IN THE SUPREME COURT OF FLORIDA

ALBERT LEE MAYS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

DCA CASE NO. 96-1621
SUP. CT. CASE NO. 90,826

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of aggravated assault, a third degree felony. Pursuant to the sentencing guidelines, Petitioner's recommended sentencing range was 50.85 months to 84.75 months in prison. Petitioner was adjudicated guilty and sentenced to 70 months in prison.

On appeal to the Fifth District Court of Appeal, Petitioner argued that the sentence was illegal inasmuch as it exceeded the statutory maximum. The issue on appeal was the interpretation of the 1995 amendment to the sentencing guidelines codified in Rule 3.703(d)(26), Florida Rules of Criminal Procedure which permits sentence in excess of the statutory maximum. Petitioner contended that if the statutory maximum is **within** the recommended range, the amendment does not apply. The District Court disagreed and held that if **any** portion of the recommended range exceeds the statutory maximum, the trial court is not bound by the general sentencing statutes. **Mays v. State**, 1997 WL 125895 (Fla. 5th DCA 1997). The Court further expressly aligned itself with the Third District Court of Appeal in

Martinez v. State, 22 Fla.L.Weekly D305 (Fla. 3d DCA January 29, 1997) opinion on rehearing 22 Fla. L. Weekly D1009 (Fla. 3d DCA April 23, 1997). Petitioner timely sought rehearing which was denied on May 9, 1997. A timely notice to invoke this Court's discretionary jurisdiction was filed on June 9, 1997.

SUMMARY OF THE ARGUMENT

The decision of the fifth District Court of Appeal sub judice specifically concurred with a decision of the Third District Court of Appeal, citing Martinez v. State, 22 Fla. L. Weekly D305 (Fla. 3d DCA January 29, 1997) opinion on rehearing, 22 Fla. L. Weekly D1009 (Fla. 3d DCA April 23, 1997), which is currently pending review before this Court in Case No. 90,679. Pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981) and Savoie v. State, 422 So.2d 308 (Fla. 1982), this Court has the discretion to accept the instant case for review.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT CASE IN WHICH THE FIFTH DISTRICT COURT OF APPEAL SPECIFICALLY CITED CONCURRENCE WITH A DECISION FROM THE THIRD DISTRICT COURT OF APPEAL WHICH IS CURRENTLY PENDING REVIEW BEFORE THIS COURT.

Acknowledging that the issue before them was the "hot issue" of the day, the Fifth District Court of Appeal affirmed Petitioner's sentence which exceeded the statutory maximum for the third degree felony, aggravated assault, of which Petitioner was convicted. At issue was the interpretation of Rule 3.703(d)(26), Florida Rules of Criminal Procedure which provides:

> If the recommended sentence under the sentencing guidelines exceeds the maximum sentence authorized for the pending felony offenses, the guidelines 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.

Petitioner's recommended sentencing range was 50.85 to 84.75 months; he received a sentence of 70 months. The Court below held that as long as a portion of the recommended range exceeds the statutory maximum, a sentencing judge is not bound by the limitation imposed by the general sentencing statute. The Court specifically concurred with a case from the Third District, Martinez v. State, 22 Fla. L. Weekly D305 (Fla. 3d DCA January 29, 1997) opinion on rehearing, 22 Fla. L. Weekly D1009 (Fla. 3d DCA April 23, 1997), wherein the Court rejected the same argument made by Petitioner herein.

In Martinez, supra, the Court also rejected an issue involving the scoring of victim

injury points and certified direct conflict with a decision of the Second District Court of Appeal. A petition for review of Martinez was filed in this Court and is currently pending in Case No. 90,679. Although Martinez did not invoke jurisdiction on the same issue as in the instant case, once this Court accepts jurisdiction over a cause to resolve a legal issue in conflict, in its discretion the Court can consider other issues properly raised and argued. Savioe v. State, 422 So.2d 308 (Fla. 1982). Since the issue sub judice will be argued in Martinez, this Court has discretionary review to accept this case pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981) to ensure uniformity of decisions.

Petitioner further directs this Court's attention to the fact that this issue is also pending review before this Court in Green v. State, Case No. 90,696.

CONCLUSION

For the above-stated reasons and authority, this Honorable Court should exercise its discretionary jurisdiction to review the case sub judice based upon the reasoning of Jollie v. State, 405 So.2d 418 (Fla. 1981).

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

Rebecca M. Becker

REBECCA M. BECKER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal, and to Albert Lee Mays, No. 165336, Gulf Correctional Institute, P.O. Box 10, Wehahitchka, Fl. 324650010, this 19th day of June, 1997.

Rebecca M. Becker

REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ALBERT LEE MAYS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

DCA CASE NO. 96-1621
SUP. CT. NO.

APPENDICES

Appendix A -- Mays v. State, 1997 WL 125895 (Fla. 5th DCA 1997)

Appendix B -- Martinez v. State, 22 Fla. L. Weekly D305 (Fla. 3d DCA January 29, 1997)

Appendix C -- Martinez v. State opinion on rehearing 22 Fla. L. Weekly D1009 (Fla. 3d DCA April 23, 1997)

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COUNSEL FOR PETITIONER

Albert L. MAYS, Appellant,
v.
STATE of Florida, Appellee.

No. 96-1421.
District Court of Appeal of Florida,
Fii District.
March 21, 1997.

Appeal from the Circuit Court for Orange County, Alice Blackwell White, Judge.

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, J.

● *l. 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 affum.

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 ken ably decided by the Third District in *Martinez v. State,* 1997 WL 30812 (Fla. 3d DCA, Jan.29, 1997), and we concur with that court's reasoning.

AFFIRMED.

DAUKSCH and COBB, JJ., concur.

Javier E. MARTINEZ, Appellant,
v.
The STATE of Florida, Appellee.

No. %-165.
District Court of Appeal of Florida,
Third District.
Jan. 29, 1997.

Defendant was convicted of vehicular homicide, in the Circuit Court, Dade County, Leslie B. Rothenberg, J. Defendant appealed. The District Court of Appeal, Cope, J., held that: (1) evidence supported conviction; (2) driver and passenger in vehicle defendant passed could give opinion testimony as to defendant's speed; (3) trial court could admit evidence of defendant's blood alcohol test results, even though defendant was not charged with drunken driving; (4) trial court could admit evidence that defendant was driig and taking medicine not to be used when driving, over claim that prejudicial impact overcame probative value; and (5) sentence had been correctly determined.

Affirmed; direct conflict certified.

1. AUTOMOBILES ⚿355(13)
48A ----
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(13) Homicide.
Fla.App. 3 Dist. 1997.
Evidence supported conviction for vehicular homicide; while passing another vehicle in 30 miles per hour no passing zone, going 70 miles per hour, defendant's car struck median, proceeded across opposite lane of traffic, and landed on top of rock wall on side of the road, and tree branch entered car, impaling passenger and causing his death. West's F.S.A. § 782.071(1).

2. CRIMINAL LAW ⚿461
110 ----
1 10XVII Evidence
1 10XVII(R) Opinion Evidence
110k449 Witnesses in General
110k461 Place, space, or distance.
Fla.App. 3 Dist. 1997.
Testimony in form of opinion by nonexpert witness, qualified by opportunity for observation, is admissible to prove speed of vehicle, animal, or object.

3. CRIMINAL LAW ⚿461
110 ----
1 10XVII Evidence
1 10XVII(R) Opinion Evidence
110k449 Witnesses in General
110k461 Place, space, or distance.
Fla.App. 3 Dist. 1997.
Driver and passenger of automobile passed by defendant, charged with vehicular homicide, could give lay opinion that defendant was traveling 70 miles per hour in 30 miles per hour zone; both were licensed drivers with several years experience and they agreed as to estimated speed.

4. AUTOMOBILES ⚿411
48A ----
48AIX Evidence of Sobriety Tests
48Ak411 In general.
Fla.App. 3 Dist. 1997.
Trial court could allow introduction of blood alcohol level test results for defendant charged with vehicular homicide, which showed no impairment, even though defendant was not being charged with drunken driving; presence of alcohol in system was factor to be assessed in determining if requisite degree of recklessness was present to support vehicular homicide conviction.

5. AUTOMOBILES ⚿357
48A ----
48AVII Offenses
48AVII(B) Prosecution
48Ak357 Instructions.
Fla.App. 3 Dist. 1997.
Trial court could instruct jury that blood alcohol test results for defendant, charged with vehicular homicide, created presumption that he was not impaired; instruction was helpful to defendant.

6. AUTOMOBILES ⚿354
48A ----
48AVII Offenses
48AVII(B) Prosecution
48Ak354 Admissibility of evidence.
Fla.App. 3 Dist. 1997.
Trial court had discretion to admit evidence that

defendant, charged with vehicular homicide, had been drinking and taking prescription medicine carrying cautionary label that persons driving automobiles should not use it, even though defendant claimed that prejudicial aspect of evidence outweighed its probative value. West's F.S.A. § 90.403.

7. AUTOMOBILES ⚿359
48 A ----
48AVII Offenses
48AVII(C) Judgment and Punishment
48Ak359 In general.
Fla.App. 3 Dist. 1997.

Defendant convicted of vehicular homicide could be sentenced to 6.5 years' incarceration followed by one year of probation, under statute providing that sentence called for under sentencing guidelines would prevail over maximum sentence provided by statute if guidelines sentence was longer, even though defendant claimed that since guidelines range was 4.6 to 7.7 years and statutory maximum for offense was five years, he should have been sentenced for only five years. West's F.S.A. §§ 775.082(3)(d), 921.001(5).

8. CRIMINAL LAW ⚿1240(2)
110 ----
110XXIX Sentencing Guidelines
110XXIX(A) In General
110k1238 Matters Considered in Applying Guidelines
110k1240 Dual Use
110k1240(2) Factors inherent in offense.
Fla.App. 3 Dist. 1997.

Trial court determining sentence for vehicular homicide could score 60 points for victim injury resulting in death, even though defendant claimed that death was element of crime of vehicular homicide; statute and rules explicitly provided for scoring done by court. West's F.S.A. § 921.0011(7); West's F.S.A. RCrP Rule 3.702(d)(5).

Lmda L. Carroll and Gregory A. Wald, Miami, for appellant.

Robert A. Butterworth, Attorney General, and Sylvie Perez Posner, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and COPE and FLETCHER, JJ.

COPE, Judge.

**1 Javier E. Martinez appeals his conviction for vehicular homicide. We affirm.

Defendant-appellant Martinez contends that the evidence was legally insufficient to convict him of vehicular homicide. " 'Vehicular homicide' is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another." § 782.071(1), Fla.Stat. (1993). See *generally McCreary v. State,* 371 So.2d 1024 (Fla.1979). In determining whether the evidence is legally sufficient, the evidence must be viewed in the light most favorable to the state. *State* v. *Law,* 559 So.2d 187, 189 (Fla.1989).

[1] On the night of the fatality, defendant drove northbound on Old Cutler Road in Coral Gables. Defendant was driving at an estimated 70 miles per hour in a 30 mile-per-hour zone, in a curving section of road. There was a continuous double yellow line, indicating that it was a no-passing zone. While passing another vehicle, defendant's car struck a median, proceeded across the southbound lane of traffic, and landed on top of a rock wall on the side of the road. A tree branch entered the car, impaling a passenger and causing his death. The facts just stated are legally sufficient for conviction under the vehicular homicide statute, and meet or exceed the level of recklessness involved in *McCreary v. State,* 371 So.2d at 1026-27, and *Savoia* v. *State,* 389 So.2d 294 (Fla. 3d DCA 1980).

Defendant relies on *R. C.G. v. State, 362* So.2d 166 (Fla. 2d DCA 1978), but the state correctly points out that *R.* C.G. applied a manslaughter standard to the vehicular homicide statute. In that respect, *R.C.G.* does not survive the Florida Supreme Court's later decision in *McCreary,* which rejected the application of the manslaughter standard in vehicular homicide cases. 371 So.2d at 1025-27. The standard of proof in vehicular homicide cases is lower than the manslaughter standard. *Zd. Since* the *R.* C.G. court applied the higher manslaughter standard, the *R.* C.G. decision sheds no light on whether the facts of that case would be legally sufficient to support a conviction for vehicular homicide. *The R.C.G. case* is also factually distinguishable; the *R. C.G. court* noted that the motorcycle accident may have been caused by a

sudden shift of weight by the motorcycle passenger, which in turn caused the inexperienced driver to lose control. 362 So.2d at 168.

Defendant *also* relies *on W.E.B. v. State, 553* So.2d 323 (Fla. 1st DCA 1989), but in that case the court concluded that the defendant was at most guilty of negligence in "overcorrecting from having driven off the shoulder of the road." *Id.* at 327 (emphasis omitted). The factual circumstances of the present case are of greater severity than those *outlined in W.E.B.*

[2] [3] Defendant next argues that the trial court erred by admitting the opinion testimony of lay witnesses about the speed of defendant's vehicle at the time of the accident. The state called as witnesses the driver and passenger in the motor vehicle which the defendant was passing at the time of the accident. Both individuals were licensed drivers with several years of driving experience and both estimated defendant's speed at about 70 miles per hour as he passed them.

"Testimony in the form of opinion by a nonexpert witness, qualified by opportunity for observation, is admissible to prove the speed of a vehicle, animal, or object. " 1 Spencer A. Gard, *Florida Evidence* § 12.04, at 421 (1980). There was no abuse of discretion in admitting the testimony.

[4] Defendant contends that the trial court erred by admitting the results of his blood alcohol test which indicated a .03 level. A toxicologist extrapolated that the level would have been .05 at the time of the accident. Defendant asserts that since this was a prosecution for reckless driving, and not a prosecution for driving under the influence (DUI) or DUI manslaughter (FN1), evidence of alcohol consumption was inadmissible. To the contrary, it has been held that evidence of alcohol consumption is a factor the trial court is entitled to consider in a reckless driving prosecution. *W.E. B. v. State, 553* So.2d at 326. Evidence of alcohol consumption was among the matters presented to the jury in such *cases as McCreary v. State,* 371 So.2d at 1025, *Savoia v. State, 389* So.2d at 295, and *R. C.G. v. State,* 362 So.2d at 166, although the question of admissibility was not discussed.

[5] Defendant makes a related argument that the trial court erred by instructing the jury on the statutory presumptions for blood alcohol levels. See § 316.1934(2), Fla.Stat. (1993). By virtue of the instruction, the jury was aware that for the .03 and .05 levels, it was presumed that the defendant was not impaired. See *id.* § 316.1934(2)(a). Defendant contends that this instruction should not have been given, but as we view the record, trial counsel took the position that if the blood alcohol test results were going to be admitted into evidence over defense objection, then defendant wanted the jury to be instructed regarding the statutory presumptions. Defendant will not now be heard to complain. Moreover, it would appear that the giving of this instruction was helpful, rather than harmful, to the defense.

[6] Defendant argues alternatively that the evidence regarding consumption of alcohol and prescribed medicine should have been excluded under section 90.403, Florida Statutes, which provides that relevant evidence is inadmissible, inter alia, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, [or] misleading the jury.. . . " At trial the State adduced evidence that at the time of the accident defendant was taking a prescription drug which carries a warning not to operate a motor vehicle, Defendant's objection was addressed to the sound discretion of the trial court, and under the circumstances, we see no abuse of that discretion.

[7] Defendant asserts that his sentence exceeds the legal maximum. Defendant was convicted of vehicular homicide under subsection 782.071(1), Florida Statutes, which is a third degree felony. Whiie the maximum legal sentence for a third degree felony is five years, *id.* § 775.082(3)(d) , the crime in this case was committed on July 23, 1994, and the 1994 sentencing guidelines are therefore applicable. Under the 1994 guidelines, "[i]f 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." § 921.001(5), Fla.Stat. (1993). The recommended guidelines range in this case was 4.6 years to 7.7 years. The trial court imposed a sentence of six aud 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 19%).

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 s. 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 ordinary 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 ordii legal maximum.

Defendant next claims that there is a scoring error in calculating the recommended sentence. Defendant argues that the recommended guidelines sentence of seventy-four months can only be increased by 15 percent in order to calculate the guidelines range. See § 921.0014(1), Fla.Stat. (1993). Defendant misreads the statute. The statute provides that "[t]he 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. " *Id.* The statute goes on to explain that the 25 percent range is not available if the trial court has already availed itself of its discretionary power to increase the total sentence points by up to 15 percent where the initial total sentence points are forty or less. See *id.* However, the defendant in this case scored 102 points, and the 15 percent discretion allowed by the statute was not available to, or invoked by, the trial court. The calculation of the guidelines range is correct.

**4 [8] Finally, the defendant argues that the trial court erred by scoring sixty points for victim injury, which is the score where death has resulted. Relying on *Thornton* v. *State*, *683* So.2d 515 (Fla. 2d DCA 1996), defendant claims that the death of the victim cannot be scored because death or great bodily harm is an element of the offense of vehicular homicide. We disagree.

Under the 1994 guidelines:

> "Victim injury" means the physical injury or death suffered by a person as a direct result of the primary offense, or any offense other than the primary offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.

§ 921.0011(7), Fla.Stat. (1993). Section 921.0014, Florida Statutes, creates the sentencing guidelines worksheet and calls for the scoring of the offense(s) plus victim injury. This is spelled out in Florida Rule of Criminal Procedure 3.702(d)(5) which states:

> "Victim injury" is scored for physical injury or death suffered by a person as a direct result of any offense pending before the court for sentencing., . .
>
> 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. However, if the victim injury is the result of a crime of which the defendant has been acquitted, it shall not be scored.

Since the rule and the statute specifically call for the scoring of victim injury, the death of the victim was properly scored in this case.

We decline to follow the Second District decision *in Thornton v. State.* In *Thornton* the defendant moved for postconviction relief, claiming scoresheet error in sentences imposed in 1992. Defendant relies on a portion of the *Thornton* opinion which states:

> In the order denying further relief upon rehearing, the trial court concedes that it was error to include forty-eight points on the scoresheet for victim injury; the primary offense had already been enhanced because injury or death is an element of *the* offense. *Byrd v. State,* 531 So.2d 1004 (Fla. 5th DCA 1988);' *see Hendsbee v. State,* 497 So.2d 718 (Fla. 2d DCA 1986); *Benedict v. State,* 475 So.2d 1000 (Fla. 5th DCA 1985).
>
> 683 So.2d at 516. (FN2)

To begin with, the *Thornton* decision analyzes the pre-1994 version of the guidelines. The question of how to score victim injury depends on the wording of the guidelines.

However, the pre-1994 guidelines are similar to the 1994 guidelines in the scoring of victim injury, Under Florida Rule of Criminal Procedure 3,701, which governs the pre-1994 guidelines, "Victim injury shall be scored for each victim physically injured during a criminal episode or transaction, and for each count resulting in such injury whether there are one or more victims." Fla.R.Crim.P. 3.701(d)(7) (1992). (FN3) The 1988 committee notes state:

> • *5 (d)(7) This provision implements the intention of the commission that points for victim injury be added for each victim injured during a criminal transaction or episode. The injury need not be an element of the crime for which the defendant is convicted, but is limited to physical trauma. However, if the victim injury is the result of a crime for which the defendant has been acquitted, it shall not be scored.

The pre-1994 scoresheet forms call for assessment of victim injury points in addition to the points assigned to the primary and additional offenses at conviction. Fla.R.Crim.P. 3.988 (1992).

The *Thornton* decision does not discuss the language of Rule 3.701 or the committee notes. Instead, *Thornton* relies on Byrd *v. State,* 531 So.2d 1004 (Fla. 5th DCA 1988), and *Hendsbee v. State,* 497 So.2d 718 (Fla. 2d DCA 1986), both of which are sentencing guidelines departure cases. In *Byrd* there was a downward departure based, in part, on defendant's lack of prior record, The *Byrd court* said, "A defendant's record or lack of one is not a valid reason for departure because that factor is already taken into consideration in the guideline calculation." 531 So.2d at 1007 (citation omitted). That is a correct statement of law, but it does not address whether victim injury is to be scored.

Similarly, the *Thornton* court cited *Hendsbee v. State,* also a departure case. There the court said:

> An element of aggravated battery, victim injury, is scored on the scoresheet. Victim injury may not be figured into the scoresheet and also used to depart from the sentencing guidelines.

497 So.2d at 718 (citations omitted). The point was that since victim injury had been scored, victim injury could not be used as a reason for departure from the guidelines. The *Hendsbee* decision does not support the proposition that victim injury is not to be scored. The court made the comment that victim injury is an element of aggravated battery because prior to July 1, 1987, the sentencing guidelines provided that, "[v]ictim injury shall be scored if it is an element of any offense at conviction." Fla.R.Crim.P. 3.701(d)(7) (1985). (FN4) *Hen&bee* was decided in 1986.

The final case relied on by *Thornton* is *Benedict v. State,* decided in 1985. The defendant *in Benedict* had been convicted of failing to stop and render aid and give information after an accident resulting in injury or death, in violation of sections 316.027 and 316.062, Florida Statutes. The question *in Benedict* was whether victim injury points had been properly scored. Since the guidelines at that time called for victim injury points to be scored only if it is an element of any offense at conviction, Fla.R.Crim.P. 3.701(d)(7) (1985), and since it was not an element of Benedict's crimes that the defendant have killed or injured someone else, *the Benedict court* ruled that victim injury points had been improperly scored. *475* So.2d at 1001. ***Benedict hinges,*** in other words, on the wording of the pre-July 1, 1987, sentencing guidelines--a version of the guidelines which was not in force at the time of the *Thornton* decision, nor at the time the defendant committed his crime in the present case. *Benedict* does not support the proposition for which *Thornton* cites it. **(FN5)**

****6.** In sum, we conclude that *Thornton* is wrongly decided and certify direct conflict with it. Victim injury is to be scored in accordance with the text of the applicable sentencing guidelines. In the present case, victim injury has been properly scored under Rule 3,702 and subsections 921.0011(7) and 921.0014(1), Florida Statutes (1993).

Affirmed; direct conflict certified.

FN1. § 316.193(3)(c)3, Fla.Stat. (1993).

FN2. Operating on the premise that the defendant had been scored incorrectly, the court ordered that Thornton be resentenced. *Id.*

FN3. Although immaterial in the present case, the phrase "and for each count resulting in injury whether there are one or more victims" was added in *1991. See Florida Rules of Criminal Procedure re: C ntencing Guidelines (Rules 3.701 and 3.988),* 576 So.2d 1307, 1308-09 & fn*

(Fla. 1991).

FN4. Effective July 1, 1987, Rule 3.701(d)(7) was amended to read, "Victim injury shall be scored for each victim physically injured during a criminal episode or transaction." *Florida Rules of Criminal Procedure re: Sentencing Guidelines* (rules 3.701 and 3.988). 509 So.2d 1088, 1089 (Fla. 1987); *see also Karchesky v. State, 591* So.2d 930, 932 (Fla. 1992).

FN5. Even if the pre-July 1, 1987 version of the sentencing guidelines were still in effect, victim injury points would be properly scored in the present case. The death of the victim is an element of the crime of vehicular homicide under section 782.071, Florida Statutes.

set for December 15, 1994. In addition, the duties of the attorney for the guardian were taken over by Thomas J. Morgan, Esq. in December 1994, at the time of the first scheduled hearing for fees.

Levin's Estate failed to make any objections to the petitions for fees until the December 15, 1994 hearing, when the Estate made oral objections, resulting in the Court resetting the matter for hearing on January 30, 1995. The Estate alleged that Galbut was negligent and responsible for Levin's death. On January 8. 1995, the Estate filed a Motion to Strike the Petition for Fees filed by Galbut. The next day, January 9, 1995, the Estate filed Levin's death certificate. On January 10, 1995, the Estate filed formal objections and made a request for jury trial.

On January 20, 1995, Galbut filed his Response to the Motion to Strike his Fees, moved to strike the jury trial demanded in the Motion to Strike his Fees, and responded to the separate motion for jury trial. Also on January 20, 1995, the Estate filed a Petition for Surcharge against Galbut, as guardian of the person, for his negligence. Galbut's attorney moved to dismiss, and on April 25, 1995, the trial court entered an Order on all pending motions. The Court dismissed the Amended Petition for Surcharge, with prejudice, finding that it failed to state a cause of action upon which relief could be granted because the Petition improperly sought relief for alleged torts. The Court also entered an order denying the Estate's Motion for Jury Trial and Motion to Strike the Petition for Fees for lack of jurisdiction.

In May of 1995, the Estate petitioned this Court for a Writ of Certiorari to review the Estate's right to trial by jury at a hearing awarding guardian fees and attorney's fees. The Estate also petitioned this Court for a Writ of Prohibition, contending that the probate court lacked jurisdiction to award either guardian or attorney's fees. This Court denied these petitions.

On June 2, 1995, Galbut's attorney filed a motion below for attorney's fees under $744.108 and § 57.105, Fla. Stat., for services rendered in defending Galbut against the Estate's Petition for Surcharge and other motions, including the defense to the motion for jury trial and the motion to strike the petition for fees. Attorney's fees were also sought in this Court for the defense against the Estate's Petition for the Writs of Certiorari and Prohibition. This Court denied attorney's fees on November 16, 1995.

On June 12, 1995, the Estate appealed the Order Dismissing with Prejudice the Petition for Surcharge. In ***Estate of Levin v. Galbut***, 666 So. 2d 266 (Fla. 3d DCA 1996), this Court affirmed the lower court's dismissal of the Amended Petition for Surcharge because it failed to state a cause of action for surcharge as a matter of law. However, to ensure that the dismissal of the Petition would not have any preclusive effect on the pending tort action in the circuit court's general jurisdiction division, this Court held that the dismissal be "without prejudice." This Court denied Galbut's motion for attorney's fees on that appeal.

Finally, a hearing was set by the lower court on March 4, 1996, on Galbut's Petition for Fees as guardian of the person and Galbut's attorney's (Morgan) Petition for Fees and Costs in representing the guardian. At that hearing an attorney's fees expert testified regarding the reasonableness and necessity of the fees and services performed by both Galbut and Morgan.

The lower court awarded fees and costs and ordered that the award be paid from the assets of the Estate. The lower court awarded Galbut and his law firm, as attorneys for the guardian, $9,000.00 for fees for services rendered from April 15, 1991 through July 20, 1994; awarded Galbut, as guardian of the person, $4,000.00 for fees for his services rendered from July 19, 1991 through April 25, 1994; and awarded **Morgan,** as attorney for the guardian, $35,000.00 for fees for his services rendered from July 25, 1994 through January 22, 1996. The Estate now appeals that Order to this Court.

We affirm the order of the trial court awarding fees and costs to the firm of Galbut, Galbut, Menin and Wasserman, P.A. We also affirm the award of fees to Abraham Galbut for services rendered as Guardian.[1]

We now address the issue of attorney's fees awarded by the trial court for services rendered by the attorney for the guardian, Morgan. First, we review the fees awarded for services rendered in the two appeals litigated here. In each of those appeals counsel for the guardian filed a motion for attorney's fees. These motions were considered and denied by this court. The trial court was therefore without authority to grant them.* *Louth v. Williams,* 643 So. 2d 69 (Fla. 2d DCA 1994); *Schere v. Z.F., Inc., 578 So.* 2d 739 (Fla. 3d DCA 1991); *Garcia v. Garcia, 570 So.* 2d 357 (Fla. 3d DCA 1990); *Scutti v. Daniel E. Adache & Assoc. Architects, P.A.,* 515 So. 2d 1023 (Fla. 4th DCA 1987); *Gieseke v. Gieseke.* 499 So. 2d 839 (Fla. 4th DCA 1986); *Elswick v. Martinez,* 394 So. 2d 529 (Fla. 3d DCA 1981); *'Travelers Indem. Co. of* Am. *v. Morris,* 390 So. 2d 464 (Fla. 3d DCA 1980). As concerns the rest of the attorney's fees, we are unable to determine from the final order, the basis of the attorney's fee award.[3] For these reasons, the order of the trial court granting attorney's fees in the amount of thirty-five thousand ($35,000) dollars is reversed. We remand the case withinstructions to conduct a new hearing to determine what attorney's fees the guardian's attorney (Morgan) may properly be entitled to receive for services rendered at the trial level, In so doing we note that we have thoroughly reviewed this record and find no legal basis for an award of attorney's fees under section 57.105, Florida Statutes. Accordingly, whatever award is ultimately made by the trial court must be based on section 744.108, Florida Statutes.

Affirmed in part; reversed in part, and remanded with instructions.

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[1]We stress that nothing in this opinion is intended to affect, in any way, the pending litigation between the Estate and the Guardian in the General Jurisdiction Division of the Circuit Court.

[2]Counsel for the Guardian suggests that the Probate Court has the authority to grant attorney's fees of any type at the conclusion of the proceeding. We agree that the Circuit Judge presiding in the Probate Division has the authority to award attorney's fees for services rendered to the estate in the appellate court. *Bissmeyer v. Southeast Bank. N.A.,* 596 So. 2d 678 (Fla. 2d DCA 1991); In *re The Estate of Daniel A Udell,* 501 So. 2d 1286 (Fla. 4th DCA 1986); *Cari v. Erickson,* 394 So. 2d 1022 (Fla. 4th DCA 1981). Counsel's services in this case, however, were not rendered to the estate but to the guardian.

[3]It is unclear to us whether the award of attorney's fees to Mr. Morgan was based on section 57.105 or section 744.108, Florida Statutes. The court's order does not refer to either statute and the motion refers to both.

* * *

Criminal law-Sentencing-Guidelines-Where recommended guidelines sentence exceeded statutory maximum, trial court properly imposed guidelines sentence--l&Recommended sentence" under guidelines includes 25 percent discretionary increase or decrease

JAVIER E. MARTINEZ, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 96-165. L.T. Case No. 94-32063. Opinion tiled Aprill 23, 1997. An appeal fmm the Circuit Coun for Dade County, Leslie B. Rothenberg, Judge. Counsel: Liida L. Carroll and Gregory A. Wald, for appellant. Robert A. Butterworth. Attorney General, and Sylvie Perez Posner, Assistant Attorney General, for appellee.

(Before SCHWARTZ, C.J., COPE and FLETCHER, JJ.)

On Motion for Rehearing

[Original Opinion at 22 Fla. L. Weekly D305a]

(COPE, J.) By motion for rehearing defendant argues that there has been a change in terminology under the 1994 sentencing guidelines. He points out that subsection 921.001(5), Florida Statutes (1993), refers to a "recommended sentence," *id.,* not a recommended range. Defendant's recommended sentence was 4.6 years. Since this is less than the 5-year legal maximum for a third degree felony, defendant again presses his argument that the trial court did not have the latitude under the 1994 guidelines to exceed the legal maximum.

In our view, the defendant argues a distinction without a legal difference. Under subsection 921.0014(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.* § 921.001(6) (referring to "the range recommended by the guidelines'.').

After defining the "recommended sentence," *id.* 921.0014(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 s. 775.082, the sentence recommended under the guidelines must be imposed absent a departure." *Id.* § 921.0014(1). When increased by 25 percent, the defendant's recommended sentence was 7.7 years, which exceeds the 5-year legal maximum. The trial court was entitled to impose the sentence that it did.

Rehearing denied.

* * *

Criminal law-post conviction relief-Record does not conclusively refute allegations as to counsel's misadvice concerning defendant's eligibility for gain time-Remand for evidentiary hearing

MARCUS J. ROTH. Appellant. vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 96-2860. L.T. Case No. 94-21013. Opinion filed April 23, 1997. An Appeal under Fla. R. App. P. 9.140(g) from the Circuit Court for Dade County, Maxine Cohen Lando, Judge. Counsel: Marcus J. Roth, in proper person. Robert A. Butterworth, Attorney General, for appellee.

(Before **JORGENSON** and **SHEVIN, JJ.,** and **BARKDULL, Senior Judge.)**

ON MOTION FOR REHEARING

(PER CURIAM.) We grant rehearing and substitute the following opinion for the opinion filed February 5, 1997.

We reverse the order denying defendant's Florida Rule of Criminal Procedure 3.850 motion as to grounds one and two of defendant's motion and remand for an evidentiary hearing as the record does not conclusively refute defendant's allegations as to his attorney's misadvice concerning gain-time eligibility. *State v. Leroux*, 21 Fla. L. Weekly S557 (Fla. Dec. 19, 1996); *Booth v. State*, 687 So. 2d 335 (Fla. 3d DCA 1997). On remand, the court must conduct a hearing "to determine the merits of. . . defendant's claim that he relied in good faith upon the erroneous advice of his attorney in entering a plea." *Leroux*, 21 Fla. L. Weekly at s559.

We affirm the remaining portions of the order.

Affirmed in part, reversed in part, and remanded.

* * *

Torts-Workers' compensation-No error in dismissing claim against employer for wrongful termination of workers' compensation benefits on ground that dispute was within exclusive jurisdiction of judge of compensation claims where basis for claim was ongoing dispute in which employer contended that plaintiff had unreasonably refused to return to work, and plaintiff contended that employer had not offered work within plaintiff's physical limitations, making refusal to return to work justifiable-Supreme court ruling that employee has statutory cause of action for wrongful discharge in retaliation for pursuit of workers' compensation benefits, and that such action is cognizable before court of competent jurisdiction does not extend to instant dispute-Employee no longer has private cause of action against employer for knowingly making false, fraudulent, or misleading statement for purpose of denying workers' compensation benefits-plaintiff cannot avoid exclusivity of Workers' Compensation Act by claiming that employer's conduct constituted intentional infliction of emotional distress

ARMANDO MONTES DE OCA, Appellant, vs. ORKIN EXTERMINATING COMPANY. a foreign corporation. and CRAWFORD & COMPANY. a foreign corporation, Appellees. 3rd District. Case No. 95-1229. L.T. Case No. 94-23827. Opinion filed April 23, 1997. An appeal from the Circuit Court for Dade County, David L. Tobin, Judge. Counsel: Manuel A. Femandez and Howard A. Barnett, for appellant. Daniels, Kashtan & Fornaris and John E. Thomas, for appellees.

(Before SCHWARTZ, C.J., and COPE and GODERICH, JJ.)

On Motion for Rehearing and Certification

[Original Opinion at 21 Fla. L. Weekly D526a]

(COPE, J.) On consideration of appellant's motion for rehearing and certification, we withdraw the court's previous opinion and substitute the following opinion:

Plaintiff-appellant Armando Montes de Oca appeals an order dismissing his complaint for want of jurisdiction. We affirm.

According to the complaint, plaintiff was injured on July 9, 1993 in the course of his employment with defendant-appellee Orkin Exterminating Company as a crew chief. In February 1994 he reached maximum medical improvement and was authorized to return to work, restricted to light duty. Orkin advised that work was available but gave plaintiff an initial work assignment which exceeded plaintiffs physical restrictions. Plaintiff was unable to perform the duties.

Thereafter Orkin again advised that a job was available within plaintiffs physical restrictions. Orkin refused to make further payments of workers' compensation benefits on the ground that plaintiff was refusing light duty work offered by Orkin. Plaintiff reported to work. Plaintiff states that he was again offered work which was outside his physical limitations. He was also promised work as a route scheduler (which was within his physical restrictions), but on reporting to work, no route scheduler assignment was available.

Plaintiff filed suit in circuit court under several theories, alleging wrongful termination of his workers' compensation benefits. and seeking relief against Orkin. The circuit court dismissed the complaint for want of jurisdiction, and plaintiff has appealed.

We agree with the trial court that this dispute is within the jurisdiction of the judge of compensation claims. Subsection 440.15(6). Florida Statute (1993) provides:

> (6) EMPLOYEE REFUSES EMPLOYMENT.—If an injured employee refuses employment suitable to the capacity thereof, offered to or procured therefor, such employee shall not be entitled to any compensation at any time during the continuance of such refusal unless at any time in the opinion of the judge of compensation claims such refusal is justifiable.

The legislature has clearly stated that the judge of compensation claims is to decide whether the refusal of the employee to return to work is justifiable. Since that is the gist of the plaintiffs case, it follows that this dispute must be submitted to the judge of compensation claims within the workers' compensation system. See *Old Republic Ins.* Co. v. *Whitworth*, 442 So. 2d 1078, 1079 (Fla. 3d DCA 1983).

Plaintiff argues, however, that his claim falls within section 440.205, Florida Statutes (1993). which states: "Coercion of employees.-No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law." Plaintiff asserts that Orkin is attempting to coerce him into settling his workers' compensation claim by not respecting his physical limitations and by claiming to have work which he can perform, when such work is not actually available. Plaintiff alleges that his claim under section 440.205 falls within the scope of *Smirh v. Piezo Technology and Professional Administrators, 427 So.* 2d 182 (Fla. 1983). We disagree.

In *Smith,* the Florida Supreme Court held that "section 440,205, Florida Statutes (1979). creates a statutory cause of action for a wrongful discharge in retaliation for an employee's pursuit of a workers' compensation claim and such action is not cognizable before a deputy commissioner but rather is cognizable in a court of competent jurisdiction." *Id.* at 183-84 (footnote omitted). *In Smith,* the employee had actually been discharged for filing a workers' compensation claim. *Id.* at 183. The Florida Supreme Court held that section 440.205 creates a cause of action for retaliatory discharge. *Id.* at 183, 185.

In the present-case, by contrast, plaintiff alleges an ongoing dispute with the employer wherein the employer contends that the plaintiff has unreasonably refused to return to work. The plaintiff claims that the employer has not offered work within the plaintiff's physical limitations, and that the plaintiffs refusal to return