IN THE SUPREME COURT OF FLORIDA

ORIGINAL

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL MYERS,

Respondent.

CASE NO. 91,251

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the district court of appeal. He will be referred to as respondent, or by name, in this brief.

The record on appeal is not consecutively numbered. References to the record proper, the pleadings and orders, will be by the symbol "R-" followed by the appropriate page number in parentheses.

References to the transcript of proceedings will be by the symbol "Tr-" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent believes the statement of the case and facts in petitioner's brief is too sparse and that the following facts are pertinent to the Court's consideration of this case.

MICHAEL MYERS was charged with sexual battery upon his grandmother, who was over age sixty-five years, when he was fifteen years of age (R-1-2,4). Although a juvenile, the decision was made to try him as an adult (R- 1-2,16).

The trial court found that respondent was "seriously mentally ill" and that his treatment needs were "beyond the treatment capability of the Broward County Jail." (R-l 1). Accordingly, the court ordered respondent to be treated in an adjoining county facility pending disposition of the charges (R-13,10,11-12,29).

Motion to suppress was filed, and the court denied the motion making the finding that respondent was approached in his bedroom by an officer at approximately 12:20 p.m. at which point he told the officer that he did not want to "talk about it, leave me along" and the officer left the bedroom until he arrested respondent and took him to the police station where he was again

approached by an officer for purpose of interrogation (R-l 16). The court found that respondent again refused but stated he did wish to speak to the officer about the case, but only if respondent's father left the room (R-l 16). Respondent then gave a full statement without aid of counsel (R-l 16-117).

Pursuant to pleas of guilty the court ordered a presentence report (R-27,119). The reports filed with the court showed that respondent was home with his seventy-nine year old grandmother, who suffered from Alzheimer's disease and that he stripped her, bound her with rope and laid her onto a bed (R-120). He had sexual intercourse which was interrupted when his parents returned home early, saw him flee naked from the waist down from her room and found her lying naked on her bed, confused and crying about why Michael had hurt her (R-120).

The sentencing guidelines total sentence points were 229 (R-141). The total or increased points, minus 28, equaled 201 (R-141). The sentencing guidelines scoresheet showed that a minimum state prison month term was 150.75 months and a maximum state prison months of 25 1.25 (R-l 4 1). The "state prison months" on the scoresheet were 201 (R-141). The guideline score allowed a sentence within the statutory maximum term of 15 years for a second degree felony, as the lowest term according to the guidelines scoresheet was a term, converted into years, of 12.6 years (R- 14 1). The scoresheet provided a highest term, converted to years, of 20.9 years (R-141). The "state prison months" on the scoresheet, converted to years, was a term of 16.75 years (R-141). The "sentencing range," as it may be loosely termed, spanned a term well within the statutory range from 12.6 years up to a term outside the range of 20.9 years (R-141).

The court held an extensive sentencing hearing at which the court heard testimony from experts who had examined and treated respondent regarding the nature and extent of his illness and

the alternatives open to the court for disposition (Tr-4).

The court heard from a witness associated with the Elaine Gordon Treatment Center Residential Program that respondent showed no remorse at all even though his grandmother loves him and doesn't realize what had happened (Tr-12). His grandmother raised him, but he's "apparently not sorry for it." (Tr-12). At time of sentencing respondent's family, his mother, father and sister, all wanted to have nothing to do with him and agreed with the prosecutor's recommendation for an upward departure sentence of 30 years incarceration (Tr-13).

The trial judge noted that in his serving as judge more than "twelve years in the criminal division," he had given "a tremendous amount of thought" and consideration to this case (Tr-13). The court observed that the case had "basically pained me probably more" than any other case (Tr-13-14). The court's primary concern expressed in the record was for the respondent to get "the right degree and quality of treatment" and this concern "led to a tremendous amount of - tremendous number of hearings before this Court that were in large part generated by myself and to persons, and also generated by the Sheriffs Office trying to get you the proper treatment." (Tr-14).

The efforts to obtain proper treatment for respondent began while the charges were pending disposition. The court had ordered the Department of Health and Rehabilitative Services (HRS) to place respondent in a secure facility and provide treatment (R- 10). HRS filed a motion to stay that order asserting that placement of respondent in a community residential facility was legally unauthorized (R-15-25). The Department referred to expert examinations that concluded respondent "suffers from an unknown mental illness" that was most likely "one of the sexual disorders" (R- 16). The Department contended that respondent's "serious mental illness" (emphasis in original) required a forensic facility that was not available in the State of Florida (R-17). The mental illness was of

such character and such a nature that the Sheriffs Office felt it was not capable of treating respondent (Tr-15). The court withdrew its earlier order and ordered respondent to be held in a secure wing and treated at the Palm Beach County Jail, which had more extensive treatment available, at the shared expense of the Department of Health and Rehabilitative Services (HRS) and Broward County (Tr-29).

The court noted at the time it imposed sentence that respondent was 16 years of age and that he was fifteen at the time the offense was committed (Tr-17). The court stated that it felt "compelled" to impose sentence as an adult because respondent had not been declared incompetent thus the court did not have an option of placing him in a forensic facility. The court noted that respondent said he felt he would become another Jeffrey Dalmer because he fantasized about killing young kids and having sex with their corpses (Tr-17-18). Lamenting the lack of a "structured program" for respondent, the court imposed a sentence that was three years longer than the maximum term provided by the statute under which respondent was charged for a second degree felony (Tr-19-20). The court stated that a desirable treatment plan would "combine psychological" treatment in a secure structured program treatment, an environment which would" comport with respondent's age and needs, but "unfortunately there is no such program available."

The court sentenced respondent to a straight prison term of eighteen years in the Florida State Prison on Count I (Tr-19-21). On the other sexual battery counts, II and IV, the court imposed a term of eighteen years followed by a period of probation for eight years. (Tr-20). The court imposed a sentence of five years on count V, the third degree felony of battery on an aged person (Tr-20). The court followed the sentences of eighteen years with two years community control (Tr-21). The length of the total sentences imposed for the second degree felony sexual batteries, the eighteen year

incarcerative portion, and the two year community control plus the eight year period of probation, was 28 years (R-20-21).

The district court of appeal ruled that the wording of the statute permitted the sentencing court in this case to impose a sentence under the guidelines that exceeded the ordinary statutory maximum. But the court construed the statute to require a sentence of the term of months as determined by the sentencing guideline point-score and no other sentence. Respondent argued below that the statute provided for punishment as provided in sections 775.082, 775.083 or 775.084, that no reference was made either in the statute defining the crime and authorizing the punishment or in the punishment statute that some other more severe term of years was authorized for this offense and that the guidelines could not override the specific statutory punishment in this case because the sentencing court was not authorized by law to impose a sentence other than as specified for punishment for this crime. The district court rejected this argument. Petitioner timely invoked the jurisdiction of this Court based upon the certified conflict with the decisions of other district courts of appeal on the issue.

SUMMARY OF ARGUMENT

Respondent submits that the District Court of Appeal erred in failing to find the enhanced sentence provided for in the sentencing guidelines statute invalid above the normal statutory maximum term of imprisonment. This is because there was no statutory link to this offense or inclusion of the penalties provided for in the sentencing guidelines statute in the penalties statute for respondent's offense. The statute defined the crime respondent committed and specified a punishment as a second degree felony as provided in the normal penalties statute. There was no link by law from either the statute defining the crime, nor any link in the penalties statute, to another

statute providing different and more severe punishment for this offense. Therefore, the court below erred in permitting this enhanced statute to be applied to increase the punishment. This increase in punishment in the sentencing guidelines statute is distinguished herein from use of the sentencing guidelines statute as a limit upon the exercise of discretion in sentencing.

The reasons set forth below support this argument and conclusion. It is urged that the Court disapprove of an enhancement from the sentencing guidelines statute when new and greater penalties are provided for therein when there has been no reference to such different penalties nor any change in the punishment statute for a particular offense to make such new penalties applicable.

ARGUMENT

WHETHER THE MAXIMUM PENALTY OF FIFTEEN YEARS IMPRISONMENT FOR THE SECOND DEGREE FELONIES SPECIFIED IN CHAPTER 775 MAY BE INCREASED TO A GREATER TERM PROVIDED IN CHAPTER 921 UNDER THE SENTENCING GUIDELINES IN THIS CASE WHERE NO REFERENCE IS MADE TO ANY PENALTY OTHER THAN THE ONE PROVIDED IN CHAPTER 775?

The lower court held that section 921.001(5), Fla. Stat. (Supp. 1994), requires a trial court to impose a sentence greater than the penalty authorized in section 794.011(5), the statute defining the crime, and greater than the punishment provided in section 775.082, 775.083 or 775.084, the statute that provides the specific penalty for the offense. No statutory reference was made in either statute to any other punishment than the one contained in Chapter 775. The decision below was erroneous in ruling that the punishment provided in section 921.001(5) took precedence over the penalty that the statute defining the offense specified.

Respondent was convicted of committing three counts of sexual battery without the use of force likely to cause serious personal injury. These offenses are specified by section 794.01 1(5) (Supp. 1993), as third degree felonies and which are punishable as provided in sections 775,082, 775.083 and 775.084, Fla. Stat. Significantly, these sections of the punishment statute fail to reference any different, alternative, or greater penalties anywhere else in the Florida statutes.

The lower court analogized the increased punishment under the current provisions of Chapter 921 to the adoption of the sentencing guideline provisions, The lower court cited to this Court's decision in Smith v. State, 537 So. 2d 982 (Fla. 1989), which clarified that it was the legislative adoption of the rules creating the sentencing guidelines that marked their legal effectiveness. The Court further noted in Smith that the purpose of the guidelines was to reduce disparity in sentencing

and to channel and guide discretion in sentencing. The present provisions of Chapter 921, however, go further. The provision at issue in this case purports to create a new and different punishment rather than to channel the discretion of the sentencing court. This difference is crucial.

Insofar as section 921.001(5) purports to approve or create an increased punishment than the one provided in the criminal statute respondent was convicted of violating, the "new" punishment is invalid. This is because a court must sentence within the authority the legislature has created. When the legislature fails to provide a punishment the courts may not advert to some generalized punishments statute for a penalty. Holmes v. State, 343 So. 2d 143 (Fla. 1st DCA 1977). In Holmes the legislature failed to specify a punishment for an offense, and the court held that no penalty was lawful to be imposed. In the present case, the legislature has specified a punishment expressly and directly in the statute defining the crime. The application by a court of some other statute for a different punishment is contrary to the express provisions of the law and should be disapproved. Various reasons support this conclusion.

The general sentencing provisions of the sentencing guidelines statute do not take precedence over the specific provisions of the sexual battery statute. The sexual battery statute respondent was convicted under provides, in this case, for punishment for a second degree felony "as provided in" section 775.082, 775.083 or 775.084, Fla. Stat,

The primary fault with the eighteen year prison sentence, exceeding by three years the 15 year maximum for a third degree felony, is that it was not provided for by the legislature for this offense. The punishment that is specifically provided for is as a second-degree felony, The punishment for sexual battery under section 794.01 1(5) is punishment provided in Chapter 775.082, 775.083 or 775.084. Nothing in these sections grants any power to impose a punishment under

another statute that is different from the terms and punishments specified in these sections. No reference is made to section 921.001(5).

Notice, however, is also a further impediment to a sentence exceeding 15 years. Chapter 775, Florida Statutes, is known as the "Florida Criminal Code" and it serves purposes set forth by the legislature in section 775.012, Fla. Stat. (1995). One of these purposes, contained in section 775.012(2), is to promote "fair warning" in "understandable language" to the people of the state of the sentences authorized upon conviction for criminal offenses, Section 775.0 12(2), provides;

> **775.012. General purposes**
> The general purposes of the provisions of the code are:
>
> (2) To give fair warning to the people of the state in understandable language of the nature of the conduct proscribed and of the sentences authorized upon conviction.

The court below noted stated that it had no quarrel with the concept of the "wandering" maximum sentence under the guidelines. However, that is but a portion of the flaws with imposition of a term greater than the maximum provided, specifically the 15 year maximum provided for the offense of which respondent was convicted in this case. The primary flaw is that the legislature provided in express terms for punishment as a second degree felony, a term not exceeding 15 years. The lack of notice that some other and different punishment could apply also violates specific provisions of the Criminal Code. See, e.g. State v. Ginn, 660 So. 2d 1118 (Fla. 4th DCA 1995), holding that all persons are presumed to know the contents of criminal statutes and the penalties provided in them. That supports respondent's argument here because the precise punishment provided in the statute is not the enhanced punishment contained in the sentencing guidelines law but the limit of a term of 15 years contained in the statute defining the crime and the punishments

statute that statute refers to as containing the punishment. If the people are presumed to know the law and the punishments, it should not be expected that the people can follow the specific by its words. Application of the statutory enhancement in the guidelines law would require the people to know that what the statute says is the penalty is in fact not the penalty. That is neither fair nor reasonable.

A third legal impediment to the imposition of a sentence under Chapter 92 1, when no such penalty is provided for in either the statute violated or in Chapter 775, is the rule of construction that the statute requires. Section 775.021(1) mandates a strict construction of the code and offenses defined by other statutes. When the language is susceptible of differing constructions the one most favorable to the accused must be adopted. This is a standard rule of construction for criminal statutes of long standing. State v. Wershow, 343 So. 2d 605 (Fla. 1977); Earnest v. State, 35 1 So. 2d 957 (Fla. 1977); Ex parte Bailey, 39 Fla. 734, 23 So. 552,555 (1897); Ex parte Amos, 93 Fla. 5, 112 So. 289 (1927). Standard rules of statutory construction are favored in resolving questions of statutory interpretation. Singletary v. State, 322 So. 2d 551,552 (Fla. 1975); State v. Iacovone, 660 So. 2d 1371 (Fla. 1995).

The conflict and divergence between the two penalty provisions, the ones in Chapter 775 and the one in Chapter 92 1, should have been reconciled in favor of the accused. The specific provisions of the statute respondent violated refer to the specific penalty of section 775.082, 775.083 and 775.084, for a second degree felony. The more general provisions of the guidelines contained in Chapter 921 are neither applicable in this circumstance nor consistent with resolving the uncertainty or ambiguity in favor of the accused. Thus, the penalty provided takes preeminence over a penalty specified by the some other statute. A court's conception of legislative intent cannot, because it is

not **clear** and unambiguous, control over a strict construction of the penalties provided for in this case. The Court should disapprove the decision below on this issue.

The court's interpretation of the guidelines, assuming arguendo that a sentence under the guidelines could take preeminence, is also flawed. Constrained to bring meaning to terms not defined in the rule, the court below chose to infuse the statute with a new construction that only the "recommended" sentence could be imposed if a sentence outside the guidelines must be chosen. Without repeating what is written in the decision below, it is clear that the "recommended sentence" is not the only sentence under the guidelines that could comply with the terms of the statute. A sentence entirely within the statutory maximum could also have complied with the statute. The decision below chooses a more severe sentence among various possible interpretations. The rule requiring a strict construction should require the decision to be quashed. It is Respondent's view that if the court has the choice of sentencing within the statutory maximum, and such a sentence would also be a guidelines sentence, that no sentence exceeding the statutory maximum is permitted. If the Court chooses to interpret the statute to require a sentence outside the statutory maximum when one within the statutory maximum is also within the guidelines, then the interpretation below is correct as it is more strictly favorable to the accused than one permitting a court to impose a sentence beyond the "recommended sentence." When it is not necessary to exceed the maximum in order to reach the guidelines range it is respondent's position that the more lenient sentencing interpretation should have been chosen as the correct statutory meaning in the absence of clear legislative mandate to do otherwise.

The decision of the court in the Fifth District in Gardiner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995), does not address the concerns argued herein. The court in that case rejected the

argument that if a defendant had to do math to calculate a statute's maximum sentence, it would be a fatal flaw to its validity.

Petitioner's reliance upon Martinez v. State, 692 So. 2d 199 (Fla. 3d DCA 1997), is likewise misplaced as it approves a sentence like the one imposed here but fails to address or resolve the defects identified and argued by respondent. Martinez is not precedent to resolve these issues. e other cases enforcing the new guidelines such as Green v. State, 691 So. 2d 502 (Fla. 5th DCA 1997), and State v. Eaves, 674 So. 2d 908 (Fla. 1st DCA 1996); Delancy v. State, 673 So. 2d 541 (Fla. 3d DCA 1996), and Dominguez v. State, 669 So. 2d 1171 (Fla. 3d DCA 1996), all do not resolve the important issues of statutory construction nor consider the issues raised herein. They should be disapproved as following an incorrect interpretation of the sentencing law. The Court should hold that sentences, where the statute as here fails to direct punishment by section 92 1 .00 I, are to be governed by the clear terms of the statute that defines the crime and specifies the penalty for the offense. Only if amended statutes refer to punishment as provided in Chapter 921 would the outcome be as suggested by those cases.

In conclusion, the myriad uncertainties of interpretation inherent in the statutes at issue here require resort to the salutary rule of statutory construction, long utilized by this Court, and specified in section 775.02 1, that uncertainties should be resolved against the state and in favor of the accused. The rule of lenity must be applied here because either punishment limited by the normal statutory maximum or punishment extended by the sentencing guidelines statute must be chosen to take precedence over the other. Without clear legislative direction of how to resolve the conflict, the rule of lenity governs which penalty is to be applied in these cases.

CONCLUSION

Based on the authorities and argument cited therein, respondent respectfully requests this Court to declare the sentence imposed in this case was invalid.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to CELIA TERENZIO, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 30th day of September, 1997.

LOUIS G. CARRES
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 91,251

MICHAEL MYERS,

Respondent.
_____/

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1997

MICHAEL MYERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-1785

Opinion filed June 25, 1997

Appeal from the Circuit Court for the Seventeenth Judicial Circuit., Broward County; Mark A. Speiser, Judge; L.T. Case No. 95-13752 CFIOA.

Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, and Melynda L. Melear, Assistant Attorney General, West Palm Beach, for appellee.

FARMER, J.

Today we confront the punitive calculus effected by the 1993 and 1994 revisions to the sentencing guidelines.[1] After analyzing the pertinent statutory text, we reverse the sentences imposed in this case. In so doing, we have not lightly rejected the construction placed on the same statutes by two other District Courts of Appeal and thus certify conflict.

First, the necessary facts. Defendant pleaded guilty to 3 counts of sexual battery (without great force) and 2 counts of battery on a person 65 or older.[2] His guidelines scoresheet reflects the following assessments of points. First, he scored 74 points for the primary offense of sexual battery, a level 8 offense. Next he scored 19.2 points for the two other sexual batteries as additional offenses and 7.2 points for the two counts of battery on a person 65 or older. Then for victim injury, he scored 128 points determined as follows: 40 points each for the three sexual battery counts involving penetration; and 4 points each for slight victim injury for the two battery counts. His prior juvenile record added an additional .6 point. In the end, his guidelines scoresheet showed a total of 229 points. On the basis oftbis scoresheet, his sentence computation is 201 state prison months, or 16.75 years.

The trial court imposed a sentence of 18 years on each of the sexual battery counts, and a sentence of 5 years on each of the counts of battery on a person 65 or older. The 18 year sentences for sexual battery were to be followed by 2 years of community control and 8 years of probation. All sentences are to run concurrently. This was not a departure sentence with written reasons; rather it was imposed as a straight guidelines sentence.

Defendant begins his argument on appeal by pointing to section 921.001(5), Florida Statutes (Supp. 1994), which provides as follows:

> "(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 s. 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

[1] See Ch. 93–406, Laws of Fla.; and Ch. 94-307, Laws of Fla.

[2] The crime was gruesome: he raped and sodomized his 79-year old grandmother who suffers from advanced Alzheimer's disease. Defendant was 15 years of age at the time of the offenses and, in the words of his lawyer, "had a substantial history of very deviant sexual behavior."

be within any relevant maximum sentence limitations provided in s. 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." [es.]

Next he asserts that section 775.082(3)(c), Florida Statutes (Supp. 1994), prescribes 15 years as the maximum sentence for these sexual battery convictions.[3] Counsel then argues as follows:

"The sentences of 18 years are illegal because the 'guideline recommended sentence' was not in excess of the statutory maximum. Under the terms of the statute the court below could not impose sentence beyond the statutory maximum allowed by section 775.082. The statute uses the term 'guideline recommended sentence' without specifically defining that term. In order to effectuate its procedure the statute refers to the guidelines. The guidelines are contained in the Rules of Criminal Procedure, specifically as applicable to the present case Rule 3.702 (1994). There the term, 'recommended sentence' is used to mean the sentencing range that the trial court must utilize absent a departure. The term 'presumptive sentence' is not used in the Rule. The presumptive sentence is defined by the statute as the guideline score converted into the same number of months to be served. Thus, the 'guideline recommended sentence' in this case is not the 16 years but the range between 12 and 20 years and thus it was not necessary to exceed the maximum statutory sentence to impose a guideline sentence. A sentence could have been imposed within both the statutory maximum and within the guidelines recommended range. The 16 years is the 'presumptive sentence' which has no meaning as far as the statutory authority in section 92 1.001(5) to impose sentence in excess of the statutory maximum."

There are a number of misconceptions in this argument which require a word or two.

First, the guidelines are adopted by and contained in the statutes, namely chapter 92 1, Florida Statutes, The Rules of Criminal Procedure repeat the substantive provisions of the statutes in the effort to implement them. We look to the statutes, however, for the meaning and content of the sentencing guidelines, not the rules. Any doubt as to the accuracy of the foregoing analysis is laid to rest in *Smith v. State, 537* So. 2d 982 (Fla. 1989), where the court said:

"rules 3.700 and 3.988 as originally enacted in 1983 were invalid Whether this case is viewed as one involving a legislative power which cannot be delegated or one in which the legislature failed to provide sufficiently ascertainable standards under which the delegation of authority could be sustained, we are convinced that section 92 1.00 1 did not legally authorize this Court to promulgate the grid schedules and recommended ranges for sentencing. Even though the legislative and judicial branches were working together to accomplish a laudable objective, the fact remains that by enacting rules which placed limitations upon the length of sentencing, this Court 'was performing a legislative function. Moreover, while section 922.00 1 mandated the establishment of rules to reduce the disparity in sentencing, the delegation of authority provided little or no guidance concerning how the schedules were to be prepared or the criteria to be considered in determining the recommended ranges.

"Our holding does not mean that the sentencing guidelines are now invalid. When the legislature adopted rules 3.701 and 3.988 in chapter 84-328, the substantive/procedure problem was resolved because the rules then became a statute. This practice. has been followed thereafter when the legislature has chosen to adopt new Supreme Court rule changes."

537 So. 2d at 987. This is precisely the rationale used recently by the fifth district in rejecting the same kind of argument *in Gardner v. State, 66* 1 So. 2d 1274 (Fla. 5th DCA 1995), where the court stated:

[3] The sexual battery crimes are second degree felonies; the counts of battery on a person 65 years of age or older are third degree felonies. AU of the crimes were committed in June 1995. The 1995 amendments to the sentencing guidelines that might otherwise have applied to this case were made effective October 1, 1995, or after the offenses were ***committed. See*** §§ *5* and 6, Ch. 95-184, Laws of Fla.

"Gardner further challenges the validity of section 92 1 .OO 1(5), arguing-that the legislature improperly vested the Sentencing Guidelines Commission with rule-making authority on a matter of substantive law. He contends that the rule-making authority resulted in the enactment of section 92 1.00 1(5), which authorizes the imposition of sentences in excess of the statutory maximum. This argument fails, because the enactment of section 921.001(5) was an act of the legislature, not a rule or regulation of the sentencing commission."

661 So. 2d at 1276. Consequently, there can be no serious contention that we should look to the rules for the substance and content of the sentencing guidelines.

Second, although the definitional provisions of the sentencing guidelines, see section 92 1 .OO 11, Florida Statutes (1993), do not contain a specific definition of the term "recommended guidelines sentence", another statute does specify the content underlying the term Section 92 1 .00 14(2) provides 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 nomts minus 28.

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 length may not be increased if the total sentence points have been increased for tbat offense by up to, and including, 15 percent. 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.

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." [e.s.]

See § 921.0014(2), Florida Statutes (Supp. 1994). 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 20 1 months, or 16.75 years.

The highlighted text of section 921.0014(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. Yet defendant's argument about a "guidelines range" reveals the nub of the problem we face today.

To address that problem, we must return to the text of section 921.001(5), which for the sake of convenience we quote once again:

"(5) Sentences imposed by trial court judges under the 1994 revised sentencing guidelines on

or after January I, 1994, must be within the 1994 guidelines unless there is a departure sentence with writ&en findings. 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. If a departure sentence, with written findings, is imposed, such sentence must b e within any relevant maximum sentence limitations provided in s. *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." [e.s.]

As we have already showed, the points in this case yield a state prison sentence greater than the maximum authorized by section 775.082(3)(c). Under the first highlighted sentence in the above quote, the trial court must impose a sentence of imprisonment for the guidelines period greater than *section 775.082,* unless the trial court is prepared to impose a departure sentence. But, as the second highlighted sentence shows, a departure sentence must itself not exceed "the maximum sentence limitations provided in s. 775.082."

We must attempt to harmonize these two provisions. When the recommended sentence under the guidelines already exceeds the section 775.082 maximum, it appears from this text that the only kind of departure sentence authorized is a mitigating departure—i.e., a sentence less than the guidelines range at the lower end. That, in turn, reveals yet another anomaly. If the imposition of the recommended sentence greater than the section 775.082 maximum is truly mandatory, "*the sentence under the guidelines must be imposed,*" then the usual discretion to sentence within a range of plus 25% of the recommended sentence has been, to that extent, taken away.

Yet that appears to be precisely what the legislature intended by the exact text it employed. In other words, when the recommended sentence is greater than the section 775.082 maximum, the sentencing judge has two alternatives: (1) impose the recommended sentence, or (2) instead impose a mitigating departure sentence. The statute appears to allow no discretion to exceed a recommended sentence greater than the section 775.082 maximum by the 25% period. This makes some sense if one supposes that the legislature intended to require more severe punishment on one whose recommended sentence *exceeds the section 775.082 maximum.* But then why allow a mitigating departure at all, or any sentence below the ordinary guidelines range?

The statutory text offers no explanation for that anomaly. The role of judges, however, is not to concern ourselves with statutory anomalies in sentencing statutes unless they create constitutional defects or are ambiguous. Judges are bound, however, by the rule of lenity in section 775.021(1).[4] Under the rule of lenity, if any of the terms in the sentencing guidelines statutes are capable of more than one meaning, we are obligated to choose the construction favoring the defendant. If the statute is clear and lacks any constitutional defect, it must be enforced even if anomalous Therefore the resolution of anomalies in unambiguous but constitutional provisions is for the substantive judgment of legislators,

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 921.00115) 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 s. *775.082.");* and § 92 1.0016(1)(e) ("A departure sentence must be within any -relevant maximum sentence limitations provided by s. 775.082.").

[4] See $775.02 1, Fla. Stat. (1995) (The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.").

Moreover, both sections 921.001(5) and 92 1.0014(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 guidelines exceeds the maximum sentence otherwise authorized by s. ***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-m 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 tbe 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.

We also note a subtle difference in the texts of section 92 1 .00 1(5) and section 92 1.00 14 as regards the imposition of a recommended sentence greater ***than the section 775.082*** maximum. Section 921.001(5) states that:

> "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."

section 92 1 .00 14 states:

> "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."

In section 92 1 .00 1(5), the pertinent term is "under the guidelines," while in section 92 1 .OO 14 the term is ***"recommended*** under the guidelines." Because different formulations of words are employed in the two provisions, it is tempting to construe them differently. In context, however, it is apparent that both must have the same essential meaning.

In both provisions the legislature is referring to the raw "recommended sentence" and not to a sentence within the allowable 25% range. This is made clear by the careful specification in both provisions that "the sentence under the guidelines" [e.s.] must be imposed even though it exceeds the maximum provided in section 775.082. If the legislature had intended that the trial court could impose a recommended sentence that already exceeds the section 775.082 maximum by an ***additional*** 25%, the framework and text of the entire chapter strongly indicate that it would have worded the mandatory recommended sentence provision in both section 921.001(5) and section 921.0014(2) explicitly to include the additional 25% discretionary 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%.

There is another aspect of these statutes that points to the same construction. Both section 921.0014 and section 921.0016 contain the authorization to vary the ecommended sentence by up to 25%. Under the text of both of these provisions, sentencing within the allowable plus or ***minus 25%*** range is supposed to be entirely discretionary with the sentencing judge. In other words this variance is not **mandatory. The state** reads the provision authorizing adjustments to the recommended sentence within the 25% range to allow the trial court to adjust a recommended sentence that is greater than the section 775.082 maximum by even an additional 25%. Such a reading creates au intolerable ambiguity. On the one hand, what is expressly written as a mandatory imposition, "must be imposed," would be then coupled with a purely discretionary addition, resulting in a statutory conflict. Is the judge truly required to impose the recommended sentence if the

judge has discretion to enhance it upwards by an additional 25%? And if the judge has the discretion to enhance it, why not also the discretion to mitigate it within the usual range? As we have just stated, we are unable to find anything in the statutory text that authorizes such a discretionary enhancement further beyond the section 775.082 maximum.

We emphasize that we have no quarrel with the concept of the "wandering" maximum sentence now employed in the 1994 revision of the guidelines-by which we refer to the authority to impose a recommended sentence greater than the section 775.082 maximum. This has the effect of increasing the maximum penalty set forth in section 775.082 by a period calculated in accordance with the defendant's prior record of convictions and the nature and circumstances of the sentencing offense. Because every defendant is presumed to know the law and has actual knowledge of one's own criminal history, not to mention the facts of the primary and additional sentencing offenses, there is no possible claim of lack of notice as to the guidelines maximum that will be imposed for these offenses.

We expressly reject defendant's contention that, because there is nothing in section 775.082 that would give him notice to "check" chapter 92 1, he lacked notice of the precise penalty imposed on him. One is charged with knowledge of all the Florida Statutes, not merely the one that favors a party in litigation. We take express note of section 775.082(8), which provides in part that "a reference to this section constitutes a general reference under the doctrine of incorporation by reference." This provision should alert the reader to the likelihood that section 775.082 has been incorporated into other statutes. Thus, when the statutes in chapter 921 refer to section 775.082, as sections 921.001(5) and 921.0014(2) expressly do, they have incorporated it by reference. The mere fact that section 775.082 itself does not expressly refer to sections 921.001(5) and 921.0014(2) does not render any of these statutes indefinite or unclear. Moreover, there is nothing indefinite about sections 921.001(5) and 921.0014(2), and certainly no uncertainty of the kind forbidden by article I, section 17, of the Florida Constitution.

The state calls our attention to the recent decisions in *Martinez v. State,* 22 Fla. L. Weekly D1009 (Fla. 3d DCA April 23, 1997); and *Mays v. State,* 22 Fla. L. Weekly D734 (Fla. 5th DCA March 21, 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 tbe 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 tbis variation, the third district reasoned:

> "In our view, the defendant argues a distinction without a legal difference. Under subsection 92 1.0014(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.* § 92 1 .OO 1(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.* § *92* 1.0014(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."

22 Fla. L. Weekly D1009–1010. See *also Mays v.* State, 22 Fla. L. Weekly D734 (Fla. 5th DCA March 2 1, 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 921.0016(1)(a) provides that: "The recommended guidelines sentence provide&v 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)[5]—"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 .OO 1(6) does indeed refer to the "range recommended by the guidelines," sections 921.001(5) and 921.0014(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.

[5] The third district was quoting from the 1993 statutes in which subparagraph (1) contains the substance of what became subparagraph (2) in the 1994 supplement, *Compare* § 921.0014(1), Fla. stat. (1993) *with* § 921.0014(2), Fla. Stat. (Supp. 1994).

For these and additional reasons, we also disagree *with Green v. State,* 691 So. 2d 502 (Fla. 5th DCA 1997). In that case, the recommended sentence was 65.8 months and the trial court sentenced the defendant to 72 months, but the section 775.082 maximum was 60 months. In approving the sentence, the district court observed that the sentence imposed did not vary from the recommended sentence by more than 25% and that the sentence was therefore not a departure sentence. The court concluded that the 72-month sentence was a permissible variation from the recommended sentence. Explaining its rationale, the court stated:

> "The emphasized line from section 921.001(5) quoted above should read, for purposes of clarity, as follows:
>
> 'If the recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, a sentence under the guidelines must be imposed, absent a departure.'
>
> It would appear, from a grammatical standpoint, that the articles in the foregoing sentence are misplaced in the printed statute."

691 So. 2d at 503. With all due respect to the fifth district we are unable to agree that "'the articles in the foregoing sentence are misplaced in the printed statute."

The court's "clarification" for grammatical purposes has effectually rewritten the statute. In the statutory text published by the legislature, the passage reads:

> "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."

The reader will note that first the legislature has written "*a* recommended sentence"; but, after the reference to section 775.082, the legislature has written "the recommended sentence." The fifth district's revision of the statutory text is to change "the court must impose the sentence under the guidelines," to read instead that "'the court must impose *a* sentence under the guidelines." The definite article the has been replaced by the indefinite article *a*. The indefinite article *a* has an accepted sense of "any," while the definite article,

the, used before a noun specifies a definite and specific noun, as opposed to any member of a class.[6] This transposition of articles enabled the fifth district to conclude that even when the recommended sentence exceeds the section 775.082 maximum the court could still impose a 25% variation sentence because it would still be a sentence under the guidelines. Again with respect, this is not what the legislature wrote.

As we stated at the beginning we certify conflict with these decisions of the third and fifth districts.

REVERSED AND REMANDED FOR RESENTENCING.

STEVENSON and GROSS, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

[6] Actually we do not agree that the use of *a* in the first reference to "recommended sentence" was grammatically improper. In context it is readily apparent that the legislature intended to refer to *any* recommended sentence that exceeds the section 775.082 maximum, so it was entirely proper for the legislature to use the indefinite a. *Any* is one of the standard senses of the indefinite article.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to MELYNDA MELEAR, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 30th day of SEPTEMBER, 1997.

Louis G. Carres

LOUIS G. CARRES
Assistant Public Defender