IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 92,769

EMANUEL O'NEAL,

Respondent.

****
ON PETITION FOR CERTIORARI REVIEW
****

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

Other Authority

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution and Respondent, Emanuel O'Neal, was the defendant in the criminal trial conducted in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the appellant and Petitioner the appellee in the appeal heard by the Fourth District Court of Appeal for the State of Florida. 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."

Reference to the record on appeal will be by the symbol "R," reference to the transcripts will be by the symbol "T," reference to any supplemental record or transcripts will be by the symbols "SR[vol.]" or ST[vol.]", and reference to the appendix will be by the symbol "A," all followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Respondent, Emanuel O'Neal, was charged by information with the third degree felony of possession of cocaine. (R 6-7). He was found guilty of this offense. (R 22, 30). Preparation of the sentencing scoresheet showed that Respondent had earned a total or increased sentence of 220.4 prison months (18.367 years). (R 23-24). The scoresheet also showed that the sentencing court could increase or decrease prison months by up to an additional twenty-five percent, which in Respondent's case, resulted in a guidelines recommended range with a minimum of 165.3 months (13.775 years) and a maximum of 275.5 months (22.958 years). (R 24). The trial court upwardly increased this recommended sentence within the guidelines range of twenty-five percent and sentenced Respondent to twenty years (240 months) in state prison. (R 24, 27).

Respondent appealed his conviction and sentence to the Fourth District Court of Appeal. The Fourth District affirmed the conviction but reversed the sentence. The Fourth District found that the trial court could not increase, by up to twenty-five percent, a recommended sentence that already exceeded the statutory maximum. The Fourth certified conflict with a number of other district courts.

SUMMARY OF THE ARGUMENT

A sentence within the guidelines is not subject to appellate review. Here the trial court imposed the recommended guidelines sentence. Respondent was attempting to appeal a guidelines sentence. Thus, the Fourth District Court of Appeal should not have addressed this issue as it was not cognizable on appeal.

Moreover, this issue was not preserved for appellate review. Respondent did not present this issue to the trial court, nor obtain a ruling on this issue from the trial court. Again, the Fourth District should have declined to address this issue.

Assuming arguendo that the issue was preserved, Respondent's contention on appeal that his guidelines sentence improperly exceeded the "recommended sentence" was directly contrary to the plain language and legislative intent of the applicable statute and therefore, must fail. This Honorable Court should reimpose Respondent's original sentence.

ARGUMENT

WHETHER THE TRIAL COURT IMPOSED A LEGAL SENTENCE UNDER THE SENTENCING GUIDELINES.

Respondent attempted to appeal a guidelines sentence below. The courts of Florida have found that a sentence within the guidelines is not subject to appellate review. See, e.g., Panek v. State, 593 So. 2d 307 (Fla. 3d DCA 1992)(defendant's claims of judicial vindictiveness were neither reviewable nor cognizable because the actual sentence fell within the range of the recommended guidelines). This Court in particular has specifically acknowledged the historical rule in Florida that a reviewing court is powerless to interfere with the length of a sentence imposed by the trial court as long as the sentence is within the limits allowed by the relevant statute. Booker v. State, 514 So. 2d 1079, 1081 (Fla. 1987).

Here, the sentence imposed, although it exceeded the statutory maximum, was within the sentencing limits set by the legislature in creating the scoring guidelines. The State argues that, as a result, this issue was not cognizable on appeal. It should not have been addressed by the Fourth District Court of Appeal.

Furthermore, the claimed sentencing error was not preserved for appeal, thus the Fourth District should have declined to address the alleged error on this additional ground. The State

acknowledges that, in the past, such an error could be raised on appeal notwithstanding the failure to object in the trial court. However, this kind of error is now required to be preserved in the trial court by either a contemporaneous objection or a written motion to correct the sentencing error pursuant to the new Criminal Appeal Reform Act of 1996. §924.051(3), Fla. Stat. (Supp. 1996).

The Criminal Appeal Reform Act of 1996 applies to the instant case, and requires affirmance because Respondent failed to preserve this issue for appellate review.[1] See Middleton v. State, 689 So. 2d 304 (Fla. 1st DCA 1997)(habitual offender sentence affirmed where the defendant failed to preserve the issue by objecting either at sentencing or in timely motion under Florida Rule of Criminal Procedure 3.800(b)); Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997)(similar). In the instant case, as in Middleton and Neal, Respondent did not object at sentencing or file a motion to correct the sentence in the trial court. Any error in Respondent's sentence was not preserved for appellate review.

The State acknowledges that the Fourth District stated that this sentence was an illegal sentence within the meaning of Davis

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[1] Section 924.051(3) places reasonable conditions on the right to appeal of those whose judgments and sentences are entered after its effective date. Because the section became effective on July 1, 1996, and Respondent was not sentenced until September 17, 1996, the section applies to Respondent.(R 27).

v. State, 661 So. 2d 1193, 1196 (Fla. 1995), because it was a sentence that exceeded the maximum period set forth by law for a particular offense without regard to the guidelines. The Fourth District found that because the sentence was illegal, it could be raised at any time and did not need to be preserved below. The Fourth District used this rationale to address the issue at hand on its merits.

However, the Fifth District, in Maddox v. State, 23 Fla. L. Weekly D720 (Fla. 5th DCA March 13, 1998), has held that a sentence which exceeds the statutory maximum does not constitute a fundamental error which can be addressed on direct appeal without necessity of preservation. But see, Harriel v. State, 23 Fla. L. Weekly D967 (Fla. 4th DCA April 15, 1998). The State submits that the time has come to officially redefine the term "illegal" as it pertains to sentences of this kind. After all, guidelines recommended sentences that exceed the statutory maximum have been affirmed by all the courts of Florida, including the Fourth District in this very case.[2] They are clearly not "illegal" in the purest sense of the word.

In the remainder of this brief, the State does not waive its procedural contentions, but the State assumes, for the sake of argument on the merits, that the Fourth District properly

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[2] After all, the Fourth District remanded for resentencing to the median sentence recommended by the guidelines scoresheet even though this sentence also exceeded the statutory maximum.

addressed this issue. The State respectfully contends that, contrary to the Fourth District's opinion, the trial court properly imposed a sentence that, although greater than the median recommended guideline sentence was within the twenty five percent recommended range allowed by the guidelines. Although, the Fourth District argued in its opinion that the trial court improperly enhanced the "recommended sentence," the State respectfully suggests that the Fourth District's reasoning was flawed.

In performing the calculations on the guidelines scoresheet, the district court defined the "recommended sentence" to be the total or increased sentence points minus twenty-eight. They stopped there because they found that the recommended sentence could only be a single fixed number and not, as the State argued, a range encompassing a twenty-five percent variation on that single fixed number. In Respondent's case, this fixed median number was 220.4 months. (R 24). The range was 165.3 months to 275.5 months. (R 24).

The Fourth District claimed, that when the "recommended sentence" exceeded the statutory maximum, a trial court was limited to imposing this single fixed median number. The trial court could not impose a sentence which fell within the recommended guidelines range but which was not **the** recommended sentence. The State argues that this interpretation is contrary

to the spirit and the letter of the guidelines which specifically provide that a trial judge has a certain discretion in imposing sentence depending on the circumstances of each case.

The guidelines expressly provide a trial court with a discretionary "window" for sentencing. § 921.0014(2), Fla. Stat. That window ranges from twenty five percent above to twenty five percent below the fixed median number. The trial court requires a discretionary window because each case carries with it unique nuances and each defendant brings his or her own special circumstances for consideration during the sentencing process. The trial court is in the best position to consider the inherently illusive variables of each individual case which can not be predetermined and which, therefore, require some amount of latitude in the final sentencing determination.

Clearly, the "220.4" figure for "prison months" appearing on the Respondent's sentencing guideline scoresheet under sentencing computation (R 15), was only a part of the overall formula, and was not intended to be considered a finite restriction upon the trial court when sentencing a defendant under the guidelines. If the Fourth's interpretation of the relevant statutes were upheld, a trial court would have no discretion whatsoever, but would have to sentence a defendant to the single fixed median number arrived at by calculating the "total or increased sentence points." This interpretation is incorrect not only because it fails to provide

the trial court with the discretionary window, but because it does not complete the calculations required by the scoresheet.

When the scoresheet is fully completed it becomes clear that the "recommended sentencing guideline" is a range, as arrived at by arithmetical calculation in accordance with the formulas embodied in the Sentencing Guidelines Scoresheet at Florida Rule of Criminal Procedure 3.991(a), and not a single fixed median number. Florida Statutes 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 twenty five percent:

> 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 under the guidelines must be imposed.

The recommended sentence is increased or decreased by up to twenty five percent *before* any determination as to whether the sentence exceeds the statutory maximum.

This shows that the legislature intended the courts to calculate the twenty five percent variation and arrive at a "recommended sentence" before they determined if this sentence

exceeded the statutory maximum. This also shows that the legislature intended the "recommended sentence" to include the recommended range. The legislature's intent should be effectuated.

As a further proof of legislative intent, 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, Exhibit B at 2). It then notes that the "total" may be increased or decreased by the court by up to twenty five percent. If the total or increased sentencing points are determinative and these points can be increased, then so can the recommended sentence for purposes of deciding whether the guidelines sentence exceeds the statutory maximum.

The Fourth District contended in Myers v. State, 696 So. 2d 893 (Fla. 4th DCA), rev. granted, 703 So. 2d 477 (Fla. 1997), 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 Florida Statutes Section 921.001(5) is mandatory. 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 v. State, 692 So. 2d 199, 201 (Fla. 3d DCA), rev. dismissed, 697 So. 2d 1217 (Fla. 1997), the

court rightly 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.

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. The use of the word "departure" suggests that the legislature anticipated that even with a twenty five percent upward variation, the guidelines sentence did not exceed the statutory maximum. Furthermore, it suggests that the 25 percent variation was not itself a departure.

This reasoning is borne out by the fact that any sentence which deviates from the median of that range by more than, or less than, twenty-five percent (25%) requires a written order of departure to be completed by the trial court at the time of sentencing. See, e.g., Fla. R. Crim. P. 3.702(d)(16). In contrast, the legislature did not require that a trial court provide any additional justification, such as the written explanation required for departure sentences, in order to sentence a defendant within the recommended "range." Clearly, the legislature did not consider a sentence within the recommended range a departure sentence.

The Fourth District suggested in Myers, that if the legislature wished the variation to be included under Section

921.001(5), it would have so specified. The State responds to this suggestion by stating that if the legislature did not wish the variation to be included, it would have used terminology referencing the original "total or increased sentence points" instead of terminology referencing the "recommended sentence." However, contrary to the district court's position, Section 921.001(5) used terminology referencing the "recommended sentence" when it allowed a trial court to vary the "recommended sentence" before the statutory maximum was even considered.

The legislature specifically amended the sentencing guidelines to allow a trial court to impose a guidelines sentence that exceeds the statutory maximum. It is patently illogical to construe this section to mean that a trial court could not sentence a defendant within either extreme of the sentencing guideline range, but that same court could sentence the defendant to a departure sentence in excess of the twenty five percent range, if only the court filed written reasons for departure. Fla. R. Crim. P. 3.701(11); Fla. Stat. § 921.001(5) (1994). If we accepted the Fourth District's interpretation this would mean that the trial court could sentence Respondent to the median number of 220.4 months; to a upper departure sentence of at least twenty-five percent (25%) greater than 220.4 months; or to a lower departure sentence of at least twenty-five percent (25%) less than 220.4 months. However, the court could not sentence

Respondent to anything within the recommended range itself unless it was the median. This is a patently absurd result.

Every district court in Florida except the Fourth District has found, when confronted with guidelines sentences which exceeded the statutory maximum, that the recommended sentence did indeed mean the recommended range. For example, in Delancy v. State, 673 So. 2d 541 (Fla. 3d DCA 1996), the Third District, citing to Section 921.001(5), 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.

Delancey was affirmed by Martinez, 692 So. 2d at 199. In Martinez, the statutory maximum was five years, but the recommended guidelines range was 4.6 years to 7.7 years. The Third District affirmed the trial court's imposition of six and one-half years incarceration followed by one year of probation.

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. Subsequently, in Floyd v. State, 23 Fla. L. Weekly D651 (Fla. 1st DCA Feb. 26, 1998), the First District certified conflict with the Fourth District in Myers. The conflict was due to the First District's finding that the legislature's use of the phrase "absent a departure" in Section 921.001(5) referred to the

sentencing guidelines range and not the fixed median sentence, or as the First called it, the "presumptive" sentence.

The Second District, in Nantz v. State, 687 So. 2d 845 (Fla. 2d DCA 1996), calculated the recomended **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. Subsequently, in West v. State, 1998 WL 171386 (Fla. 2d DCA April 15, 1998), the Second District specifically affirmed the trial court's authority to exercise the twenty-five percent prerogative in cases where the guidelines score exceeded the statutory maximum.

In Mays v. State, 693 So. 2d 52 (Fla. 5th DCA), rev. granted, 700 So. 2d 686 (Fla. 1997), and more recently, in Green v. State, 691 So. 2d 502 (Fla. 5th DCA), rev. granted, 699 So. 2d 1373 (Fla. 1997), the Fifth District concurred with the First District in Martinez. In Green, the Fifth District affirmed a sentence greater than the median of the recommended range. Although it called the median of 65.8 months "the recommended sentence," the court found that the sentence of 72 months actually imposed was not only not an improper departure without written reasons, it was a permissible variation. 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.

Id.

The First, Second, Third, and Fifth Districts have all affirmed the interpretation of "recommended sentence" in Section 921.001(5) as meaning the "recommended range." These courts recognized that the legislature clearly intended for the recommended guidelines sentence to include the recommended range and for a recommended sentence to be imposed regardless of any statutory maximum. As the cases cited above skillfully argue, the Fourth District's opinion is inconsistent with the wording of the statute and with its intent.

Here the trial court was required to sentence Respondent beyond the statutory maximum because the recommended sentence exceeded the statutory maximum of five years or 60 months for a third degree felony. See § 921.001(5), Fla. Stat.; § 775.082, Fla. Stat. The "recommended guideline sentence" was properly calculated to be 165.3 months to 275.5 months, and the trial court could properly sentence Respondent to any sentence within that range. Respondent's sentence of 220.4 months was a proper nondeparture sentence in accordance with Florida Statutes Section 921.001(5). The district court's opinion insofar as it finds this sentence to be improper should be quashed and Respondent's

original sentence should be reinstated.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, the State of Florida respectfully submits that the decision of the district court, insofar as it found that a sentence that was in excess of the guidelines recommended median sentence but within the guidelines recommended range was improper, should be QUASHED, and that the sentence originally imposed by the trial court should be REINSTATED.

Respectfully submitted,
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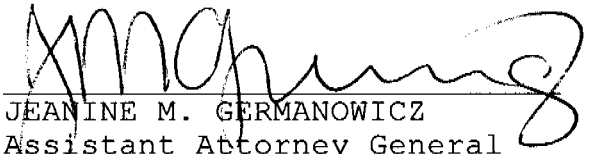

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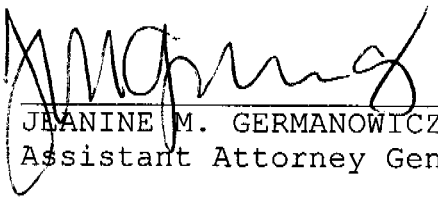
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits" has been furnished by courier to: JEFFREY L. ANDERSON, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, on May 26, 1998.



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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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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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R215

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1998

EMANUEL O'NEAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96–3406

Opinion filed April 1, 1998.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William P. Dimitrouleas, Judge; L.T. Case No. 96–10930 CF10A.

Richard L. Jorandby, Public Defender, and Jeffrey L. Anderson, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

FARMER, J.

A jury convicted defendant of possession of cocaine, a third degree felony.[1] The penalty statute provides a maximum sentence for this conviction of 5 years.[2] His sentencing scoresheet, however, showed a recommended sentence of 220.4 months. The trial judge enhanced the recommended sentence within the guidelines range of 25% and sentenced him to 20 years in prison. This appeal follows.

We decided the issue raised in this appeal in our previous decision in *Myers v. State*, 696 So. 2d 893 (Fla. 4th DCA), *rev. granted*, 703 So. 2d 477 (Fla. 1997).[3] There we held that the court may not enhance a recommended sentence that already exceeds the maximum set by the penalty statute by a further extension within the guidelines range. *Myers* requires that we reverse the sentence in this case and remand with instructions to resentence defendant to the sentence recommended by the guidelines scoresheet. As we did in *Myers*, we certify conflict with *Mays v. State*, 693 So. 2d 52 (Fla. 5th DCA), *rev. granted*, 700 So. 2d 686 (Fla. 1997); *Martinez v. State*, 692 So. 2d 199 (Fla. 3d DCA), *rev. dismissed*, 697 So. 2d 1217 (Fla. 1997); and *Green v. State*, 691 So. 2d 502 (Fla. 5th DCA), *rev. granted* 699 So. 2d 1373 (Fla. 1997); and with subsequently issued decision in *Floyd v. State*, 23 Fla. L. Weekly D651 (Fla. 1st DCA Feb. 26, 1998).

REVERSED AND REMANDED FOR RESENTENCING TO RECOMMENDED SENTENCE UNDER GUIDELINES.

DELL and SHAHOOD, JJ., concur.

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

[1] We find no merit in any issue relating to the conviction and consequently affirm it.

[2] § 775.082(3)(d). Fla. Stat. (1995).

[3] Defendant did not raise this issue in the trial court, and thus the state argues that he is barred from doing so here by the Criminal Appeal Reform Act of 1996. §§ 924.051(3), Fla. Stat. (Supp. 1996) ("A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and . . . if not properly preserved, would constitute fundamental error."). We disagree. If defendant is correct then his sentence is an illegal sentence within the meaning of *Davis v. State*, 661 So. 2d 1193, 1196 (Fla. 1995) ("an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines."), which may be raised at any time.

A

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based 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 WE		1.	CJ	Favorable/CS
2.			2.	WM	
3.			3.		
4.			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 points 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 injunction for protection 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
8	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 for 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	16.5
7	5.6	14.0
6	4.8	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.

DOC 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)