IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

vs. CASE NO. 93,188

DONALD SOLOMON,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Donald Soloman, 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 plead guilty to three felony counts under an agreement to be sentenced within the guidelines and without habitual offender treatment. R/77-78. One of the counts, Count IV, as grand theft of an automobile, which is a third degree felony. The penalty statue for this third degree felony provides a maximum sentence of 5 years. See, Section, 775.082(3)(d), Fla.Stat. On his sentencing scoresheet respondent scored a total sentence points of 240 which results in a recommended guidelines sentence of 212 state prison months and a presumptive guideline sentence of 265 maximum and 159 minimum state prison months. The trial judge sentenced him to 265 months in prison on this count.

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 in Meyers v. State, 696 So. 2d 893 (Fla. 4th DCA), rev. granted, 703 So. 2d 1997) 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. Consequently, the Fourth District Court reversed the respondent's sentence on count IV and remanded for resentencing to the recommended sentence under the guidelines or to a sentence of 212 prison months.

Petitioner maintains that the recommended guideline of 212 prison months 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. See, Meyers.

The reasoning of the Fourth District Court has been rejected by all of the district courts in Florida. The First District Court of Appeal in Floyd v. State, 23 Fla. L. Weekly D651 (Fla. 1 DCA, February 26, 1998) specifically rejected the Meyers stating that the use of the definite article "the" means "only that the trial court should apply the guidelines and not the statutory maximum." Floyd holds that this conclusion is supported by the "part of section 921.001(5) which says that the court must impose the sentence under the guidelines "absent a departure. A departure

sentence is on e that deviates from the range, not the presumptive sentence." Noting that Section 921.001(5) "stands for the unremarkable proposition that the sentencing guidelines can trump the statutory maximum otherwise set by law", the Floyd court held that the statutory language of Section 921.001(5) supports the "conclusion that the trial court may impose a sentence in excess of the statutory maximum to the extent the sentencing guidelines range exceeds the maximum." See also, West v. State, 23 Fla. L. Weekly D976 (Fla. 2d DCA April 15, 1998); Jordan v. State, 23 Fla. L. Weekly D 536, 537 (Fla. 5th DCA Feb. 20 1998).

In conclusion, the State urges that the trial court properly imposed the 265 month 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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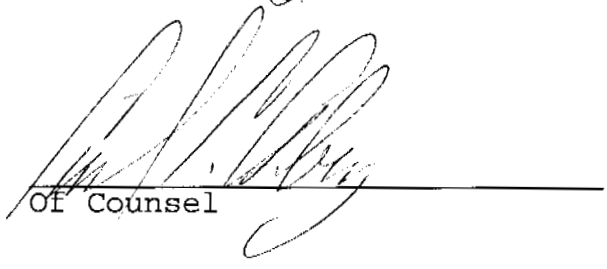
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Brief of Petitioner on the Merits" has been furnished by courier to: KAREN E. EHRLICH, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, on this 30th day of June, 1998.



Of Counsel

96-1-6476

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

DONALD SOLOMON,

Appellant,

v.

STATE OF FLORIDA,

 Appellee.

CASE NO. 96–2553

Opinion filed May 27, 1998

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Joe Wild, Judge; L.T. Case No. 96–009B.

Richard L. Jorandby, Public Defender, and Karen E. Ehrlich, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Carol Cobourn Asbury, Assistant Attorney General, West Palm Beach, for appellee.

ON MOTION FOR REHEARING

FARMER , J.

It appearing that in affirming we overlooked relevant recent precedent from this court on defendant's issue as to the illegality of his sentence, we grant rehearing.

Defendant pleaded guilty to three felony counts under an agreement to be sentenced within the guidelines and without habitual felony offender treatment.[1] One of the counts, count IV, was grand theft of an automobile, which is a third degree felony.. The penalty statute for this third degree felony provides a maximum sentence of 5 years.[2] His sentencing scoresheet, however, showed a recommended sentence of 212 months. The trial judge sentenced him to 265 months in prison on this count.

We decided this issue in *Myers v. State*, 696 So. 2d 893 (Fla. 4th DCA), *rev. granted,* 703 So. 2d (Fla. 1997). 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.[3] 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 the subsequently issued decision in *Floyd v. State*, 707 So. 2d 833 (Fla. 1st DCA 1998).

REVERSED AND REMANDED FOR RESENTENCING ON COUNT IV TO RECOMMENDED SENTENCE UNDER GUIDELINES.

DELL and SHAHOOD, JJ., concur.

FINAL UPON RELEASE; NO FURTHER MOTION FOR REHEARING WILL BE ENTERTAINED.

[1] As we affirm on all other issues and the sentences on the other counts are not affected by this issue, we therefore leave them undisturbed.

[2] *See* 775.082(3)(d), Fla. Stat. (1995).

[3] Defendant did not raise this issue in the trial court, but an illegal sentence within the meaning of *Davis v. State*, 661 So. 2d 1193, 1196 (Fla. 1995) ("[A]n illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines."), may be raised at any time, even for the first time on direct appeal.

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		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 cmmitted 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)