IN THE SUPREME COURT OF FLORIDA

ALBERT LEE MAYS,	)	
PETITIONER,	)	
	)	
	)	
vs.	)	CASE NO. 90,824
	)	
STATE OF FLORIDA,	)	
	)	
RESPONDENT.	)	
	)	
	)	

FILED
SID J. WHITE
DEC 1 1997
CLERK, SUPREME COURT
By
Chief Deputy Clerk

AMICUS CURIAE BRIEF OF THE FLORIDA PUBLIC DEFENDER'S ASSOCIATION in support of PETITIONER ALBERT L. MAYS

RICHARD L. JORANDBY
Public Defender

ANTHONY CALVELLO
Assistant Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar No. 266345
The Criminal Justice Building
42 1 Third Street, Sixth Floor
West Palm Beach, Florida 33401
(561) 3557600

ON BEHALF OF THE FLORIDA PUBLIC DEFENDER'S ASSOCIATION

TABLE OF CONTENTS

CONTENTS **PAGE**

TABLE OF CONTENTS i

AUTHORITIES CITED ii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

PRELIMINARY STATEMENT 2

STATEMENT OF THE CASE 3

SUMMARYOFTHEARGUMENT 6

ARGUMENT

POINT I

SECTION 921.001(5), *FLORIDA STATUTES (1995)* ISUNCONSTITUTIONAL 9

POINT II

THE SENTENCING JUDGE ERRED IN IMPOSING AN ILLEGAL EXCESSIVE PRISON SENTENCE THAT EXCEEDED PETITIONER'S RECOMMENDED GUIDELINE SENTENCE UNDER THE FLORIDA SENTENCING GUIDELINES, ... 18

CONCLUSION 32

CERTIFICATE OF SERVICE 33

AUTHORITIES CITED

CASES **PAGE(S)**

Connally v. General Construction Co., 269 U.S. 385
(1926) 12

Crenshaw v. State, 661 So. 2d 400
(Fla. 5th DCA 1995) 9

Garcia v. State, 666 So. 2d 23 1
(Fla. 2d DCA 1995) ....**..... 21

Gardiner v. State, 661 So. 2d 1274
(Fla. 5th DCA 1995) 13

Gilbert v. State, 680 So. 2d 1132
(Fla. 3d DCA 1996) 21

Grapin v. State, 450 So. 2d 480
(Fla. 1981) 23

Green v. State, 691 So, 2d 502
(Fla. 5thDCA 1997) 30

Jenkins v. State, 696 So. 2d 893
(Fla. 4th DCA 1997) 21, 22, 24

Lanzetta v. New Jersey, 306 U.S. 451
(1939) 12

Lewis v. State, 574 So. 2d 245
(Fla. 2dDCA 1991) 21

Logan v. State, 666 So. 2d 260
(Fla. 4thDCA 1996).[e.s] 21

Martinez v. State, 692 So. 2d 199, LO4
(Fla. 34d DCA 1997) 24-27, 30

Mays v. State, 493 So. 2d 52
(Fla. 5th DCA 1997) 3, 4, 7, 9, 18, 26

Myers v. State, 696 So. 2d 893
(Fla. 4th DCA 1997) 8, 13, 22-24, 26, 27, 30, 31

Papachristou v. Jacksonville, 405 U.S. 156
(1972) 1 2

Roberts v. State, 677 So. 2d 309 n.2
(Fla. 1st DCA 1996) 21, 24

State v. Ginn, 660 So. 2d 1118
(Fla. 4th DCA 1995) 12

State v. Wershow, 343 So. 2d 605
(Fla. 1977) 21

United States v. Batchelder, 442 U.S. 1 14,
99 S. Ct. 2198 (1979) 12

United States v. Harriss, 347 U.S. 612
(1954) 12

UNITED STATES CONSTITUTION

Fourteenth Amendment 12, 15

FLORIDA CONSTITUTION

Article II, Section 3 16

FLORIDA STATUTES

Section 775.021(1) 21
Section775.082 11
Section 775.082(3)(d) (1995) 3, 6, 9, 10
Section775.083 11
Section775.084 11
Section 784.021(1)(a) (1995) 3, 11
Section 921.001(4)(b)1 9
Section 921.001(5) 1, 6-8, 10-13, 15, 16, 18, 19, 23, 24, 30, 32
Section921.0012 13
Section921.0014.. 13
Section 921.0014(2) (1995) 19, 20
Section 921.0016(1)(c) 19, 21

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule3.702 (d)(18) 21
Rule3.703 .... 3, 9, 13, 18
Rule 3.703(26) 10, 24
Rule 3.703(a) 9
Rule 3.703(c)(1) 14
Rule 3.703(d)(3) 15
Rule 3.703(d)(7) 14
Rule 3.703(d)(8) 14
Rule 3.703(d)(9) 14, 15
Rule 3.703(d)(12) 15
Rule 3.703(d)(15) 14
Rule 3.703(d)(16) 14
Rule 3.703(d)(17) 14
Rule 3.703(d)(19) 15
Rule 3.703(d)(26) 4, 10, 15, 19, 24
Rule 3.703(d)(28) 19
Rule 3.703(d)(29) 19
Rule 3.703(d)(15)(D) 14

STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida Public Defender Association, Inc. (FPDA) is a non-profit Florida corporation. Its membership comprises the Public Defender's of the twenty judicial circuits of Florida, their assistant public defender's, and their staff, charged under the Florida Constitution and laws with the responsibility of providing representation to indigent persons charged with criminal law violations in the State of Florida. The FPDA seeks to improve the representation of indigent criminal defendants through various educational and professional activities and advocates criminal law and procedures issues of importance to its membership. The FPDA frequently files briefs as Amicus Curiae on issues which widely affect the right to counsel for criminal defendants. The FPDA is interested in Section 92 1 .00 1(5), *Florida Statutes,* because it directly affects the constitutional rights of indigent criminal defendants and the legality of prison sentences in excess of the statutory maximum for the crimes charged.

PRELIMINARY STATEMENT

The Petitioner, Albert Lee May, before this Court was the Defendant and Respondent, the State of Florida, was the Prosecution in the Criminal Division of the Circuit Court of the 9th Judicial Circuit, In and For Orange County Florida.

In the brief, the Petitioner and the Respondent will be referred to as they appear before this Honorable Court.

The symbol "R" will denote the Record on Appeal.

The symbol "T" will denote Petitioner's jury trial and sentencing hearing.

STATEMENT OF THE CASE

Petitioner, Albert Lee Mays, was charged by way of an information filed in the Ninth Judicial Circuit, in and for Orange County, Florida, with aggravated assault in violation of Section ***784.02*** 1 (l)(a), *Florida* ***Statutes*** (1995)[1]. Petitioner, Mr. Mays, went to jury trial on the third degree felony and was convicted as charged. T **1-136.**

Petitioner was scored pursuant to the *Fla.* ***R.*** *Crim. P.* 3.703 sentencing guidelines to a "total sentence points" of 95.8 which results in a recommended guideline sentence of 67.8 months in prison. R 41,5 1-52, T **13** 1. As the Fifth District noted in the instant cause: "Mays was convicted of a third degree felony and under the sentencing guidelines, his recommended sentencing range was 50.85 months to 84.75 months incarceration, with ***a recommended sentence*** of 67.8 months." ***Mays v. State,*** 693 So. 2d 52 (Fla. 5th DCA 1997) (Emphasis Supplied). Even though the statutory maximum for a third degree felony is five (5) years or sixty (60) months in prison, Petitioner, Mr. Mays, was sentenced to seventy (70) months in prison with credit for time served. R 32-33, 51-52, T 126, 131; ***Mays, 693 So.*** 2d at 53.

Petitioner filed a timely notice of appeal to the Fifth District Court of Appeal. R62.

---

[1] Aggravated assault is a third degree felony under Florida law punishable by a maximum of five (5) years imprisonment. Section *775.082* (3)(d), *Florida Statutes* (1995).

The Fifth District in, ***Mays v. State,*** 693 So. 2d 52 (Fla. 5th DCA 1997)[See Appendix], affirmed Petitioner's seventy (70) month sentence in reliance on ***Fla. R. Crim. P.*** 3.703 (d)(26). Judge Harris writing for the Court explained:

> In this "hot issue" of the day, Albert L. Mays appeals his sentence imposed under the guidelines but in excess of the statutory maximum. We affirm.
>
> Mays was convicted of a third degree felony and, under the sentencing guidelines, his recommended sentencing range was SO.85 months to 84.75 months incarceration, with a recommended sentence of 67.8 months. Even though generally the statutory limit for a third degree felony is five years, the court sentenced Mays to 70 months incarceration.
>
> Mays recognizes that the sentencing guidelines provide:
>
> If the recommended sentence under the sentencing guidelines exceeds the maximum sentence authorized for the pending felony offenses, the guideline sentence must be imposed, absent a departure. Such downward departure must be equal to or less than the maximum sentence authorized by section 775.082.
>
> Rule 3.703(d)(26), Fla. R. Crim. Pro.
>
> Mays contends, however, that since the five-year statutory limitation is within the recommended sentencing range, the above-cited rule does not apply. But that is not the test. Clearly the sentencing range, or at least a portion of it that is available to the sentencing judge, exceeds the statutory maximum and takes the sentencing outside the limitation imposed by the general sentencing statute. This issue has been ably decided by the Third District in ***Martinez v. State,*** 692 So. 2d 199 (Fla. 3d DCA 1997), and we concur with that court's reasoning.

Petitioner, Albert **Lee** Mays, filed a notice of discretionary review with this Honorable Court.

SUMMARY OF THE ARGUMENT

POINT I

Respondent, Albert Lee Mays, was charged and convicted of aggravated assault which is classified under Florida law as a third degree felony punishable by up to five (5) years in prison. See Section 775.082(3)(d), ***Florida Statutes (1995).*** However, Petitioner was sentenced by the trial judge in excess of the statutory maximum. To reach this result the trial court relied on a statutory provision that permits a prison sentence to exceed the statutory maximum.

Section 92 1 .00 1(5), *Florida Statutes* (1995), provides that if "a recommended sentence under the guidelines" **exceeds** the otherwise applicable statutory maximum period of imprisonment the sentence under the guidelines must be imposed, absent a departure".

Amicus Curiae respectfully submits that Section 92 1 .001(5), *Florida Statutes* (1995), is unconstitutional on its face. Said statute fails to provide persons of common intelligence adequate notice of the authorized penalty for the crime charged. Reference to the expressly cited statutory sections in Chapter 775 reveal no mention of imposition of any sentence other than the maximum for the degree of felony or an habitual offender sentence if that section were otherwise applicable. There is no notice given of a possible penalty in excess of the statutory maximum by operation

of the Florida sentencing guidelines statutory provisions or rule of procedures. This lack of notice renders said statute unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The lack of notice to the general public in the statutory provisions for the various crimes charged is a due process flaw that condemns use of the provisions of Section 92 1 .001 (5) to exceed the specified statutory penalty for the criminal offense charged.

On an alternative basis, the Florida Legislature through the enactment of Section 92 1 .OO 1(5) has, in essence, delegated to the Florida Sentencing Guideline Commission the authority to set the actual maximum penalties for persons who are sentenced for crimes committed after the effective date of the statutory provision.

POINT II

At bar, Petitioner, Albert L. Mays' "recommended guideline sentence" was 67.8 months in prison. The Fifth District in this cause found that Petitioner Mays was charged and "convicted of a third degree felony and under the sentencing guidelines, his recommended sentencing range was 50.85 months to 84.74 months incarceration, with a recommended sentence of 67.8 months." *Mays*, ***693 So.*** 2d at 52. The statutory maximum for the third degree felony charged was five (5) years or sixty (60) months in prison. Yet the seventy (70) month sentence imposed on Petitioner was upheld by the appellate court.

Assuming *arguendo*, that this Honorable Court declines to hold Section 92 1 .OO 1(5), *Florida Statutes* (1995), unconstitutional on its face (See Point I, *supra*), Amicus Curiae respectfully submits that the seventy (70) month sentence imposed upon Mr. Mays, is still illegal and excessive because it exceeds his "recommended sentence" of 67.8 months in prison in contravention of Section 92 1 .00 1(5), *Florida Statutes (1995). See Myers v. State,* 696 So. 2d 893 (Fla. 4th DCA 1997), *rev. granted,* Case No. 9 1,25 1.

ARGUMENT

POINT I

SECTION 921.001(5), *FLORIDA STATUTES* (1995) IS UNCONSTITUTIONAL.

Petitioner, Albert Lee Mays, was charged and convicted of aggravated assault which is classified under Florida law as a third degree felony punishable by up to five (5) years in prison. See Section 775.082(3)(d), ***Florida Statutes*** (1995). Since Mr. Mays offense occurred in 1996, the amended *Fla. R. Crim. P.* 3.703 sentencing guidelines apply to his offense. See *Fla. R. Crim. P.* 3.703 (a)[2]; Section 921.001(4)(b)1, ***Florida Statutes*** (1995); See also *Crenshaw v. **State,*** 661 So. 2d 400 (Fla. 5th DCA 1995). However, Petitioner, Mr. Mays, was sentenced by the trial judge in excess of the statutory maximum expressly provided for in Section 775.082(3)(d), *Florida Statutes*(1995).

Petitioner, Mr. Mays, was scored pursuant to the Rule 3.703 sentencing guidelines to a "total sentence points" of 95.8 which results in "a recommended sentence" of 67.8 months in prison. ***Mays, 693 So.*** 2d at 52.; R 51-52, T 131. However, the recommended state prison months "may be increased or decreased by up to and including 25% at the discretion of the sentencing court." See Rule

---

[2] Rule 3.703 (a) provides, in pertinent part: "This rule applies to offenses committed on or after October 1, 1995, or as otherwise indicated."

3.703(26). Therefore, Petitioner's presumptive sentence range (absent any departure) was 84.75 maximum state prison months and 50.85 minimum state prison months. However, Petitioner was sentenced to seventy (70) months in prison which is in excess of the five (5) years or 60 months statutory maximum authorized for a third degree felony pursuant to Section 775.082(3)(d), *Florida Statutes (1995).* To reach this result the trial court ostensibly relied on a statutory provision that permits a prison sentence to exceed the statutory maximum,

Section *92* 1 .001(5), *Florida Statute*(1995), provides:

> (5) Sentences imposed by trial court judges under the 1994 revised sentencing guidelines on or after January 1, 1994, must be within the 1994 guidelines unless there is a departure sentence with written findings. If a *recommended sentence* under the guidelines exceeds the maximum sentence otherwise authorized by § 775.082, the sentence under the guidelines must be imposed, absent a departure. If a departure sentence, with written findings, is imposed, *such sentence must be within any relevant maximum sentence limitations provided in §* 775.082. The failure of a trial court to impose a sentence within the sentencing guidelines is subject to appellate review pursuant to chapter 924. However, the extent of a departure from a guidelines sentence is not subject to appellate review.
>
> [Emphasis Added].

The 1995 revision to the Florida sentencing guidelines added a rule of criminal procedure, Rule 3.703(d)(26), counterpart to section 921.001(5). Rule 3.703(d)(26) provides:

> (26) If the recommended sentence under the sentencing guidelines exceeds the maximum sentence authorized for the pending felon offenses, the guideline sentence must be imposed, absent a departure. Such downward departure must be equal to or less than the maximum sentence authorized by section 775.082.

A. DUE PROCESS VIOLATION

Mr. Mays was charged and convicted of aggravated assault in violation of Section 784.02 1 *(1)(a), Florida Statutes* (1995). This statute expressly provided that aggravated assault constitutes a third degree felony that is punishable "as provided in § *775.082,* § *775.083* or § *775.084." See* Section *784.02 1* (l)(a), *Florida Statutes* **(1995).**

Reference to the expressly cited statutory sections in Chapter 775 reveals ***no*** mention of imposition of any sentence other than the maximum sentence of five (5) years imprisonment or a habitual offender sentence if that section were otherwise applicable. There is no notice given of the possible imposition of a penalty in excess of 5 years in prison by operation of any sentencing guidelines' rules or laws. Also, no mention or reference is made to Section 92 1 .OO 1(5) in Section 784.02 1 (1) (a) that would put any member of the public on reasonable notice that some additional or greater penalty could be imposed for this third degree felony. Further, the charging document in this cause merely refers to the aggravated assault statute, Section **784. 02** 1 (l)(a). R 6.

It is a fundamental tenet of the due process clause of the Fourteenth Amendment that "[no] person is required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey, 306* U.S. 45 1, 453 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States v. Harriss, 347* U.S. 612,617 (1954). *See Connally v. General Construction Co., 269* U.S. 385, 391-393 (1926); *Papachristou v. Jacksonville, 405* U.S. 156,162 (1972). The United States Supreme *Court* in *United States v. Batchelder, 442* U.S. 114, 123, 99 S. Ct. 2 198 (1979), also made clear that " too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute."

This lack of notice to the general public in the various penal statutory sections is a due process flaw that condemns use of the provisions of Section 92 1 .OO 1(5) to exceed the specified statutory penalty for the offenses charged. See cf. *State v. Ginn,* 660 So. 2d 1118 (Fla. 4th DCA 1995)(due process does not require separate written notice of possibility of impoundment when notice is given by statute and at time of arrest thus no failure to notify defendant of potential penalty). There is no notice in the statute under which Petitioner was charged or in the charging document filed against him.

In *Gardinerv. State,* 661 So, 2d 1274 (Fla. 5th DCA 1995), the Fifth District rejected the defendant's "claim that Section 92 1 .00 1(5) deprives him of due process of law by failing to provide adequate notice of the authorized punishment, because we conclude that the wording of the statute is clear, In this regard, an accused can assess a potential sentence by preparing a guidelines scoresheet in accordance with the provisions of sections 92 1 .00 12 and *92* 1 *.OO* 14, *Florida Statutes* (Supp. 1994). As noted by the state, the fact that an accused must perform arithmetical calculations in order to ascertain a sentence does not deprive him of adequate notice as to potential penalties." *Id,* at 1276; See also Myers *v. State, 696 So.* 2d 893 (Fla. 4th DCA 1997).

This argument is totally specious and rather glib. The proper calculation of a sentencing guidelines scoresheet involves a sophisticated interpretation of Florida statutes and rules of criminal procedure.

The steps involved in calculating a person's recommended guideline sentence pursuant to Rule 3.703 would totally allude a lay person and thereby do *not* provide "notice" to the general public. To obtain a person's "recommended sentence" under the Florida sentencing guidelines, this lay person will embark on a arduous journey fraught with snares, traps and blind-alleys.

First, the individual must look at their own criminal conduct *prior* to its

commission and determine which offense is their "primary offense," and which offenses represent "additional offenses." See Rule 3.703(c)(1), (d)(7), (d)(8). This lay person must know the extent punishment prior to engaging in any conduct to thereby receive "notice" of the penalty for the offense to be charged.

The scoring of a person's "prior record" entails five (5) separate provisions. See Rule 3.703 (d) (I 5). And under the Florida sentencing guidelines, any uncertainty in the scoring of the offender's prior record "shall be resolved by the sentencing judge." Rule 3.703(d)(15)(D).

A lay person would then have to determine whether "legal status violations" points and/or "community sanction points" were applicable to him or her. Rule 3.703 (d) (16), (d) (17). Further, this same lay person would have to decide whether he or she should assess themselves 6 community sanction points for each successive violation or the 12 points because " the violation results from a new felony conviction. " Rule 3.703(d)(17).

Then this lay person will need to determine if any victim injury occurred due to their conduct. If "victim injury" is involved, the lay person would need to decide whether their offense caused slight, moderate, or severe injury to their victim. See Rule 3.703(d) (9). Hopefully, this lay person will remember that "victim injury" "shall be scored for each victim physically injured and for each offense resulting in

physical injury whether there are one or more victims." Rule 3.703(d)(9).

This lay person will also need to carefully assess whether they should receive "firearm points" or "serious prior felony points." Rule 3.703(d)(12), (d)(19). And again hopefully, the lay person calculating their "own" scoresheet will not have a substantive offense or pending violations of probation from before 1993, or after January 1, 1994, 1995, 1996, and 1997 where different rules apply. See Rule 3.703 (d)(3)("If an offender is before the court for sentencing for more then one version or revision of the guidelines, separate scoresheets must be prepared and used at sentencing.")

Petitioner Mr. Mays's sentence to 70 months in prison for a third degree felony should be vacated because the application of Section 921 .001(5), *Florida Statute*(**1995)** and the rule of procedure counterpart, Rule 3.703 (d) (2 6), violates the notice provision of the due process clause of the Fourteenth Amendment to the United States Constitution.

B. UNLAWFUL DELEGATION AND VIOLATION OF SEPARATION OF POWERS

The Florida Legislature, through enactment of Section 92 1 .00 1(5), *Florida Statutes* (1995), has delegated to the Sentencing Guidelines Commission the authority to set the maximum penalties for offenses for persons who are sentenced

for offenses committed after October 1, 1994. However, no guidance is given limiting the commission in the exercise of this traditionally legislative power to set the maximum penalties for crimes. The commission could, if the guidelines it adopts so provide, award life sentences for third degree felonies or the Commission could, if revised guidelines so provides add fifty (50) years of probation in addition to the prison sentence imposed in excess of the statutory maximum for a mere third degree felony. The fact that the present guidelines require a lengthy prior record for such to occur does not change the fact that such power exists and could be exercised for persons who have no prior record through enhancement of the other points assessed defendants under the Florida sentencing guidelines

This unlawful delegation to the Florida Sentencing Guidelines Commission of the power to set the maximum penalties for offenses violates the provisions of Article II, Section 3 of the *Florida Constitution* that mandates three branches of government and prohibits one branch from exercising the powers appertaining to either of the other branches unless expressly provided for in the Constitution.

The statute's provision for a commission to set maximum penalties run afoul of this limitation and the provisions of Section 921.001(5) must be disapproved to the extent that new maximum penalties can be set by the commission to prevail over the statutory maximum penalties provided by general law. On this separate basis,

Petitioner Mr. Mays excessive sentence should be vacated and on remand, Mr. Mays, should be resentenced to a term in prison up to the five (5) years statutory maximum for the third degree felony charged.

POINT II

THE SENTENCING JUDGE ERRED IN IMPOSING AN ILLEGAL EXCESSIVE PRISON SENTENCE THAT EXCEEDED PETITIONER'S RECOMMENDED GUIDELINE SENTENCE UNDER THE FLORIDA SENTENCING GUIDELINES.

Petitioner, Mr. Mays, was scored pursuant to the *Fla.* ***R.*** *Crim. P.* ***3.703*** sentencing guidelines to a "total sentence points" of 95.8 which results in "a recommended guideline" sentence of 67.8 state prison months. R 41 .[3] The Fifth District in the instant cause correctly found that Mr. Mays' recommended guideline sentence was 67.8 months in prison. ***Mays,*** 693 So. 2d at 52. In turn, Petitioner's presumptive guidelines sentence range was 84.75 maximum state prison months and 50.85 minimum state prison months. However, the statutory maximum for the offense charge was sixty (60) months in prison.

Assuming *arguendo,* that this Honorable Court declines to hold Section 921.001(5), *Florida Statute* (1995), unconstitutional on its face **(See Point I, *sup-a),*** Amicus respectfully submits that the 70 month sentence imposed upon Petitioner, Mr. Mays, is still illegal and excessive because it exceeds his "recommended sentence ", i.e. 67.8 months in prison in violation of Section 921 .001(5), ***Florida***

---

[3] "Mays was convicted of a third degree felony and under the sentencing guidelines, his recommended sentencing range was 50.85 months to 84.74 months incarceration, with a recommended sentence of 67.8 months." *Mays,* 693 So. 2d at 52.

Statutes (199.5).

Section 92 1 .00 1 (5), *Florida Statutes* (1995) only authorizes the imposition of "a recommended sentence" *if* it exceeds the statutory maximum. Said statute provides:

> If **a recommended sentence** under the guidelines exceeds the maximum sentence otherwise authorized by $775.082, the sentence under the guidelines must be imposed, **absent a departure.** If a departure sentence, with written findings, is imposed, such sentence must be **within any relevant maximum sentence limitations provided in** § 775.082.
>
> [Emphasis Added].

Under the applicable sentencing guidelines, a "recommended sentence" is determined by the total sentence points minus 28 points. See Section 921.0014(2), *Florida Statutes* (1995); Rule 3.703(d)(26). A departure sentence is "[a] state prison sentence which varies upward or downward from the *recommended guidelines prison* sentence by more than 25 percent..." See Section 92 1 .OO16(1)(c), *Florida Statute* (1995) [Emphasis Added]; See also Rule 3.703(d)(28) ("A state prison sentence that deviates from the recommended prison sentence by more than 25 percent..."); Rule 3.703(d)(29)("If a split sentence is imposed, the incarcerative portion of the sentence must not deviate more than 25 percent from the recommended guidelines prison sentence.").

Section *92* 1.0014(2), ***Florida Statutes*** (1995), specifies that recommended guideline sentences are obtained as follows:

"(2) Recommended sentences:

> "If the total sentence points are less than or equal to 40, the recommended sentence shall not be a state prison sentence; however, the court, in its discretion, may increase the total sentence points by up to, and including, 15 percent.
>
> If the total sentence points are greater than 40 and less than or equal to 52, the decision to incarcerate in a state prison is left to the discretion of the court.
>
> If the total sentence points are greater than 52, the sentence must be a state prison sentence calculated by total sentence points. A state prison sentence is calculated as follows:
>
> State prison months = total sentence points minus 28.
>
> The recommended sentence length in state prison months may be increased by up to, and including, 2.5 percent or decreased by up to, and including, 25 percent, at the discretion of the court. The recommended sentence length may not be increased if the total sentence points have been increased for that offense by up to, and including, 15 percent, If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 7 75.082, the sentence recommended under the guidelines must be imposed absent a departure.
>
> If the total sentence points are equal to or greater than 363, the court may sentence the offender to life imprisonment. An offender sentenced to life imprisonment under this section is not eligible for any

> form of discretionary early release, except pardon, executive clemency, or conditional medical release under s. 947.149."

First and foremost, penal statutes must be strictly construed and any doubt as to its language should be resolved in favor of the accused against the state. See Section *775.02 1* (1), *Florida Statute* (1995); *State v. Wershow, 343 So.* 2d 605, 608 (Fla. 1977); *Gilbert v. State,* 680 So. 2d 1132 (Fla. 3d DCA 1996)

Second, in interpreting penal statutes the familiar rule of lenity requires that the accused be given the benefit of any doubt. The rule of lenity applies to an interpretation of the Florida sentencing guidelines. See *Lewis v. State, 574 So,* 2d 245, 246 (Fla. 2d DCA 199 1). Lenity applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also *to the penalties they impose.* " *Logan v. State, 666* So. 2d 260, 261 (Fla. 4th DCA 1996).[Emphasis Added].

Third, the First District in *Roberts v. State,* 677 So. 2d 309 n.2 (Fla. 1st DCA 1996)[4],the Second District in *Garcia v. State,* 666 So. 2d 23 1 n. 1 (Fla. 2d DCA 1995),the Fourth District in *Jenkins v. State,* 696 So. 2d 893 (Fla.4th DCA 1997), and the Fifth District in the instant case all stated that a criminal defendant's

---

4. "Under the 1994 Guidelines, a departure sentence is "[a] state prison sentence which varies upward or downward from the recommended guidelines prison sentence by more than 2.5 percent...." § 921 .0016(l)(c), Florida Statute (1993); Fla. R. Crim. P. 3.702(d)(18). Here the "recommendedguidelines prison sentence" was 46 months. (R. at 14, 57.)" ***Roberts, 677 So.*** 2d at 309 n.2.

recommended sentence was the state prison months obtained after subtracting the 28 points.

The Fourth District in *Jenkins* explained that the defendant's "recommended sentence" was determined by subtracting 28 from the "total sentence points":

> We affirm appellant's conviction but reverse appellant's sentence. The state concedes that a mathematical error was made in the scoresheet calculation. Using the correct total sentencing points would result in *a recommended state prison sentence* of 37 *months,* rather than the 40 months which was imposed. The state urges, however, that the error is harmless, because the sentence falls within the variation permitted by Florida Rule of Criminal Procedure 3.703(25). See also Sec. 921.0014, 921.0016, Fla. Stat. (1995). As we stated in Shabazzv. State, 674 So. 2d 920 (Fla. 4th DCA 1996), we are unable to conclude that appellant's sentence would have been the same had the trial court utilized a correctly calculated scoresheet. This case involves the new procedure for calculating sentences where an exact amount of state prison months is calculated. Then a range is calculated from that figure. In the instant case, the court sentenced appellant *to the recommended state prison months* and did not increase his sentence within the range allowed.
>
> *Id.* at 390-39 1. [Emphasis Added].

In a subsequent decision, *Myers v. State,* 696 So. 2d 893 (Fla. 4th DCA 1997), *rev. granted,* Case No. 91,25 1, the Fourth District reiterated this definition of "a recommended sentence":

> Under section 921.0014(2), the nature of the recommended sentence depends on the total points

> assessed: if the points are under 40, the court may not sentence to state prison but may increase the point total by up to 15%; if the points are between 40 and 52, the court may in its discretion imprison; if the points are greater than 52 the court must imprison; and if the points are greater than 362 the court may imprison for life. Here *the points were 229, so the recommended sentence is therefore 201 months, or 16.75 years.*
>
> The highlighted text of section 92 1 .00 14(2), above, also demonstrates the error in defendant's argument "that the term 'recommended sentence' is used to mean *the sentencing range* that the trial court must utilize absent a departure." [e.s.] ***In reality, under this statute the recommended sentence is the precise number of months, expressed in this case (where the total exceeds 52) as 229 minus 28. The "recommended sentence" of 201 months is thus a specific sentence of a precise, fixed number** of **months, and not a range.***
>
> *Id.* at 896.[Emphasis Added].

Fourth, Section 92 1 .OO 1(5) expressly states ***"a"*** recommended sentence not the recommended guideline sentence. The use of the article "a" by the Florida Legislature indicates that they are referring to a single item, *Grapin v. State, 450 So.* 2d 480, 482 (Fla. 1981), not a group or multiple items,

Fifth, the Florida Legislature did not use the word "range" or the phrase "recommended range" if the Legislature wanted a trial judge to have the discretion to exceed the statutory maximum sentence by imposing any sentence within the defendant's presumptive guidelines sentence " range" they could have clearly done

so.

In light of the above decisions coupled with the doctrine of lenity, the application of Section 92 1 .00 l(5) is straight forward and uncomplicated. First, the parties obtain the defendant's recommended sentence by subtracting 28 points from the defendant's " total sentence points". *See Myers, Jenkins, Roberts.* Then if this recommended sentence is **more** than the statutory maximum then the trial court in his or her discretion can impose this sentence upon the defendant. See *Myers, 696* So. 2d at 896-897. If the recommendedsentence is **less** than the statutory maximum then the statutory maximum controls. There is no indication in this statute that the trial court could first apply the 25% upward multiplier found in Rule 3.703(26) and then sentence a defendant to the very top of this range consistent with Section 921.001(5) or the rule counterpart Rule 3.703 (d)(26).

It must be noted that the Third District has looked at the identical language of this statute and proclaimed that the phrase " a recommended sentence" is really the *range* provided for on the sentencing guidelines. See *Martinez v. State, 692 So.* 2d 199, LO4 (Fla. 3d DCA 1997). In essence, the Third District rewrote this penal statute and utterly failed to apply the strict construction that any doubt **must** be resolved in favor of the accused. The *Martinez* court construed the pertinent statute as follows:

> The recommended guidelines range in this case was 4.6 years to 7.7 years. The trial court imposed a sentence of six and one-half years incarceration followed by one year of probation. This is a legal sentence under the 1994 guidelines. *Delancy v. State, 673 So.* 2d 541 (Fla. 3d DCA 1996).
>
> Defendant takes issue with *Delancy* and argues that the five-year statutory maximum applies in this case. He reasons that the recommended sentence does not exceed the five-year legal maximum because the bottom of the guidelines range is 4.6 years. He contends that so long as the bottom of the recommended range is below the ordinary legal maximum (in this case, five years), then the court cannot impose sentence above the ordinary legal maximum. We do not think that defendant's argument is consistent with the wording of the statute, or with its intent. The statute begins by stating, "If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by § 775.082...." § 921.001(5), Fla. Stat. *In this case the top end of the recommended range is 7.7 years, and thus the recommended sentence exceeds the ordinay legal maximum.* Further, in our view the legislative intent is to allow the trial court *the full use of the recommended range unencumbered by the ordina y legal maximum.*

Id. at 2 10-202. [Emphasis Added]

Regrettably, the Fifth District in the instant cause , relied on the opinion of the Third District in *Martinez,* to affirm Petitioner's seventy (70) month

sentence.[5]

Judge Farmer writing for the Fourth District in *Myers* cogently articulated the basis for rejecting the notion that "a recommended sentence" is really the 25% percent range:

> Applying this clear statutory text, we specifically reject the state's argument that the guidelines authorize a trial court to enhance a recommended sentence by a period of up to 25% when the recommended sentence is greater than the section 775.082 maximum. Both section 92 1.001(5) and section 921.0016(1)(e) are very clear that a departure sentence may not exceed the section 775.082 maximum. See § 921.001(5) ("If a departure sentence, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in § 775.082."); and § 92 1 .0016(l)(e) ("A departure sentence must be within any relevant maximum sentence limitations provided by § 775.082."). Moreover, both sections 92 1 .001(5) and 92 1 .OO 14(2) expressly require the imposition of a recommended sentence greater than the section 775.082 maximum. See § 921.001(5) ("If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure." [e.s.], and § 921.0014(2) ("If a recommended sentence under the

[5] "Clearly the sentencing range, or at least a portion of it that is available to the sentencing judge, exceeds the statutory maximum and takes the sentencing outside the limitation imposed by the general sentencing statute. The issues has been ably decided by the Third District in ***Martinez v. State, 692 So.*** 2d 199 (Fla 3d DCA 1997), and we concur with that Court's reasoning". ***Mays, 693 So.*** 2d at 53.

> guidelines exceeds the maximum sentence otherwise authorized by § 775.082, the sentence recommended under the guidelines must be imposed absent a departure."). While the 25% range from the recommended sentence is discretionary, there is nothing in the text clearly specifying that the 25% range may be used to increase the recommended sentence further beyond the section 775.082 maximum. In contrast, as we have just seen, there is specific authority--in fact, a mandatory direction--to impose a recommended sentence greater than the section 775.082 maximum, but that authorization is limited to a recommended sentence and does not include the discretionary authority to enhance a recommended sentence within the 25% range. The absence of express textual authority to impose a discretionary range enhancement up to 25% greater than a recommended sentence that is itself greater than the section 775.082 maximum leads us to the conclusion that there is no such authority.
>
> . . . . .
>
> Because in neither formulation did the legislature add any words that convey that precise meaning, it follows that the recommended sentence that must be imposed when it exceeds section 775.082 is the unenhanced version without the additional 25%.
>
> *Id.* at 897.

Finally, the Myers court expressly rejected the holding of Third District in *Martinez* and the Fifth District's decision in the instant case:

> The state calls our attention to the recent decisions in

Martinez v. State, 692 So. 2d 199 (Fla. 3d DCA 1997); and Mays v. State, 693 So, 2d 52 (Fla. 5th DCA 1997), and suggests thereby that the sentence in this case was proper. In Martinez the court considered on motion for rehearing virtually the same issue we confront in this case. There is an important difference in that the recommended sentence in Martinez was within the section 775.082 maximum, while here it exceeds it. But the trial judge in Martinez elected to enhance the recommended sentence within the 25% permitted variance, and the enhanced sentence then exceeded the section 775.082 maximum. In approving this variation, the third district reasoned:

"In our view, the defendant argues a distinction without a legal difference. Under subsection 92 1 .OO 14(1), Florida Statutes (1993), 'The recommended sentence length in state prison months may be increased by up to, and including, 25 percent or decreased by up to, and including, 25 percent, at the discretion of the court.' The recommended sentence is, therefore, the full range from minus 25 percent to plus 25 percent. It is accurate to describe this as a recommended range, and the term 'range' continues to be used elsewhere in the guidelines statute. See id. § 92 1 .00 1(6) (referring to 'the range recommended by the guidelines').

"After defining the 'recommended sentence,' id. § 92 1 .00 14(1), to include the 25 percent increase and 25 percent decrease, the statute goes on to say, 'If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by § 775.082, the sentence recommended under the guidelines must be imposed absent a departure.' Id. § 92 1.0014(1). When increased by 25 percent, the defendant's recommended sentence was 7.7 years, which exceeds the S-year legal maximum. The trial court was entitled to impose the sentence that it did."

692 So. 2d at 204. *See* also *Mays v. State, 693 So.* 2d 52 (Fla. 5th DCA 1997) (recommended sentence less than section 775.082 maximum; sentence imposed greater than maximum but within 25% variance range; sentence affirmed on basis of Martinez).

We do not agree that section 92 1 .OO 14(2) defines recommended sentence to include the 25% variance range. Section 92 1.0016(l)(a)provides that: "The recommended guidelines sentence provided by the total sentence points is assumed to be appropriate for the offender." [e.s.] Hence the recommended sentence is the one "provided by the total sentence points." A sentence that varies from the recommended sentence by plus or minus 25% is a variation sentence, or a sentence within the guidelines range, but it is not "the recommended sentence provided by the total sentence points." As we have previously explained, we construe the quotation in Martinez taken from section 92 1 .OO 14(1)--"If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775,082, the sentence recommended under the guidelines must be imposed absent a departure"--to allow only a mitigating departure but not an aggravating departure further beyond the section 775.082 maximum, And while section 92 1 .001(6) does indeed refer to the "range recommended by the guidelines," sections 92 1 .00 1(5) and 92 1.0014(2) both state that "the sentence recommended by the guidelines must be imposed absent a departure." [e.s.] To repeat ourselves, we view the "must be imposed" language of this provision, and the discretionary 25% variance provision of the same statute, to create an ambiguity which we must resolve in favor of the defendant. Thus while this provision authorizes the imposition of a recommended sentence greater than the section 775.082 maximum, it does not allow the imposition of sentence enhanced by a 25% variation above the recommended sentence. We disagree with the analysis of both Martinez and Mays to the extent that it applies to

> the case we face today, in which the recommended sentence itself exceeds the section 775.082 maximum without any variation.
>
> *Id.* at 899-900. (Footnote omitted).

Finally, turning to the Fifth District's decision in Green *v. State, 69* 1 So. 2d 502 (Fla. 5th DCA 1997), *rev. granted,* Case No. 90,696,that Court allowed the trial court to exceed the statutory maximum beyond the defendant's recommended sentence or 65.8 months in prison to the very top of his presumptive **guideline sentence range** or 72 months in prison because this sentence does not represent a "departure sentence." See Green, 691 So. 2d at 504.

The Fifth District's decision in *Green* is clearly wrong because it veered off on a tangent. The departure concept is irrelevant. The applicable statute states that the trial court can only exceed the statutory maximum if "a recommended sentence under the guidelines exceeds the maximum sentence." As noted, the reference in Section 92 1.001(5) to a departure must be solely to a **downward** departure. Not surprisingly, the Green court conceded to reach its own conclusion this penal statute must be redrafted because "the articles in the foregoing sentence are misplaced in the printed statute." *See Green v. State,* 691 So. 2d at 504. The Fifth District in *Green* failed to strictly construe this penal statute or apply the rule of lenity to its application to the accused. Also, the Fourth District in Myers expressly rejected the

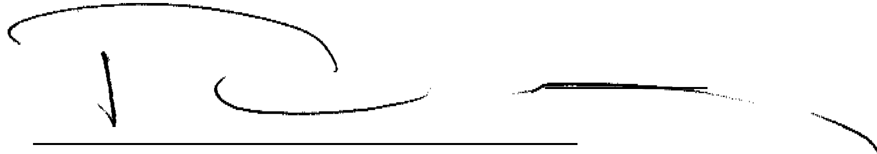
holding of the Fifth District in Green. See Myers, 696 So, 2d at 899.

Amicus Curiae respectfully submits that Petitioner's sentence of (70) months in prison is illegal and excessive. Thus, said sentence should be vacated and this cause remanded to the sentencing court for imposition of a sentence not to exceed Petitioner's "recommended sentence" of 67.8 months in state prison.

CONCLUSION

Based on the arguments contained herein, the FPDA urges this Honorable Court to declare Section *92* 1 *.OO*1(5), *Florida Statutes* (1995), **unconstitutional** and remand the instant cause to the trial court for the resentencing of Petitioner, Mr. Albert L. Mays, to a term in prison not to exceed the statutory maximum for the offense charge.

Respectfully submitted,



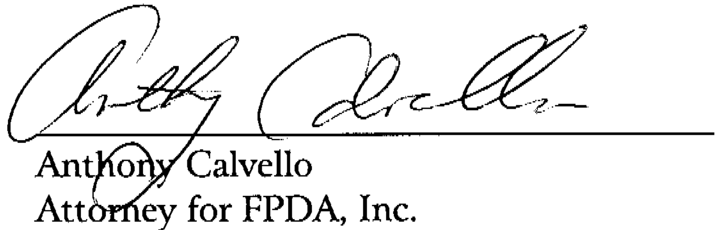
RICHARD L. JORANDBY
Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar No. 94700

ANTHONY CALVELLO
Assistant Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar No. 266345
The Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

ON BEHALF OF THE FLORIDA PUBLIC DEFENDER'S ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to Robin A. Compton, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Fl 32 118-3956 and Michael S. Becker, Assistant Public Defender, 112 Orange Ave., Suite A, Daytona Beach, F132 114-4340 this 26th day of November , 1997.



Anthony Calvello
Attorney for FPDA, Inc.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

ALBERT LEE MAYS,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 90,826
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
______________________________	)	

APPENDIX

Mays v. State, 493 So. 2d 52
(Fla. 5th Dist. 1997)

there was a fund, we reverse the granting of summary judgment and remand for further proceedings.

Having concluded that the trial court improperly entered the summary judgment, it follows that the determination to award the City attorney's fees under section 57.105(1) was also error and, accordingly, we reverse that order.

As we noted above, there remain questions of fact that must be resolved before liability might be determined in this matter. Having concluded there is a fund which would give rise to the common fund doctrine, we suggest that the trial court look to this court's opinion in *Fidelity & Casualty Company of New York*, as well as the quoted language from *Sprague*, in further proceedings. As in Sprague, we are making no determination as to Costello/Reynolds's entitlement to recovery based upon the common fund doctrine, but only that there is a sufficient basis for the trial court to entertain such a petition. Accordingly, although we affirm the denial of Costello/Reynolds's motion for summary judgment, we reverse the final summary judgment in favor of the City and the finding that the City was entitled to attorney's fees.

Reversed and remanded for further proceedings.

FRANK, A.C.J., concurs.

PARKER, J., dissents with opinion.

PARKER, Judge, dissenting.

I respectfully dissent. I conclude the trial court was correct in finding that there was no common fund created by the City of Cape Coral. In my opinion, the City has not created a common fund subject to an attorney's fee award by transferring money from another city account to make up for a shortfall in anticipated tax revenues.

Albert L. MAYS, Appellant,

v.

STATE of Florida, Appellee.

No. 96-1621.

District Court of Appeal of Florida, Fifth District.

March 21, 1997.

Rehearing Denied May 9, 1997.

Defendant was convicted in the Circuit Court, Orange County, Alice Blackwell White, J., of a third-degree felony. He appealed. The District Court of Appeal, Harris, J., held that trial court could impose sentence that was within sentencing range, even though sentence exceeded statutory maximum.

Affirmed.

Criminal Law ⚷1208.3(1)

Trial court could impose sentence of 70 months for conviction of third-degree felony, even though statutory maximum sentence was 60 months, where defendant's recommended sentencing range under Sentencing Guidelines was 50.85 months to 84.75 months. West's F.S.A. RCrP Rule 3.703(d)(26) (1996).

James B. Gibson, Public Defender, and Rebecca M. Becker, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

HARRIS, Judge.

In this "hot issue" of the day, Albert L. Mays appeals his sentence imposed under the guidelines but in excess of the statutory maximum. We affirm.

Mays was convicted of a third degree felony and; under the sentencing guidelines, his recommended sentencing range was 50.85 months to 84.75 months incarceration, with a recommended sentence of 67.8 months. Even though generally the statutory limit for

a third degree felony is five years, the court sentenced Mays to 70 months incarceration.

Mays recognizes that the sentencing guidelines provide:

> If the recommended sentence under the sentencing guidelines exceeds the maximum sentence authorized for the pending felony offenses, the guideline sentence must be imposed, absent a departure. Such downward departure must be equal to or less than the maximum sentence authorized by section 775.032.

Rule 3.703(d)(26), Fla.R.Crim.Pro.

Mays contends, however, that since the five-year statutory limitation is *within* the recommended sentencing range, the above-cited rule does not apply. But that is not the test. Clearly the sentencing range, or at least a portion of it that is available to the sentencing judge, exceeds the statutory maximum and takes the sentencing outside the limitation imposed by the general sentencing statute. This issue has been ably decided by the Third District in Martinez *v. State,* 692 So.2d 199 (Fla. 3d DCA 1997), and we concur with that court's reasoning.

AFFIRMED.

DAUKSCH and COBB, JJ., concur.

Glenn Allen LARSEN, Petitioner,

v.

STATE of Florida and Harry K. Singletary, Secretary of the Department of Corrections Respondents.

No. 97-0244.

District Court of Appeal of Florida, Fourth District.

April 2, 1997.

Rehearing, Clarification, and Rehearing En Banc Denied May 20, 1997.

Defendant sought habeas corpus, challenging affirmance of sentence imposed by the Circuit Court, Seventeenth Judicial. Circuit, Broward County, M. Daniel Futch, Jr., J., on grounds of ineffective assistance of appellate counsel. The District Court of Appeal, Warner, J., held that: (1) fact that codefendant's sentence was reversed on direct appeal whereas defendant's sentence was affirmed without opinion on same issue did not establish that appellate counsel was deficient; (2) appellate counsel cannot be deemed to have rendered ineffective assistance by failing to brief issue that was not preserved for appeal; and (3) appellate counsel cannot be deficient for failing to file reply brief.

Petition denied.

1. Criminal Law ⚷641.13(7)

Fact that codefendant'ssentence was reversed on direct appeal whereas defendant's sentence was affrmed without opinion even though same issue was presented did not establish that appellate counsel was deficient, where trial court was experienced with defendant from other criminal matters and examined his record, where all of court's comments at sentencing hearing were directed at his conduct and only as afterthought did court indicate that sentence applied to codefendant also, and where. codefendant raised additional issue concerning accuracy of prior convictions.

2. Criminal Law ⚷641.13(7)

Appellate counsel cannot be deemed to have rendered ineffective assistance by failing to brief issue that was not preserved for appeal.

3. Criminal Law ⚷641.13(7)

Appellate counsel cannot be deficient for failing, to file reply, brief, which is not even required.

Glenn Allen Larsen, Madison, pro se.

No response required for respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to Robin A. Compton, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Fl 32 118-3956 and Michael S. Becker, Assistant Public Defender, 112 Orange Ave., Suite A, Daytona Beach, F132 114-4340 this 26th day of November , 1997.

Anthony Calvello
Attorney for FPDA, Inc.