and administration of the statute prior to litigation," before Frank, and Falzone, supra, was consistent with the Petitioner's position.

A Court is not to begin this interpretation process until after it has decided that on its face the language is unclear. Sutherland, supra. In discussing the expressed intent of the Legislature, Sutherland, Section 4603 at 82-3 teaches that Courts owe "fidelity to the will of the legislature" and further, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." That treatise

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10. When it formulated the instant definition, the Legislature was aware of a body of law embodying the theory that, before enhanced penalties are imposed, a defendant must be given the opportunity to reform after each of his convictions. In Joyner v. State, 30 So.2d 304 (Fla. 1947) the State tried to enhance the punishment of the defendant by arguing that he had four prior convictions. However, one of those convictions was on appeal at the time.

This Court held that before a prior conviction can be relied upon to enhance punishment it must be final and that it does not become final until the judgment has been affirmed in the appellate courts.

The Court stated that the implicit purpose of the enhancement statute was to protect society from habitual criminals, but that it also contemplated that criminals would have "an opportunity for reformation" after each of the convictions. Though there was no chance for Mr. Joyner to reform before the commission of the offense which was on appeal, this Court gave the statute a consistent application and refused to apply the habitual offender statute.

further cites with approval the language of the Rhode Island Supreme Court:

> It is an elementary proposition that courts only determine by construction the scope and intent of the law when the law itself is ambiguous or doubtful. If a law is plain and within the legislative power, it declares itself and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh would make the judicial superior to the legislative branch of the government, and practically invest it with the lawmaking power. The remedy for a harsh law is not in interpretation but in an amendment or repeal.
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> State v Duggan, 15 R.I. 403, 6 A. 787 (1886)

This Court has also consistently held that where words of a statute are unambigous judicial interpretation is not appropriate to displace the expressed intent of the Legislature. Citizens of the State of Florida v. Public Service Com'n, 435 So.2d 784 (Fla. 1983).

Utilizing the above tenets of statutory construction it is submitted by the Petitioner that since Rule 3.701's definition of prior record is clear on its face there was no need for judicial interpretation of that plain language. Both a reading of that Rule and a recogniztion that for the first several years of its existence no contrary interpretation was made any court leads the Petitioner to this conclusion.

Hence, for the above reasons this Court should not permit the supplanting of the will of the Legislature by the courts.

B. THE INTERPRETATIONS OF THE STATUTORILY DEFINED TERM "PRIOR RECORD" BY THE COURTS OF APPEAL.

1. The Frank line of cases.

The entire line of reasoning ultimately adopted by the trial and the Appellate Courts in this case had its birth in a footnote in Frank v. State, supra. At issue in that case was the defendant's presentence investigation report (PSI). One of the defendant's Aggravated Battery convictions had been excluded in the guidelines computation as reflected in the PSI, and the Second District thought wrongfully so.

That Aggravated Battery was committed before the offense which was the subject of the PSI (no information is given regarding when the offense was charged) but the defendant was not convicted of it until after the offense at issue was committed.

The issue in Frank was whether the reasons given by the trial judge for departure from the guidelines justified the departure. The appellate court found that the reasons relied upon were legally invalid and remanded for sentencing within the appropriate range. In dictum the Second District noted that it felt that the Presentence Report was deficient in that it did not score the above-referenced offense.

Though it was not necessary to its decision on the PSI issue, the Court, in a footnote, stated:

> Because of the commas setting off the words "resulting in conviction," we read the rule as meaning that only the past criminal conduct must occur prior to the commission of the primary offense and that the crime should be scored even though the conviction does not occur until after the commission of the primary offense. If the rule were to be read to require a conviction for the prior crime before the commission of the primary offense, then the very fact of conviction of the prior offense could constitute an independent basis for departure because it could not be used in the guidelines calculations.
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> Id., N. 1.

That Court recognized that the Legislature had set up a scheme where, if a conviction were not scorable, it could be used for departure. However, for the first time by any court, it read the Rule to mean that "only the past criminal conduct must occur prior to the commission of the primary offense and that the crime should be scored even though the conviction does not occur until after the commission of the primary offense." Id.

It is submitted that this reading tortured the plain meaning of the rule as written and was an example of rewriting that which the Legislature had seen fit to enact. That Court created the fiction that what the Legislature had truly intended was to enact a rule which stated that prior record was to be defined as any conviction with which the defendant came before the court on the day of his sentencing.

Whether that is a wiser course for the Legislature to have followed was not an appropriate issue for resolution by a Court.

Building on that flimsy base in Frank, the Second District then decided Falzone v. State, 496 So.2d 894 (2d DCA 1986).

The trial Court in that instance departed upward from the guidelines in sentencing the defendant and gave written reasons for that departure. It relied on an offense which occurred prior to the subject offense but for which the defendant had not been convicted until after the subject offense occurred.

The Court stated that Frank had held, "that any crime committed prior to the subject offense should be factored into the guidelines so long as the conviction of the prior crime takes place before the sentencing for the subject offense." Id. at 2217. It is submitted that this was an overextension of the holding of Frank.

The Falzone Court stated that it was not relying only on the placement of commas referred to in Frank, but also on the fact that it saw no reason why the Rule "would seek to exclude from guidelines computation those convictions which occur between the commission of the subject offense and the sentencing for that offense." Id. In other words it saw no reason why the Legislature defined prior record as it had.

The Falzone Court further recognized that the original construction of the definition contained the words "disposed of" following the commas setting off the words "resulting in conviction." The State argued against the trial court's interpretation

of the Rule and contended that "in order for the prior crime to be factored into the guidelines, the conviction must have occurred before commission of the subject crime." Id. (Emphasis added). It is submitted that the State's argument in that case was correct and that Falzone was incorrectly decided.

The Falzone Court emphasized the fact that the words "disposed of" had been eliminated from the new Rule. However, it admitted that the words "disposed of" seemed more likely to refer to a conviction than the commission of an offense, when these words were read in the context..." Id. (Emphasis Added). It was also aware that this Court had stated that the deletion of the words "disposed of" was not to alter the Rule's meaning. The Florida Bar, supra. If the rule more likely referred to a conviction with words "disposed of" in it; if this Court stated that it means the same after the change; the Second District is disregarding this Court's plain language by placing reliance on the deletion.

The clear intent of the Legislature was to set up consistent, reasonable, understandable standards for courts to use in computation of guideline scores. Enough litigation has been generated by the application of these guidelines that it is beyond understanding that the Legislature's plain meaning must be so tortured to reach a particular result. The Legislature has said that a crime which results in a conviction before the primary offense is committed should be used in computation of the

guideline[11] score.

In the instant case, the trial judge, in his adoption of the Falzone analysis, rejected the reasoning of the First District Court of Appeals in Hunt v. State, 468 So.2d 1100 (Fla. 1st D.C.A. 1985). In that case the trial Court went outside the guideline range of three and one-half to four and one-half years and sentenced the defendant to twenty-five years on one count and five years on the other. It gave many reasons for its departure. The one at issue is reason number 4 wherein the Court found that the defendant was sentenced for another crime which was committed in close proximity to the time of the offense at issue. The trial court opined that these two offenses together showed total disregard for the law. The First District Court of Appeals recognized that:

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11. Of course a judge is not without remedy in the instant situation. He may, as the Frank court recognized, sentence a defendant outside the guideline range, based upon valid reasons, which he articulates in writing, and which meet the clear and convincing standard.

It is also clear that convictions which cannot be scored because they are, for instance, too remote in time, can be used as the subject of departure. See for instance Evard v. State, 502 So.2d 3 (Fla. 4th DCA 1986) and Mullen v. State, 483 So.2d 754 (Fla. 5th DCA 1986). Unscored juvenile convictions can be used as departures. See Weems v. State, 469 So.2d 128 (Fla. 1985).

In point of fact the sentencing judge in the instant case has indicated that he would do so, (R/35-6). These statements are the subject of the defendant's request for resentencing before a different Circuit Court judge.

> Rule 3.701 (d)(5)(a) prohibits consideration of past criminal conduct obtained prior to the commission of the primary offense for purposes of scoring under the prior record cateaory. Here, the trial court properly did not consider the unarmed robbery conviction for that reason. However, nothing in rule 3.701 prohibited the court from taking that conviction into consideration for purposes of departure. Rule 3.701(d)(11) only prohibits as reasons for departure factors relating to prior arrests without conviction, or to the instant offense for which convictions have not been obtained.
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> Id. (Emphasis added).

The Legislature was free to define prior record as "any conduct, whenever occurring, which results in a conviction" or "any conviction with which the defendant comes before the Court." It did not do so. Yet this rewriting of a legislatively defined term is the result which the lower courts would have this Court adopt in order to sustain its inclusion of convictions in Mr. Thorp's guideline computation which were not had until after Mr. Thorp was charged in the instant case.

The First District Court of Appeal followed Frank in Merriex v. State, 521 So 2d 248 (Fla. 1st DCA 1988). The trial court used as an aggravation rather than as a part of the sentencing guidelines' calculations an offense for which the defendant was arrested one day after executing a plea agreement for his first offense and to which he pled guilty before coming back before the court on the first offense.

The appellate court commented that the trial judge had

recognized that this was subsequent conduct rather than prior conduct and thus used it as a basis for departure but appeared to have generally approved the Frank rationale.

The Second District Court of Appeal also followed Frank in Williams v State, 493 So. 2d 48 (Fla. 2nd DCA 1986). That Court remanded for resentencing a defendant following the Frank principle. The court stated:

> If they involved criminal conduct occurring before the defendant's commission of the primary offense, then these convictions should have been scored, even though they may not have occurred until after the primary offense.

The Fifth District Court of Appeal relied on the Frank, Falzone, and Cousins[12] trilogy in Smith v State, 518 So.2d 1336 (Fla. 5th DCA 1987). It felt that the Second District was correct and that:

> ...there is no logical reason why convictions obtained between commission of the primary offense and sentencing (or in our case resentencing) cannot be considered as "prior record." Such a holding promotes the uniformity in sentencing sought by the guidelines.

By adopting the interpretation of the Second District Court of Appeal, this Court would not only be turning the statutory language on its head but would also open up a situation in which there might be a race to the courthouse to decide which of several charged offenses should be dealt with first in order to have

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12. Cousins v State, 507 So.2d 651 (Fla. 2nd DCA 1987)

them calculated either as a mandatory inclusion in the guideline scoring sheet or as reasons for departure. Those charged with multiple offenses would be evaluating the gravity of the first vs. the second offense and would go to great lengths in order to obtain the most favorable result. This type of forum shopping is at odds with the goal of consistency of the sentencing guidelines.

Additionally, if the Rule were read to require that the sentencing court ascertain when a prior offense took place, it might frequently not be in a position where it would have sufficient facts to so determine. The position of the State in the instant case is thus one which will open up even more problems for Courts on the guideline issue:

> Mr. Dimitrouleas [Assistant State Attorney]: I don't think you can score as prior record a conviction that occurred after the commission of the offense and it itself happened after the commission of the offense. (R/9).

The position of the State would have this Court attempt to ascertain exactly when a prior offense, possibly from a foreign jurisdiction, occurred. It is submitted that that would be opening a Pandora's Box. Consider for a moment a conspiracy whose charge read: "From on or about 1971 until on or about June, 1977." If the primary offense occurred in 1972, the sentencing Court would be in a position where it would have to determine whether the evidence of the conviction on the more far-ranging

conspiracy actually proved that the conspiracy began prior to 1972 and that this defendant was involved in it at that time. Issues might arise as to whether the crime had to be completed before the commission of the primary offense whether one overt act was sufficient, etc.?

B. THE HUNT LINE OF CASES.

From the effective date of Rule 3.702 until the time of Frank the interpretation urged by the Petitioner was apparently clear to all of the trial and appellate courts in Florida.

A clear rule of law was carved by the Legislature. If a defendant has committed and been convicted of a crime before he was charged in that court, it was to be counted as a part of his prior record. The state is asking this Court to rewrite the law to read that if a defendant comes to court with a conviction, no matter when he got it, it should be called a part of his prior record. Even assuming, arguendo, that this were a logical alternative structure, it is not the law as promulgated by the Legislature.

What the Petitioner is suggesting is that the opening up of these and other issues is totally and completely unwarranted. The creating of judicially made legislation in the instant case is unwise and would lead to even more guideline litigation.

In Hunt v State, 468 So.2d 1100 (Fla. 1st DCA 1985) that Court was faced with the appeal of a defendant who had committed

an unarmed robbery close in time to the charged armed robbery. The sentencing court went outside the guidelines based upon disregard for the law and propensity to be dangerous to society.

The Hunt Court approved this as a valid reason for departure, stating:

> Florida Rule of Criminal Procedure 3.701d.5.a. prohibits consideration of past criminal conduct for which convictions were not obtained prior to the commission of the primary offense for purposes of scoring under the prior record category.

In Prince v. State, 461 So.2d 105 (Fla. 4th DCA 1984) the defendant had been tried, convicted, and was successful on appeal. Between his reversal and the retrial he was convicted of two offenses. After the second trial the judge sentenced Prince departing to a sentence above the guidelines but gave no written reasons for so doing. The Fourth District upheld the sentences but remanded for the trial Court to set forth its reasons in writing, thus approving the use of subsequent convictions for aggravation rather than for guideline computation.

Prince cited the Fifth District Court of Appeal's decision in Davis v. State, 455 So.2d 602 (Fla. 5th DCA 1984). In Davis the defendant committed subsequent offenses and those were used "appropriately" as departures from the guidelines rather than inclusions within the computation of the guideline sentence. It is this same appropriate procedure which the Petitioner now urges.

Subsequent to the decision in Prince the Fourth District Court of Appeals has dealt with this similar issue on at least two occasions, State v Rodaers, 13 F.L.W. 2073 (Fla. 4th DCA Dec. 23, 1988) and Brown v State, 529 So.2d 1247 (Fla. 4th DCA 1988).

Brown was the earlier decided case. There the appellant argued that the trial court erred when it factored into the Defendant's guideline score a robbery conviction because the conviction occurred after the commission of the primary offense. With no discussion, the court cited to Cousins, supra, and Falzone, supra.

In a subsequent opinion, and with two different panel members, the Court decided Rodgers, supra. Though Rodaers has an interesting factual pattern which distinguishes it somewhat, the language that the court used is of importance.

In Rodaers the defendant was sentenced to a period of incarceration on one count and to five years' probation on a second count, with those sentences to run consecutively. He completed the prison term but was brought before the court on a violation of the subsequent probation. The State argued that the first count upon which he had already served his term should have been factored into prior record. The trial court did not accept the State's argument and did not factor in the first count as a prior offense.

The Fourth District Court of Appeal upheld the trial court.

That court held that the "sexual assault charge in Count I of the original information which resulted in the sentence of three and one-half years' imprisonment should have been scored as a primary offense at conviction, not under the "prior record" category. It was not disposed of prior to the commission of the second sexual assault charge for which he was being sentenced after violating probation.

As late as December 14th of 1988 that court recognized that an offense which is not disposed of prior to the commission of a second offense should not be factored into the guideline score.

The First District Court of Appeal in Puah v State 499 So. 2d 54 (Fla. 1st DCA 1986) remanded a guideline case to the trial court with instructions concerning what convictions of the defendant should be calculated. It approved the general rule that:

> Any convictions obtained after the offense in question may not be included in the guidelines scoresheet, but may be used as a basis for departure. (Citations omitted).

The Court did not address Pugh in Merriex, supra.

It must be noted that even in Falzone, the State of Florida had argued that Hunt v. State, supra, required that for the crime to be factored into the guidelines, the conviction must have occurred before the commission of the subject crime. Falzone, at 2217.

If this Court is to accept the judicially created definition of prior record, it would be eliminating entirely the last clause

of the Legislature's definition. If the Circuit Court's definition were to be upheld, the definition of prior record would read: "Any past criminal conduct on the part of the offender resulting in conviction." However, the Legislature included a second clause in the definition, one which must not be ignored: "Any past criminal conduct on the part of the offender, resulting in conviction, prior to the commissioq ~~of~~ ~~the~~ primary offense." (Emphasis Added).

It would fly in the face of this plain language of the statute to omit the last clause of the definition. It must be presumed that the Legislature did not intend for such a result to obtain.

The appropriate action for this sentencing Court was to have correctly computed the guidelines and then, if the evidence warranted it, and if it were shown by clear and convincing evidence, depart from those guidelines.

What this Court must address is exactly at what point in time the term "prior" is being defined. If it is at the time of the commission of the primary offense, then there can be no use of any conviction which was not of record at that time. Though this is clearly the route taken by the Legislature, some courts have chosen the moment of time as that when the defendant appears before the sentencing court. The Petitioner submits that the will of the Legislature must be followed.

CONCLUSION

The Petitioner prays that, for the above reasons, this Court vacate his sentence; Order that his resentencing take place before a different judge of the Seventeenth Judicial Circuit; Order that his new sentence be within the appropriate guideline range; and further Order that no consideration be given in the computation of those guidelines to any convictions obtained after his being charged in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing instrument was mailed to Assistant Attorney General Alfonso M. Saldana, Esq. 111 Georgia Avenue, Suite 204, W. Palm Beach, FL 33401 on this 5th day of June, 1989.

By: Mary Catherine Bonner
MARY CATHERINE BONNER, ESQ.