IN THE SUPREME COURT OF FLORIDA

CHARLES WILLIAM FLOYD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 92,602

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the appellee in the First District, will be referred to in this brief as Respondent, the prosecution, or the State. Petitioner, CHARLES WILLIAM FLOYD, the Appellant in the First District and the defendant in the trial court, will be referred to as petitioner or by his proper name.

The record on appeal consists of one volume. The symbol "R" will refer to the record on appeal. The symbol "IB" will refer to petitioner's initial brief. Each symbol is followed by any appropriate page number. All underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts regarding the appeal but would add the following facts regarding the case which occurred at the trial court level:

Petitioner pled no contest to DUI with serious bodily injury, a violation of § 316.193(3)(c)(2), FLA. STAT. (1995) and driving while his license was suspended, a violation of § 322.34(1)(d), FLA. STAT. (1995). (R.3). A guidelines scoresheet was prepared. (R.22). Petitioner had two prior DUI offenses. (T.16). The recommended State prison months was 61.1 months incarceration. (R.22). The recommended range was 3.81 years to 6.36 years. (R.ll). The unsigned plea agreement contains a provision stating that the agreed upon sentence is six years. (R.19). The trial court sentenced petitioner to six years incarceration. (R. 16,26). Petitioner's DUI offense was a third degree felony with a statutory maximum of five years.[1] No objection to the sentence as being beyond the statutory maximum was made at sentencing. (R. 16). However, a hearing held eight days later, the issue of the petitioner's sentence being beyond the statutory maximum was presented to the trial court. (R. 30-32). The trial court mentioned a case that held, in the trial court's words, "if the guidelines call for a sentence that is higher than the statutory sentence, then the guidelines sentence is presumed correct and it

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[1] Collins v. State, 605 So.2d 568 (Fla. 5th DCA 1992)(noting that DUI with serious injuries is a third degree felony); § 775.082(3)(d), Fla. Stat. (1995)(stating that the maximum sentence for a third degree felony is five years' incarceration).

controls." (R. 30-31). The trial court ruled that petitioner's sentence would remain as pronounced. (R. 31). Defense counsel then acknowledged that petitioner entered a plea but wanted to lodge an objection to the sentence as being beyond the statutory maximum. (R. 32).

SUMMARY OF ARGUMENT

ISSUE I

Petitioner contends that the sentencing guidelines provision, § 921.001(5), which requires a guidelines sentence be imposed although the guidelines sentence exceeds the statutory maximum, is unconstitutional. Specifically, he claims that this provision violates the due process clause requirement of fair notice of the penalty for a crime. The State respectfully disagrees. First, this Court should decline to address this issue. The First District did not certify conflict with the Fourth District on this issue. Both Courts agreed that there was no due process problem with the statute. Additionally, the guidelines provision comports with the due process clause requirement of fair warning of the punishment for a crime. The sentencing guidelines statute lists every crime and gives a severity ranking for that particular crime. The sentencing guidelines statute also contain a scoresheet form and detailed directions on how to perform the calculations. Thus, Florida Statutes provide constructive notice of the likely penalty for every crime. An accused is not deprived of notice of the criminal penalty merely because he must add to determine the penalty. Contrary to petitioner's claim, the sentencing guidelines provide more notice of what the actual sentence will be than the statutory maximum. A criminal defendant can calculate to the month what his actual sentence may likely be. Moreover, as the Fourth District in Myers Court stated: "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." Every District Court that has addressed the issue has held that the statute does not violate the due process clause requirement of fair notice of the penalty that will be imposed for a crime. This Court should follow the reasoning of the First, Fourth and Fifth Districts and hold that § 921.001(5) is constitutional.

ISSUE II

Petitioner contends that because the term "recommended sentence" is vague and susceptible of differing constructions, under the rule of lenity, the term must be defined as "a specific sentence of a precise, fixed number of months and not a range". This was the Fourth District's definition of the term in Myers. He also asserts that the rule of lenity requires that this Court follow the decision of District Court that is most favorable to the defendant. The State respectfully disagrees. The rule of lenity does not apply; rather, the clear intent of the legislature governs. The rule of lenity only applies when a term is ambiguous and its meaning is not clear from the legislative intent of the statute. While the legislature did not define the term "recommended sentence", the legislature has explained, in great detail, how to calculate the recommended sentence and when and to what extent the trial court can increase or decrease the state prison months. Their intent could not be clearer. The term is use by the legislature to mean the range, not a specific sentence of a

precise, fixed number of months. Moreover, the rule of lenity certainly does not require this Court to defer to the decision of a District Court. Thus, the First, Second, Third and Fifth District Courts have properly held that the term "recommended sentence" is a range.

ARGUMENT

ISSUE I

DID THE FIRST, FOURTH AND FIFTH DISTRICT PROPERLY HOLD THAT THE SENTENCING GUIDELINES PROVISION THAT ALLOWS A TRIAL COURT TO EXCEED THE STATUTORY MAXIMUM IS CONSTITUTIONAL? (Restated)

Petitioner contends that the sentencing guidelines provision, § 921.001(5), which requires a guidelines sentence be imposed although the guidelines sentence exceeds the statutory maximum, is unconstitutional. Specifically, he claims that this provision violates the due process clause requirement of fair notice of the penalty for a crime. The State respectfully disagrees. The guidelines provision comports with the due process clause requirement of fair warning of the punishment for a crime. The sentencing guidelines statute lists every crime and gives a severity ranking for that particular crime. The sentencing guidelines statute also contains a scoresheet form and detailed directions on how to perform the calculations. Thus, Florida Statutes provide constructive notice of the likely penalty for every crime. An accused is not deprived of notice of the criminal penalty merely because he must add to determine the penalty. Contrary to petitioner's claim, the sentencing guidelines provide more notice of what the actual sentence will be than the statutory maximum. A criminal defendant can calculate to the month what his actual sentence may likely be. Every District Court that has addressed the issue has held that the statute does not violate the due process clause requirement of fair notice of the penalty that will be imposed for a crime. This Court should follow the

reasoning of the First, Fourth and Fifth Districts and hold that the provision, § 921.001(5), is constitutional.

Standard of review

Challenges to constitutionality of the sentencing guidelines as applied presents an issue that courts consider de *novo.* United States v. Lombard, 102 F.3d 1, 3 (1st Cir. 1996)(holding an "a challenge to the constitutionality of the guidelines as applied is certainly a permitted subject for an appeal and presents an issue that we consider de *novo").* Thus, the standard of review, in the instant case, is de novo.

Jurisdiction

The First District did not certify conflict on this issue, it certified conflict regarding the correct application of the provision, not the constitutionality of the provision. The First District specifically joined the Fourth and Fifth District on the adequate notice issue. While the Florida Supreme Court has jurisdiction over all of the issues in a case, when it has jurisdiction based on a certified question, that does not mean that the Court should exercise that jurisdiction. Fulton County Admin. v. Sullivan, 22 FLA.L.WEEKLY S578 n.5 (Fla. September 25, 1997)(stating that because Florida Supreme Court had jurisdiction on the basis of the certified question, the Court had jurisdiction over all of the issues raised in a case); Feller v. State, 637 So.2d 911, 914 (Fla. 1994)(same). The Florida Supreme Court is

free to decline to exercise jurisdiction. Keane v. Andrews, 581 So.2d 160 (Fla. 1991)(declining jurisdiction over an issue certified to be of great public importance). The purpose of the Florida Supreme Court's conflict jurisdiction to resolving legal conflicts among the districts and maintaining uniformity of law throughout the State of Florida. Jollie v. State, 405 So.2d 418, 424 (Fla. 1981) (Boyd, dissenting). This Court should decline to reach this issue for the simple reason that it is not necessary.

There is no conflict among the First District's decision in Flovd v. State, 23 FLA.L.WEEKLY D651 (Fla. 1st DCA February 26, 1998), the Fourth District's decision in Myers v. State, 696 So.2d 893 (Fla. 4th DCA 1997) and the Fifth District's decision in Gardner v. State, 661 so. 2d 1274 (Fla. 5th DCA 1995). The three decisions, all hold that the provision does not violate the due process clause. Judge Farmer, Judge Padavano and Judge Antoon, all writing for unanimous panels, found the provision provides fair notice of the penalty. Nine judges, in three different District Courts, have all agreed that the provision is constitutional. Thus, there is no conflict among the District Courts on this issue and Florida law is currently uniform on the matter.

Merits

The criminal penalties statute, § 775.082(3)(d), FLA. STAT. (1995) provides that the maximum penalty for a third degree felony is five years incarceration. However, the statute governing when

a guidelines sentence exceeds the statutory maximum, § 921.001(5), Fla. Stat. (1995)[2], provides in pertinent part:

> "If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by § 775.082, the sentence under the guidelines must be imposed, absent a departure."

The statute governing scoresheet calculations, § 921.0014, Fla. Stat. (1995), provides in pertinent part:

> "If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by § 775.082, the sentence recommended under the guidelines must be imposed absent a departure.'

The excessive punishment clause of the Florida Constitution, Art. I, § 17, provides:

> Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

The due process clause of the Florida Constitution, Art. I, § 9, provides:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Petitioner raises the "hot issue of the day" - whether his guidelines sentence may exceed the statutory maximum. Mays v. State, 693 So. 2d 52 (Fla. 5th DCA 1997)(referring to this issue as the hot issue of the day and concurring with the Third District's reasoning that a trial court is not limited to imposing a

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[2] This provision of the sentencing guidelines became effective on January 1, 1994. Delancy v. State, 673 So.2d 541 (Fla. 3d DCA 1996). Because petitioner's crimes were committed on February 24, 1996, this provision applies to him. (R. 3)

guidelines sentence within the statutory maximum even if part of the range is within the statutory maximum).

DUE PROCESS CLAUSE & NOTICE

Petitioner contends that a person of ordinary intelligence would not be on notice of the maximum penalty of his crime because a person of ordinary intelligence cannot calculate the penalty under a guidelines scoresheet. IB at 7. Petitioner claims that only those of extraordinary intelligence can properly perform the calculations required in a guidelines scoresheet to determine the criminal penalty. IB at 8. Vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute. United States v. Batchelder, *442* U.S. 114, *123, 99* S.Ct. 2198, *2203, 60* L.Ed.2d 755 (1979). However, Florida's sentencing guidelines are not vague. *Cf.* Ecenrode v. State, 576 So.2d 967, 968 (Fla. 5th DCA 1991)(the "permitted range" in the sentencing guidelines is not vague).

A defendant is not deprived of notice of the criminal penalty merely because the he must add. Gardner v. State, 661 So. 2d 1274, 1276 (Fla. 5th DCA 1995)(requiring an accused to add to know the penalty does not deprive the accused of notice). The guidelines sentencing calculations have been simplified in recent years. Contrary to petitioner's claim, addition is not beyond the ability of a person of ordinary intelligence.

The sentencing guidelines are based mainly on the offense committed and the defendant's past criminal history. A defendant has actual knowledge of his own criminal past and actual knowledge of the points that were assessed for that criminal past from the last scoresheet used to sentence him. A defendant has constructive notice of the penalty for any new crime he commits through Florida Statutes. State v. Beasley, 580 So.2d 139, 142 (Fla. 1991)(holding that publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions).

Florida's Sentencing Guidelines lists every crime and contains an offense severity ranking chart, § 921.0012, FLA. STAT. (1995)I for every crime. The Sentencing Guidelines statute also contains a standard scoresheet and detailed directions on how to compute the total sentence. § 921.0014, FLA. STAT. (1995). Any defendant with a piece of paper and a pencil can follow these directions and determine, almost to the month, the actual amount of time he will likely serve for a particular crime.

Additionally, before the guidelines, while a defendant had notice of the maximum penalty from the statutory maximum statute, he had little or no ability to determine what his actual sentence would likely be. For example, before the sentencing guidelines, a person convicted of a second degree felony could receive anything from probation to 15 years incarceration as an actual penalty. Sentencing before the guidelines was indeterminate. United States v. Bavlor, 97 F.3d 542, 551 (D.C. Cir. 1996) (J. Wald,

concurring) (comparing statutory maximum for felonies which were set in an era of indeterminate sentencing with the concept of guideline sentencing which were motivated by Congress' wish to replace indeterminate sentencing with more rigid formulas allowing little or no discretion on the part of the judge.) Indeed, the stated purpose of the sentencing guidelines was to ensure uniformity and therefore, certainty, in sentencing. Koon v. United States, - U.S. -, -, 116 S.Ct. 2035, 2053, 135 L.Ed.2d 392 (1996)(stating the Federal Sentencing Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system.); United States v. Ashburn, 20 F.3d 1336, 1347 (5th Cir. 1994)(stating the Guidelines were enacted to bring uniformity and predictability to sentencing). Under a sentencing guidelines regime, a defendant has more notice of the actual penalty that will be imposed.

FLORIDA CASELAW

While the Mavs court referred to this as the "hot issue" of the day, it is not hotly contested. Every District Court that has addressed the issue has held that the statute does not violate the due process clause requirement of fair notice of the penalty that will be imposed for a crime. This Court should follow the reasoning of the First, Fourth and Fifth Districts and hold that § 921.001(5) is constitutional.

In Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995), the Fifth District held that the guidelines sentencing statute, § 921.001(5), did not violate the due process notice requirement.

Gardner was sentenced to seven years for two crimes that were third degree felonies. *Id.* at 1275. The statutory maximum for a third degree felony is five years. Gardner argued that the provision that allowed a trial court to exceed the statutory maximum if the guidelines recommended sentence was above the statutory maximum denied him notice of the authorized penalty as required by the due process clause. *Id.* at 1276. The provision does not violate due process because the wording of the provision is clear and an accused can calculate the penalty by preparing a scoresheet. Merely requiring an accused to add to know the penalty does not deprive the accused of notice. *Id.*

In Floyd v. State, 23 FLA.L.WEEKLY D651 (Fla. 1st DCA February 26, 1998), the First District disagreed with petitioner's due process argument as a matter of law. Judge Padovano acknowledged several concerns with the statute but noted that these concerns were matters for the legislature. He thought that § 921.001(5) would increase litigation relating to the validity of the sentence and make it more difficult for trial courts to automatically deny post-conviction 3.800(a) motions. He also expressed concern that § 921.001(5) would reduce the certainty of the statutory maximum statute. While it may be true that § 921.001(5) reduces the certainty of the statutory maximum statute, it does not reduce the certainty associated with the actual sentence imposed. The provision, at issue, increases the certainty associated with the actual sentence imposed.

In Myers v. State, 696 So.2d 893 (Fla. 4th DCA 1997), the Fourth District rejected a lack of notice challenge to § 921.001(5). *Id.* at 898. Judge Farmer, writing for a unanimous panel, stated: "[w]e 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." The Myers Court noted that the statute had the effect of increasing the statutory maximum penalty normally set by § 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. The Myers Court then rejected a lack of notice claim by stating: "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 an offense." The Fourth District also rejected a claim that a defendant would be misled by the structure of Florida Statutes. Judge Farmer wrote:

> We expressly reject defendant's contention that, because there is nothing in section 775.082 that would give him notice to "check" chapter 921, 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.

He also noted that "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."

FEDERAL CASELAW

A Federal Circuit has also rejected a claim that the Federal Sentencing guidelines violate the requirement of fair notice of the punishment. In United States v. Bolton, 82 F.3d 427 (10th Cir. 1996), the Tenth Circuit held that the complexity of the Federal Sentencing Guidelines did not violate the due process clause's requirement of fair notice of the punishment. Bolton attacked the constitutionality of the Federal Sentencing Guidelines, claiming that the guidelines are so complex and incomprehensible that they fail to give a defendant fair notice of the punishment he will face. The Court noted that the very complexity of the guidelines gives a defendant more warning of the punishment than the pre-guidelines exercise of unfettered judicial discretion.

In the instant case, as in Bolton, Florida's sentencing guidelines provide a defendant with more accurate and detailed warning of the punishment than the statutory maximum. Moreover, while there is no doubting the complexity of the Federal Sentencing Guidelines, Florida's sentencing guidelines are, in comparison,

extremely simple. Therefore, petitioner's federal due process clause argument fails. IB at 10.

ISSUE II

DID THE FIRST, SECOND, THIRD AND FIFTH DISTRICT PROPERLY HOLD THAT THE TERM "RECOMMENDED SENTENCE" IS THE RANGE RATHER THAN A SPECIFIC SENTENCE OF A PRECISE, FIXED NUMBER OF MONTHS? (Restated)

Petitioner contends that because the term "recommended sentence" is vague and susceptible of differing constructions, under the rule of lenity, the term must be defined as "a specific sentence of a precise, fixed number of months and not a range". This was the Fourth District's definition of the term in Myers. He also asserts that the rule of lenity requires that this Court follow the decision of District Court that is most favorable to the defendant. The State respectfully disagrees. The rule of lenity does not apply; rather, the clear intent of the legislature governs. The rule of lenity only implies when a term is ambiguous and its meaning is not clear from the legislative intent of the statute. While the legislature did not define the term "recommended sentence", the legislature has explained, in great detail, how to calculate the recommended sentence and when and to what extent the trial court can increase or decrease the state prison months. Their intent could not be clearer. The term is use by the legislature to mean the range, not a specific sentence of a precise, fixed number of months. Moreover, the rule of lenity certainly does not require this Court to defer to the decision of a District Court. Thus, the First, Second, Third and Fifth District Courts have properly held that the term "recommended sentence" is a range.

Standard of review

Questions of statutory interpretation present purely legal issues that are reviewed de *novo.* United States v. Myers, *106* F.3d 936, 941 (10th Cir. 1997)(stating that "[w]e review *de novo* the district court's interpretation of a statute or the sentencing guidelines."). Thus, the standard of review is *de novo.*

Merits

The rule of lenity statute, § 775.021(1), FLA. STAT. (1995), provides:

> 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.

The definition section of the sentencing guidelines does not contain a definition of the term "recommended guidelines sentence". Myers, 696 So.2d at 895. However, § 921.0014(2) provides:

> (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 de v

up to, and including, 25 percent, at the discretion of the court. The recommended sentence length may not be increased if the total points have been increased for that offense by up to, and including, 15 percent.

First, contrary to petitioner's contention, the term is not vague. Ecenrode v. State, 576 So.2d 967, 968 (Fla. 5th DCA 1991) (the "permitted range" in the sentencing guidelines is not vague). The legislature has explained, in great detail, how to calculate the recommended sentence and when and to what extent the trial court could increase or decrease it.

Second, the rule of lenity is by its very name a rule of construction. Courts never resort to rules of construction where the legislative intent is plain and unambiguous. State v. Dugan, 685 So.2d 1210, 1212 (Fla. 1996) (noting if the language of the statute is clear and unambiguous, a court must derive legislative intent from the words used without involving the rules of construction). While the legislature did not define the term "recommended guidelines sentence", they certainly explained how to calculate it and provided that a trial court may increase or decrease the state prison months by 25 percent. Their intent could not be clearer.

In Martinez v. State, 692 So.2d 199 (Fla. 3d DCA 1997), the Third District held that when part of the recommended range is within the statutory maximum, § 921.001(5), still applies and a trial court is not limited to imposing a sentence within the statutory maximum. Martinez was convicted of a third degree felony. The statutory maximum for a third degree felony is five years. However, Martinez's recommended guidelines range was 4.6

years to 7.7 years. The trial court imposed a six and a half year sentence. Martinez argued that the provision allowing a trial court to impose a guidelines sentence that exceeds the statutory maximum did not apply because the bottom of the range, 4.6 years, was within the statutory maximum. Martinez argued that the trial court was limited to imposing a five year sentence when part of the guidelines range was within the statutory maximum. The Third District rejected this argument as inconsistent with both the wording of the provision and the legislature's intent. The intent of the legislature is to allow a trial court "the full use of the recommended range unencumbered by the ordinary legal maximum". Thus, the trial court may sentence at the top of the recommended range. See Mavs v. State, 693 So. 2d 52 (Fla 5th DCA 1997)(concurring with the Fifth District's reasoning in Martinez).

In Flovd v. State, 23 FLA.L.WEEKLY D651 (Fla. 1st DCA February 26, 1998), the First District held that the term recommended sentence was used by the legislature "in the simplest possible sense to signify only that the trial court should apply the guidelines and not the statutory maximum." The statute states that a trial court must impose the guidelines sentence "absent a departure." The use of the phrase "absent a departure" means the legislature was referring to the range because a departure is a sentence that deviates from the range, not the state prison months. Judge Padavano reasoned that wording of statute meant the legislature expressing it intent that a trial court may not impose a departure sentence beyond the statutory maximum. The trial court

can impose a guidelines sentence beyond the statutory maximum but cannot impose a departure sentence beyond the statutory maximum. See West v. State, 23 FLA.L.WEEKLY D976 (Fla. 2d DCA April 15, 1998)(adopting the First District's reasoning in Floyd and rejecting Myers) .

In Myers v. State, 696 So.2d 893 (Fla. 4th DCA 1997), the Fourth District held that the term "recommended sentence refers to a specific sentence of the precise, fixed number of state prison months not the range. *Id.* at 876. The Myers Court stated that when the recommended sentence, as they defined it, exceeds the statutory maximum the trial court had only two options: (1) impose the recommended sentence or (2) impose a mitigating departure sentence. Judge Farmer admitted that this was an "anomaly" but reasoned that he was bound by the rule of lenity to reach this old conclusion.

The problem with Judge Farmer's view is that if the fixed sentence is below the statutory maximum, then the trial court has some discretion in sentencing but if the fixed sentence is beyond the statutory maximum, then the trial court has no discretion. If the legislature wanted to remove the trial court's discretion when the state prison months exceeded the statutory maximum, they would have done so. There is no such exception in the statute. The legislature would have amended the wording of this provision to remove the trial court's discretion. They have not done so, so the only conclusion consistent with the intent of the legislature and the wording of the recommended sentence provision is that the legislature intended for trial courts retain the discretion to

increase or decrease the sentence 25% even beyond the statutory maximum. The rule of lenity does not apply and does not require anomalous interpretations of a statute.

Judge Padavano's interpretation plainly makes more sense and does not lead the anomalies of Judge Farmer's. The interpretation that the legislature meant that a trial court can impose a auidelines sentence within the range beyond the statutory maximum but cannot impose a departure sentence beyond the statutory maximum is the simpler, better view. Thus, this Court should follow the view of the four District Courts and hold that the statute allows a trial court to increase or decrease the sentence by 25 percent beyond the statutory maximum.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District Court of Appeal in Floyd v. State, 23 FLA.L.WEEKLY D651 (Fla. 1st DCA February 26, 1998) should be approved, and the sentence entered in the trial court should be affirmed.

Respectfully submitted,

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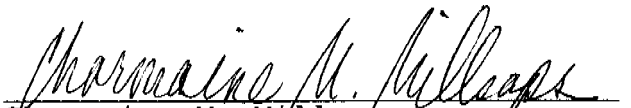
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Glen P. Gifford, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 6th day of May, 1998.



Charmaine M. Millsaps
Attorney for the State of Florida

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