IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

vs. CASE NO. 91, 251

MICHAEL MYERS,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Michael Myers, was the defendant, and Petitioner, the State of Florida, was the prosecution, in the trial on criminal charges filed in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the appellant, and Petitioner was the appellee, in the appeal filed with the District Court of Appeal, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to as "the State."

The following symbols will be used in this brief:

A = Appendix

R = Record on Appeal

T = Transcript

STATEMENT OF THE CASE AND FACTS

Respondent was sentenced to eighteen years imprisonment on three counts of sexual battery, second degree felonies (R. 125-130, 134-136). The state prison months calculation on the sentencing guidelines scoresheet was 201 months, resulting from 229 total sentencing points (R. 141). The guidelines range, obtained by increasing and decreasing the total months by 25%, was 12.6 to 20.9 years imprisonment (R. 141).

SUMMARY OF ARGUMENT

The use of "recommended sentence" in sections 921.001(5) and 921.0014(2), Florida Statutes, includes the 25% discretionary variation provided for under sections 921.0014(2) and 921.0016(1)(b), Florida Statutes. Section 921.0014, which sets out the worksheet and calculations for determining a sentence under the guidelines, allows the recommended sentence to be varied, prior to any determination as to whether the sentence exceeds the statutory maximum. Thus, the later determination is made by reference to the already varied recommended sentence. Moreover, section 921.001(5) states only that the sentence "under the guidelines" must be imposed.

ARGUMENT

WHETHER "RECOMMENDED SENTENCE" AS USED IN SECTIONS 921.001(5) AND 921.0014(2), FLORIDA STATUTES, INCLUDES THE 25% DISCRETIONARY VARIATION PROVIDED FOR UNDER SECTIONS 921.0014(2) AND 921.0016(1)(B), FLORIDA STATUTES.

The Fourth District held that the recommended sentence under the guidelines does not include the 25% variance range under section 921.0014(2), Florida Statutes. It determined that the recommended range consisted only of the total number months, calculated from the total of points minus 28 under this subsection. However, this calculation is only a part of the overall equation necessary to arrive at the sentencing range that was intended to give the court a discretionary window for sentencing.

Section 921.0014(2) begins the calculation with a finding of state prison months, but then immediately proceeds to provide that the trial court may increase or decrease the recommended sentence by up to 25%:

> **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 that 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.

(emphasis supplied).

This being so, the recommended sentence is modified prior to any determination as to whether it exceeds the statutory maximum.

Indeed, the 1995 Senate Staff Analysis on section 921.0014 states that under the 1994 sentencing guidelines, the state prison sentence is calculated by deducting 28 points from "total or increased sentencing points." CS/SB 172. (A. B p. 2). It notes that he 'total" may be increased or decreased by the court by up to 25%. The State submits that if the total is determinative, as the Fourth District believed, and the total **can** be increased, then so can the recommended sentence for purposes of deciding whether the guidelines sentence exceeds the statutory maximum.

In other words, there is a range from which the trial court may decide the recommended sentence. Obviously, the legislature, in allowing a trial court leeway in sentencing based on the unique circumstances of each case, recognized that' what might be recommended in one case, might not **be** so recommended in another. Hence the total number of points under the scoresheet is only part of the overall formula, and is not meant to be considered a finite

restriction upon the trial court.

Courts have found that the recommended sentence under the guidelines includes the 25% variation. In Delancy v. State, 673 so. 2d 541 (Fla. 3d DCA 1996), the Third District, citing to §921.001(5), Florida Statutes, held that the defendant's 6 year sentence was permissible despite its exceeding the 5 year statutory maximum, since the guidelines range was 4.3 to 7.1 years. The First District, in State v. Eaves, 674 So. 2d 908 (Fla 1st DCA 1996), required the trial court on remand to impose sentences within the presumptive range under the guidelines. The Second District, in Nantz v. State, 687 So. 2d 845 (Fla. 2d DCA 1996), calculated the recommended range, not the recommended sentence, to determine if the appealed sentence was correct, then ordered that on remand the **trial court** should impose a sentence no greater than the upper limit of the guidelines recommended **range.**

In Martinez v. State, 692 So. 2d 199 (Fla. 3d DCA 1997), the defendant was convicted of a third degree felony with a statutory maximum of five years. The recommended guidelines range was 4.6 years to 7.7 years. The trial court imposed a sentence of six and one-half years incarceration followed by one **year** of probation, a sentence close to the top of the range. The Third District held that this was a **legal** sentence under the 1994 guidelines,

reaffirming its earlier holding in Delancey, 673 So. 2d at 541. The Fifth District in Mays v. State, 693 So. 2d 52 (Fla. 5th DCA 1997) concurred with Martinez, and affirmed the 70 month sentence for the third degree felony, despite the median sentence being 67.8 months.

In Green v. State, 691 So. 2d 502 (Fla. 5th DCA 1997), the Fifth District similarly affirmed a sentence greater than the median of 65.8 months. The court found that the sentence of 72 months actually imposed was a permissible variation, and not a departure sentence. The Green court stated:

> The emphasized line from section 921.001(5) . . . should read, for purposes of clarity, as follows: "If the recommended sentence under the guidelines exceeds the maximum 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 904.

The Fourth District contended that to allow a variation when the statutory maximum is exceeded would create "an intolerable ambiguity" because the variation is discretionary but the language in section 921.001(5), Florida Statutes, is mandatory. (A. A p. 5). The State respectfully maintains that no such ambiguity would be created because the thrust of section 921.001(5) is that the

guidelines now take precedence over the statutory maximum. In Martinez, the court accurately noted that the legislative intent of the statute was "to allow the trial court the full use of the recommended range unencumbered by the ordinary legal maximum." 692 so. 2d at 201.

Hence, the legislature in section 921.001(5) directed that "the sentence under the guidelines must be imposed" if it exceeds the statutory maximum, but stated that a departure sentence must be within the maximum. This suggests that by "departure," the legislature anticipated that even with a 25% upward variation, the guidelines sentence did not exceed the statutory maximum. After all, a departure sentence is one beyond 25% over the median number of prison months. See Sections 921.0014(2) and 921.0016(1)(c), Florida Statutes. There is simply no basis by which this statute can be read to authorize a mitigating departure sentence where the guidelines sentence exceeds the statutory maximum, for the statute provides that in such a case, the guidelines sentence must be imposed (A. A p. 4).

The Fourth District suggested that if the legislature wished the variation to be included under section 921.001(5), it would have so specified (A. A p. 5). The State responds, though, that if the legislature did not wish the variation to be included, it would

have referred to the original total sentence points instead of the recommended sentence. This is so because section 921.0014(2) allows a trial court to vary the "recommended sentence," before the statutory maximum is even considered.

In conclusion, the State urges that the trial court properly imposed the eighteen year imprisonment term because it was within the 25% upward variation permitted under section 921.0014(2).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State of Florida respectfully submits that the decision of the district court should be QUASHED and that the sentence be REINSTATED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Brief of Petitioner on the Merits" has been furnished by courier to: LOUIS CARRES, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, on this 8th day of September, 1997.

Of Counsel

IN **THE SUPREME COURT** OF **FLORIDA**

STATE OF FLORIDA

Petitioner,

vs. **CASE NO.** 91,251

MICHAEL MYERS,

Respondent.

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ON PETITION FOR CERTIORARI REVIEW

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APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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F

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

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-1785

Opinion filed June 25, 1997

Appeal from the Circuit Court for the Seventeenth Judicial Cii Broward County; Mark A. Speiser, Judge; L.T. Case No. 95-13752 CF10A.

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 tbe 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 of this 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 guideline 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 suhstantial history of very deviant sexual behavior."

A

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." [e.s.]

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 arc 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 921.001(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 921.001 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 922.001 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 cm a person 65 years of age or older are third degree felonies. All 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 §§ S and 6, Ch. 95-184, Laws of Fla.

"Gardner further challenges the validity of section 92 1.001(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 autbority 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 921.0Q1(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 921.0011, 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 921.0014(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 points 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 that 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 92 1.0014(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 1, 1994, must be within the 1994 guidelines unless there is a departure sentence with written fmdings. 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 be within any relevant maximum sentence limitations provided in s. 735.082, 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 iu 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 guideline 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 921.001(5) and section 921.0016(1)(e) are very clear that a departure sentence may not exceed the section 775.082 maximum. See § 921.001(5) ("If a departure sentence, with written fmdings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s. 775.082."); and § 921.0016(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." [es.]), 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-in fact, a mandatory direction—to impose a ***recommended*** sentence greater than the section 775.082 maximum, but that authorization is limited to a recommended sentence and does not include the discretionary authority to enhance a recommended sentence within the 25% range. The absence of express textual authority to impose a discretionary range enhancement up to 25% greater than a recommended sentence that is itself greater than the section 775.082 maximum leads us to the conclusion that there is no such authority.

We also note a subtle difference in the texts of section 921.001(5) and section 921.0014 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 921.0014 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 921.001(5), the pertinent term is "under the guidelines," while in section 92 1.0014 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 recommended 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 an 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 recotnmcnded 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 laek 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 775.083 ·· would give him notice to "check" cha·· lacked notice of the precise penal·· One is charged with kn·· Statutes, not mer·· litigation. W·· 775.082(8), wh·· to *this* section co·· the doctrine of in·· provision should a·· that section 775.08·· other statutes. Thus; 921 refer to section 775. and 921.0014(2) ex·· incorporated it by refere·· section 775.082 itself doe·· sections 921.001(5) and ·· render any of these statutes Moreover, there is nothing inde·· ·tions 921.001(5) and 921.0014(2), ·ertainly 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 D 1009 (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 the* section *775.082* maximum, while here it exceeds it. But the trial judge in *Martinez* elected to enhance the recommended sentence within the 25% permitted variance, and the enhanced sentence then exceeded the section 775.082 maximum In approving this variation, the third district reasoned

> "In our view, the defendant argues a distinction without a legal difference. Under subsection 921.0014(1), Florida Statutes (1993), 'The recommended sentence length in state prison months may be increased b· · to, and including, *25* percent or decr·· o, and including, 25 percent ·· 'he court.' The recor·· the full range ·ercent. It is nded range, be used be *id.* § mended ·,' id ·ase to ·e ·ust be 921.0014(1). ·cent, the defendant's ·nce *was 7.7* years, which J-year legal maximum. The trial 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 .00 14(2) defines *recommended sentence* to include the 25% variance range. Section 92 1.0016(1)(a) provides that: "The recommended guidelines sentence provided by the total sentence points is assumed to be appropriate for the offender," [es.] 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 1.00 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), Ha. 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.

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[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.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is bared only on the provisions contained in the legislation as of the latest date listed below.)

DATE: January 24, 1995 REVISED: _____

SUBJECT: Sentencing Guidelines Ranking Chart

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson		CJ	Favorable/CS
2.			WM	
3.				
4.				

I. SUMMARY:

CS/SB 172 provides for additional specified crimes to be included in the offense severity ranking chart of the sentencing guidelines. The CS also revises the sentencing points assessed under the sentencing guidelines worksheet, and provides for certain prior felony offenses, and prior capital felonies, to be included in computing an offender's sentence.

CS/SB 172 substantially amends, creates, or repeals the following sections of the Florida Statutes: 921.0012, 921.0014.

II. PRESENT SITUATION:

Under the sentencing guidelines, effective on January 1, 1994, many offenses have been ranked according to their severity and points assessed for the level in which they appear. There are ten levels.

An offense severity ranking chart includes many of the guidelines offenses. Since there are hundreds of criminal offenses, the chart does not include every criminal offense falling under the guidelines. Accordingly, the Legislature created s. 921.0013, F.S., to rank any unlisted felony offenses. Under this statute, the felony degree of the offense determines the ranking it will receive. Section 921.0013, F.S., insures that no guidelines offense will go unranked. However, the Legislature is not precluded from placing an unlisted offense in the severity ranking chart to assign it a higher ranking than it would have received-as an unlisted offense.

Under the 1994 sentencing guidelines, the decision whether to impose a state prison sentence upon an offender with a guidelines offense is determined by the total sentence point-he scores on the sentencing guidelines scoresheet. Points are assessed against an offender for his current offense as well as for other factors such as additional and prior offenses; the victim's injury or death; legal status and release program violations; and the possession of a firearm, destructive device, or semi-automatic weapon. Sentencing points are also enhanced through multipliers for a primary offense of drug trafficking, or violation of the Law Enforcement Protection Act.

If total sentencing points are greater than 40 points but less than or equal to 52 points, the court has the discretion to impose a state prison sentence: over 52 points, a prison sentence is required. The sentencing court can increase total sentencing

points that are less than or equal to 40 points by up to 15 percent, which may pull an offender into the range where a prison Sentence is permissible.

A state prison sentence is calculated by deducting 28 points from total or increased sentencing points. This total may be increased or decreased by the court by up to 25 percent, except where the total sentencing points were less than or equal to 40 but have been increased by the 15 percent multiplier to exceed 40 points. Any state prison sentence must exceed 12 months.

A state prison sentence that varies upward or downward by more than 25 percent is a departure sentence and must be accompanied by written reasons for the departure. Some of the aggravating or mitigating circumstances that may call for a departure are listed in s. 921.0016, F.S.

III. EFFECT OF PROPOSED CHANGES:

CS/SB 172 adds five offenses to the offense severity chart of the sentencing guidelines:

	Level 3	
s. 376.302(5)	3rd degree felony	Fraudulent representation or submission for reimbursement of cleanup expenses
s. 697.08	3rd degree felony	Equity skimming
	Level 4	
s. 790.115(1)	3rd degree felony	Exhibiting firearm or weapon within 1,000 feet of a school
	Level 5	
s. 316.1935(2) & (3)	3rd degree felony	Fleeing or attempting to elude law enforcement officer or aggravated fleeing or eluding while leaving the scene of an accident
	Level 6	
s. 784.048(3)	3rd degree felony	Aggravated stalking
	Level 7	
s. 784.048(4)	3rd degree felony	Aggravated stalking after in junction for protect ion or order of prohibition

The legislation follows the recommendations of the Florida Supreme Court with the exception of s. 784.048(4), F.S., which has been placed in level 7 rather than level 6 as the Court recommended.

CS/SB 172 also significantly amends the sentencing guidelines scoresheet. First, the 91 points assigned to a level 9 primary offense are enhanced by 1 point, and the 42 points assigned to a level 7 primary offense are enhanced to 56 points.

Second, additional offense points currently assigned to levels 6 through 10 offenses are enhanced so that they are equal to 50 percent of the points assigned for a level 6 through 10 primary offense.

Additional Offenses

Levels	Points	Presently Assigned	Under CS/SB 172
10		12.0	58.0
9		10.8	46.0
a		9.6	37.0
7		8.4	28.0
6		7.2	18.0

Third, prior offense points currently assigned to levels 6 through 10 offenses are enhanced so that they are equal to 25 percent of the points assigned fot a level 6 through 10 primary offense.

Prior Offenses

Levels	Points	Presently Assigned	Under CS/SB 172
10		8.0	29.0
9		7.2	23.0
8		6.4	16.S
7		5.6	14.0
6		4.0	9.0

Fourth, enhancers are created for prior serious felonies and prior capital felonies. Thirty points are added to the subtotal sentence points of an offender who has a primary offense in levels 7-10, and one or more prior serious felonies. The legislation defines a prior serious felony as an offense for which the offender has been found guilty; which was committed within 3 years before the date the primary offense or any additional offense was committed; and which is ranked in levels 7-10, or would be ranked in these levels if the offense were committed in Florida on or after January 1, 1994.

If the offender has one or more prior capital felonies, points are added to the offender's subtotal sentence points equal to twice the number of points the offender receives for his primary offense and any additional offense. The legislation defines a prior capital felony as an offense for which the offender is found guilty; and which is a capital felony, or would be a capital felony if the offense were committed in Florida.

Finally, the bill enhances points currently assigned for the victim's death and certain victim injuries.

Victim Injury

Level	Points Presently Assigned	Under CS/SB 172
Death	60	80
Sexual Penetration	40	80
Sexual Contact	18	40

In summary, the impact of this legislation on inmate Sentencing for guidelines offenses is that it will pull many offenders into the discretionary range in which a prison sentence may be imposed, and pull many other offenders into the range where a prison sentence is mandatory. It will assign more weight to an offender's prior record and additional offenses, and capture prior capital felonies, which are not scored under the present guidelines scoresheet. It will assign more weight to the victim's death, make injury to the victim through sexual penetration coequal with the victim's death, and assign more weight to the victim's injury through sexual contact. Finally, it will increase the prison sentences for many offenders, particularly multiple offenders and recidivists with serious prior violent offenses.

IV. CONSTITUTIONAL ISSUES:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. ECONOMIC IMPACT AND FISCAL NOTE:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Section 921.001(9)(b), F.S., 1994 Supp., requires that any legislation that creates a felony, enhances a misdemeanor to a felony, upgrades a lesser offense severity level in s. 921.0012, F.S., 1994 Supp., or reclassifies an existing felony to a greater felony classification, must provide that the change result in a net zero sum impact in the overall prison population as determined by the Criminal Justice Estimating Conference, unless the legislation contains a funding source sufficient in its base or rate to accomodate the change, or a provision to specifically abrogate the application of the law.

The Criminal Justice Estimating Conference (CJEC) has temporarily postponed consideration of CS/SB 172. However, Economic and Demographic Research (EDR) and the Department of Corrections (DOC) have provided preliminary estimates, These estimates are subject to change when the CJEC meets to consider CS/SB 172.

EDR estimates that SB 172 will require 24,618 new beds by FY 1999-2000. No cost estimates of these new beds have been provided.

WC has provided the following estimate of cumulative additional beds required under CS/SB 172 and expenditures required for these additional beds:

June 30	Cumulative Addt' Beds Required Under CS/SB 172	Operating	Total F.C.O.	All Funds
1996	5,270	$ 81,231,517	$113,526,340	$194,751,857
1997	9,833	$151,565,370	$211,822,486	$363,387,856
1998	13,140	$202,539,303	$283,061,880	$485,601,183
1999	15,883	$244,819,768	$342,151,586	$586,971,354
2000	18.161	$279,932,746	$391,224,262	$671,157,008

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
COMMITTEE SUBSTITUTE FOR
Senate Bill 172

1. Enhances points presently assigned to levels 7 and 9 primary offense in the sentencing guidelines scoresheet.

2. Enhances points presently assigned to levels 7, 8, 9 and 10 additional and prior offenses in the sentencing guidelines scoresheet.

3. Enhances points presently assigned in the sentencing guidelines scoresheet to the victim's death, or the victim's injury by sexual penetration or sexual contact.

4. Provides that 30 points shall be added to the subtotal sentence points of an offender who has a primary offense in levels 7, 8, 9 or 10, and one or more prior serious felonies.

5. Defines prior serious felony as an offense for which the offender has been found guilty; which was committed within 3 years before the date the primary offense or any additional offense was committed; and which is ranked in levels 7, 8, 9 or 10, or would be ranked in these levels if the offense were committed in Florida on or after January 1, 1994.

6. Deletes from the bill the definition of prior serious felony as an offense for which the defendant has been found guilty: which was committed within 3 years before the date of the primary offense; and which is ranked in levels 7, 8, 9 or 10, or would be ranked in those levels on or after January 1, 1994.

7. Provides that an offender with one or more prior capital felonies shall receive additional points to his subtotal sentencing points. These additional points are equal to twice the number of points the offender receives for his primary offense and any additional offense.

8. Defines a prior capital felony as an offense for which the offender is found guilty: and which is a capital felony, or would be a capital felony if the offense were committed in Florida.

Committee on Criminal Justice

Staff Director

(FILE TWO COPIES WITH THE SECRETARY OF THE SENATE)