IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2358

JAMES LEE HALL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

James Lee Hall was the defendant below and will be referred to as "Appellant." The State will be referred to as "Appellee." References to the record will be preceded by "R." References to any supplemental record will be preceded by "SR." All emphasis is added unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Appellee agrees with Appellant's statement of the case and facts, with the following additions and clarifications.

Appellant stipulated in his written and signed plea agreement that there was a factual basis for both offenses (R 20). At the plea colloquy, Appellant stated that he had read everything in the plea agreement (SR 6). He understood the contents of the plea agreement (SR 6).

SUMMARY OF THE ARGUMENT

I

There is no conflict. This Court should decline to exercise jurisdiction. This claim was not preserved. The statute relied on by Appellant is inapplicable to pleas. No manifest injustice has been shown. Any challenge to the factual basis for a plea must first be made in the trial court.

II

This Court should decline to exercise jurisdiction. Due process simply does not require uniformity in sentencing. If due process required uniformity in sentencing then only minimum mandatory sentences would be constitutional. The Code did not remove Appellant's right to appeal a sentence within the guidelines; there never was such a right.

ARGUMENT

I

THE TRIAL COURT PROPERLY ADJUDICATED APPELLANT GUILTY OF GRAND THEFT AND DEALING IN STOLEN PROPERTY.

JURISDICTION

This Court should decline jurisdiction. The Fourth District incorrectly concluded that its decision was in conflict with Victory v. State, 422 So. 2d 67 (Fla. 2d DCA 1982). In Victory, the defendant filed a motion to dismiss one of the counts, claiming that under the facts of his case he could not be convicted of both grand theft and dealing in the same stolen property. After that motion was denied, the defendant pleaded nolo contendere, reserving the right to appeal the denial of his motion to dismiss. There is no indication that the State argued at trial or on appeal that Section 812.025 was inapplicable to pleas.

In this case, the defendant did not file a motion to dismiss and made no claim or showing that under the facts of the case he could not be convicted of both offenses. Hall also did not reserve the right to appeal anything and has never challenged the factual basis for his plea in the trial court. See Wilson v. State, 748 So. 2d 343 (Fla. 4th DCA 1999) (A defendant who has entered a plea may directly challenge the factual basis for his plea only after preserving the issue by a motion to withdraw the plea). In fact, Appellant agreed that there was a factual basis for both crimes and

pleaded to both offenses. Additionally, the State argued on appeal that Section 812.025 was inapplicable to pleas.

As Hall and Victory are distinguishable, this Court should decline jurisdiction. See, e.g., State v. Hogan, 25 Fla. L. Weekly S1038 (Fla. Nov. 11, 2000)(review improvidently granted even though District Court certified conflict) and Hartleb v. Florida Department of Transportation, 748 So. 2d 985 (Fla. 1999)(same). See also Cleaves v. State, 450 So. 2d 511 (Fla. 2d DCA 1984)(distinguishing Victory).

PRESERVATION

Assuming arguendo that this Court accepts jurisdiction, this claim was not preserved. Appellant never filed a motion to dismiss either count and in fact agreed that the facts supported convictions for both crimes. He never claimed the statute was applicable to nolo contendere pleas. Appellant conceded that there was a factual basis for both crimes (R 20, TR 6). He cannot now claim that the trial court erred by accepting his plea to both crimes. See also Wilson v. State, 748 So. 2d 343 (Fla. 4th DCA 1999) (A defendant who has entered a plea may directly challenge the factual basis for his plea only after preserving the issue by a motion to withdraw the plea) and Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979) (An appeal from a plea should never be a substitute for a motion to withdraw a plea).

Additionally, Appellant is attempting to appeal his

convictions after a nolo contendere plea. He did not reserve the right to appeal his convictions. Accordingly, there is no jurisdiction to review this claim. See Nettles v. State, 643 So. 2d 547, (Fla. 4th DCA 1996)(dismissing appeal claiming insufficient factual basis where defendant pleaded nolo contendere and did not reserve right to appeal).

STANDARD OF REVIEW

In deciding whether Section 812.025 applies to nolo contendere pleas, the standard of review is de novo. See Racetrac Petroleum, Inc. v. DELCO Oil, Inc., 721 So. 2d 376, 377 (Fla. 5th DCA 1998).

MERITS

Assuming arguendo, that this claim was preserved and this Court finds there is jurisdiction, there was no error. Section 812.025 Fla. Stat. (1999) states:

> Notwithstanding any other provision of law, a single indictment or information may, under proper circumstances, charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for *trial*, but the *trier of fact* may return a *guilty verdict* on one or the other, but not both counts.

The statute is not ambiguous. By its plain terms, Section 812.025, applies only to trials with guilty verdicts. It does not apply to plea agreements. See Hall v. State, 767 So. 2d 560, 561-62 (Fla. 4th DCA 2000); Brown v. State, 464 So. 2d 193, 195 (Fla. 1st DCA 1985) and Jorstad v. State, 635 So. 2d 161 (Fla. 5th DCA 1994)(citing Brown and another First District case on the subject

with approval). See also Calliar v. State, 760 So. 2d 885, 886 (Fla. 2000)(courts are obligated to give statutes and the words they use their plain meaning). Appellee also notes that the statute applies to theft, not grand theft.

Assuming arguendo that this claim is preserved, there is jurisdiction, and the statute applies to nolo contendere pleas, the argument is without merit. In enacting Section 812.014, the Legislature broadened the definition of theft. See generally Jackson v. State, 736 So. 2d 77, 83 (Fla. 4th DCA 1999). Under the present statute, one who buys stolen property with knowledge of its stolen character is just as guilty of theft as the person who physically removed the property from the owner's possession. See Colvin v. State, 445 So. 2d 657, 660 (Fla. 1st DCA 1984).

Section 812.019 Fla. Stat. (1999), entitled "Dealing in stolen property," states in part:

> (1) Any person who traffics in, or endeavors to traffic in, property that he knows or should know was stolen shall be guilty of a felony of the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

Under section 812.012(7), Florida Statutes (1999), "traffic," means:

> (b) To buy, receive, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property.

Accordingly, if a person buys property that he knows or should know is stolen, and does so with the intent to sell it or otherwise

dispose of it, he is be guilty of theft and dealing in stolen property, even if no further action was taken. Similarly, if a defendant steals property with the intent to sell, transfer, distribute or otherwise dispose of it, he is guilty of both offenses, even if no further action is taken. Under both scenarios, the defendant has committed both crimes even though there was only "one scheme or course of conduct." These are the situations under which the statute was intended to prevent dual convictions and sentences.

Unlike the situations outlined above, the present case did not involve "one scheme or course of conduct." Appellant committed two distinct offenses with different victims at different times and places. The owner of the property was victimized at the time the property was stolen. The buyer of the property was victimized when Appellant sold property belonging to another. There is no reason to conclude that the Legislature intended only one conviction in this situation.

Even if this Court were to employ the most expansive definition of "one scheme or course of conduct," Appellant has not shown error. The record indicates that Appellant stole the jewelry from one victim and sold it to another victim at a different time and place, sometime within a twenty-four hour period (R 4, SR 3-4). In Cleaves v. State, 450 So. 2d 511 (Fla. 2d DCA 1984), the defendant pleaded nolo contendere to theft and dealing in stolen

property. After violating his probation, he claimed that he could not be convicted of both crimes. The record showed only that the crimes involved the same property and occurred on dates in close proximity to one another. The Second District rejected the defendant's claim that both convictions could not stand, stating: "Any inference derived from the fact that the same property was involved on dates in close proximity with each other is not enough to make void the previous adjudications of guilt based on the prior nolo contendere pleas." Cleaves, 450 So.2d at 512. That reasoning applies here.

Appellant seems to claim that the statute automatically applies whenever a defendant's crimes occurred on the same day and involved same property (initial brief pp. 8-9). Such reasoning defies logic. Suppose "A" steals some earrings simply because he hates the victim. "A" stole the earrings intending to throw them in the ocean as a sign of his hate for the victim. Once "A" possesses the earrings, he has committed both theft and dealing in stolen property as he possesses property with the intent to dispose of it.[1] However, a few hours after stealing the earrings, he decides to keep them for himself. A few hours later, he decides to give them to his girlfriend ("B") as a gift. "B" doesn't like the earrings and secretly sells them to "C" for five dollars. "C"

[1]Actually, the crimes could even be committed before the perpetrator had possession as both statutes include attempts as part of the the crimes.

trades them to "D" for a crack rock. "A" learns what has happened, becomes mad, takes the earrings from "D" and then pawns them 23 hours after he initially stole them.

Using Appellant's reasoning, the initial theft and the subsequent pawning necessarily arose from "one scheme or course of conduct" because they relate to the same property and defendant. Clearly, Appellant's claim is without merit. The fact that his crimes involved the same property and occurred on the within twenty-four hours of one another does not show that his actions fall within the statute. No manifest injustice has been shown. See State v. Thompson, 735 So. 2d 482, 485 (Fla. 1999)(after sentence is imposed the burden is on the defendant to show a manifest injustice). Appellant is not entitled to relief.

ISSUE II

THE CRIMINAL PUNISHMENT CODE DOES NOT VIOLATE FEDERAL AND FLORIDA CONSTITUTIONAL GUARANTEES REGARDING DUE PROCESS OF LAW.

Discretionary Review

There is no reason this Court should treat the district courts as mere intermediate courts whose decisions are subject to review by this court any time there is discretionary jurisdiction.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

In the routine exercise of appellate review, the district court below upheld the constitutionality of a sentencing statute against boilerplate claims. The decision below thoroughly examines the issue and nothing in it is exceptional or objectionable. Moreover, the statute at issue is a standard sentencing statute which is in effect statewide and will be subject to review by all

five district courts. Should any one of those courts declare it invalid, there will be direct and express conflict and mandatory review pursuant to article V, section 3(b)(1) of the Florida Constitution.

Naturally, every new criminal statute will be challenged as unconstitutional when enacted. However, that should not entitle defendants to automatic review in the Florida Supreme Court, especially when the argument is so weak. See Peterson v. State, 775 So. 2d 376 (Fla. 4th DCA 2001)(the defendant's arguments do not present a close question regarding the statute's constitutionality). Accordingly, this Court should decline to exercise discretionary jurisdiction.

The state adds that if this Court does choose to exercise discretionary jurisdiction on whether the Criminal Punishment Code is unconstitutional, that there will be thousands of other discretionary review cases to follow. Accordingly, if discretionary review is exercised, this Court should immediately issue a reported opinion directing all district courts to conduct routine appellate review of all other such challenges but to stay their mandates and extend the time in which rehearing may be sought until this Court issues its decision here. See,Jollie v. State, 405 So.2d 418 (Fla. 1981)(District court decisions grounded on cases which are under review in the Florida Supreme Court should be stayed in the district court pending resolution in the Florida Supreme Court.)

Appealability

This issue is not appealable. Appellant was sentenced within the guideline range. Sentences within the range are not appealable.

Standing

Appellant has no standing to challenge the constitutionality of the Criminal Punishment Code. The amendments that are embodied in the Code did not affect appellant's right to appeal. The changes in the Code did not affect appellant adversely. Appellant had no right to appeal the refusal of the trial court to depart under the prior version of the statute. Moreover, prior to the guidelines, the length of the sentence was not appealable at all. In sum, appellant had never had the right to appeal this type of issue. Thus, the Code did not affect his right to appeal. He never had such a right. *Cf.* Smith v. State, 25 FLA. L. WEEKLY D1273 (Fla. 2d DCA May 24, 2000)(recognizing that Heggs v. State, 25 FLA. L. WEEKLY S359 (Fla. May 4, 2000) does not require resentencing unless a defendant's sentence under the 1995 guidelines constitutes a departure sentence under the 1994 guidelines). Thus, appellant has no standing.

The standard of review

The constitutionality of a statute is reviewed *de novo*. Dept. of Ins. v. Keys Title and Abstract Co., Inc., 741 So.2d 599 (Fla. 1st DCA 1999)(explaining that the constitutionality of a statute is reviewed de novo). Under the de novo standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own determination of the

legal issue with no deference to the legal determinations of the Court below.

The presumption of constitutionality

Legislative acts are strongly presumed constitutional. State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981). Courts should resolve every reasonable doubt in favor of the constitutionality of a statute. Florida League of Cities, Inc. v. Administration Com'n, 586 So.2d 397, 412 (Fla. 1st DCA 1991). An act should not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Todd v. State, 643 So.2d 625, 627 (Fla. 1st DCA 1994). Indeed, even when a trial court has declared a statute unconstitutional, the appellate court must presume that the trial court is incorrect. Dept. of Ins. v. Keys Title and Abstract Co., Inc., 741 So.2d 599 (Fla. 1st DCA 1999).

FLORIDA CASES

Two district courts, the Fourth District and First District, have addressed this issue and both have held that the Criminal Punishment Code is constitutional. In Hall v. State, 767 So.2d 560 (Fla. 4th DCA 2000), the Fourth District held that the Criminal Punishment Code was constitutional. The defendant asserted that the Code violated due process because the State has the right to appeal a downward departure without providing a corresponding right to the defendant. The Fourth District observed that a defendant can appeal an illegal sentence. Hall also claimed that the Code fails to promote uniformity in sentencing; invites discriminatory and arbitrary application; it does not discriminate between career

and first-time felons and is arbitrary, capricious, irrational, and discriminatory.

The Fourth District explained that because sentencing guidelines are not constitutional rights, they are not subject to Due Process challenges. The Hall Court cited two federal circuit cases as support, United States v. Brierton, 165 F.3d 1133, 1139 (7th Cir.1999)(stating that because there is no constitutional right to sentencing pursuant to the Guidelines, the discretionary limitations the Guidelines place on the sentencing judge do not violate a defendant's right to due process by reason of vagueness) and United States v. Wivell, 893 F.2d 156 (8th Cir. 1990)(stating that because there is no constitutional right to sentencing guidelines, the limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague). In Peterson v. State, 25 Fla. L. Weekly D2711 (Fla. 4th DCA Nov. 22, 2000), the Fourth District again concluded that the Criminal Punishment Code did not violate due process.

In Hall v. State, 2000 WL 1724976, 1D99-1272 (November 21, 2000), the First District found that the Criminal Punishment Code does not violate due process, does not constitute cruel and unusual punishment and does not unconstitutionally limit a defendant's right to appeal. Hall asserted the Code violated due process because it promotes disparity in sentencing and invites discriminatory and arbitrary application because it does not distinguish between career and first time felons. Hall also

asserted that the Code violated the prohibition against cruel and unusual punishment because it permits the imposition of consecutive sentences and that his consecutive sentences were disproportionate. The First District panel noted that, historically, sentences were not appealable. The Court relied on the Fourth District decision's in Hall, *supra*. The First District explained the sentencing scheme in the Code as permitting the trial court to sentence from the lowest permissible sentence up to the statutory maximum without written explanation. The Hall Court observed that a defendant may appeal a sentence that exceeds the statutory maximum.

DUE PROCESS

Appellant claims that the Code allows increased disparity in sentencing. However, appellant is attacking the wisdom of the legislation, not presenting a due process constitutional challenge. Florida's substantive due process analysis is limited to the reasonable relation test. This test does not turn on whether a Court agrees or disagrees with the legislation at issue. Courts do not impose on a duly-elected legislative body their own views regarding the wisdom of the legislation. See State v. Ashley, 701 So.2d 338, 343 (Fla. 1997)(stating: "the making of social policy is a matter within the purview of the legislature not this Court"); Brown v. State, 672 So.2d 861 (Fla. 3d DCA 1996)(stating that it is the "Courts' duty is to give effect to legislative enactment despite any personal opinions as to their wisdom or efficacy").

Instead, the reasonable relation test merely requires that the legislation be rationally related to a legitimate governmental

objective or purpose. See D.P. v. State, 705 So.2d 593 (Fla. 3d DCA 1997)(holding that a city ordinance prohibiting minors from possessing jumbo markers or spray paint did not violate federal or state constitutional due process clauses).

The Code may, indeed, increase disparity in sentencing. But due process - procedural or substantive - does not require strict uniformity in sentencing. If the due process clause did require uniformity in sentencing, only determinate or minimum mandatory sentencing schemes would be constitutional. Prior to the guidelines, disparity in sentencing did not render an otherwise legal sentence illegal. Dennis v. State, 549 So.2d 228 (Fla. 3d DCA 1989).

Furthermore, uniformity is not the only desirable goal in a sentencing scheme. There are other the desirable goals in sentencing such as the protection of society from violent offenders by increasing the length of sentences. State v. Peterson, 667 So.2d 199 (Fla. 1996)(explaining that the Sentencing Guidelines take away much of trial court's discretion in order to establish consistency in sentencing, in sharp contrast to habitual offender statute which gives trial court broad latitude to sentence defendants to extended prison terms in effort to protect society from recidivists). The Punishment Code is the legislature's latest attempt to balance these various goals. Judge Robert N. Scola, Jr. & H. Scott Fingerhut, *Tough Times in the Sunshine State*, FLA. BAR J. (November 1999)(explaining that the Florida Legislature enacted several new sentencing measures, including the Punishment Code, based on

statistics showing Florida's high rate of recidivism and violent gun crimes but low rate of incarceration).

Appellant's reliance on State v. Saiez, 489 So.2d 1125 (Fla. 1986), is misplaced. In Saiez, the Florida Supreme Court struck down a statute which imposed a criminal penalty for the possession of credit card embossing machines, regardless of whether the machines were being used legitimately. The Court explained that "due process requires that the means selected shall have a reasonable and substantial relation to the object sought to be attained" and concluded that "without evidence of criminal behavior, the prohibition of this conduct lacks any rational relation to the legislative purpose and criminalizes activity that is otherwise inherently innocent." Saiez and its antecedents, such as Robinson v. State, 393 So.2d 1076, 1077 (Fla. 1980)(invalidating statute prohibiting wearing of mask or hood because "this law is susceptible of application to entirely innocent activities ... so as to create prohibitions that completely lack any rational basis") and Foster v. State, 286 So.2d 549, 551 (Fla. 1973)(prohibiting punishment of possession of a simple screwdriver as being a burglary tool, without any showing of criminal intent), are criminalizing innocent conduct cases. At issue here is a sentencing scheme. The Code does not criminalize any conduct; it punishes for conduct that another statute criminalizes. Such cases are clearly inapposite to the Code.

Appellant also claims the Code is unconstitutional because it does not discriminate between first time offenders and career

felons. There is no due process requirement for such a distinction in sentencing. However, the Code does in fact consider prior records of defendants. As the legislature explained in ch. 97-194, § 3 and in § 921.002, one of the guiding principles of the Code is that "the severity of the sentence increases with the length and nature of the offender's prior record." If one scrutinizes the Criminal Punishment Code and pursuant scoresheet, it becomes quite apparent that the Code assesses additional points for prior criminal record. § 921.0024, Fla. Stat. (Supp. 1998); Fla. R. Crim. P. 3.704; Fla. R. Crim. P. 3.992. In addition, a sentencing judge retains the discretion to downwardly depart from the minimum sentence scored under the Code based on circumstances or factors which justify the mitigation of the sentence. § 921.002, Fla. Stat. (Supp. 1998); § 921.0026, Fla. Stat. (Supp. 1998). Thus, contrary to Appellant's argument, the Code does distinguish between career felons and first time felons and it also allows the judge the flexibility of taking the circumstances of the case into account.

APPELLATE REVIEW OF SENTENCES

Prior to the sentencing guidelines, the length of a legal sentence was not appealable at all. See Booker v. State, 514 So.2d 1079 (Fla. 1987)(discussing that the rule in Florida historically has been that a reviewing court is powerless to interfere with the length of a sentence imposed by the trial court so long as the sentence is within the limits allowed by the relevant statute); Davis v. State, 123 So.2d 703, 707 (Fla. 1960)(explaining that

where a sentence is within the statutory limit, the extent of it cannot be reviewed on appeal regardless of the existence or nonexistence of mitigating circumstances); Stanford v. State, 110 So.2d 1 (Fla. 1959)(stating that while the length of the sentences imposed in these cases on these young men sounds harsh when viewed in the cold light of this record, but such sentences are less than the maximum fixed by law and this Court has no power to reduce or modify them); Walker v. State, 44 So.2d 814 (Fla. 1950)(reaffirming the principle that if a trial judge imposes a sentence that is within the limits defined in the statute denouncing the offense, further relief by way of reducing the term is a matter purely within the province of the parole authorities); Brown v. State, 152 Fla. 853, 13 So.2d 458 (Fla. 1943)(explaining that if a sentence appears to be excessive, that is a matter which should be presented to the State Board of Pardons; it is not a matter for review and remedy by the appellate court).

This was also true in the federal system. See Scott v. United States, 997 F.2d 340, 342 (7th Cir. 1993)(noting that prior to the Guidelines, federal district judges had all but total control over sentencing; "they could slap the defendant on the wrist or impose the statutory maximum sentence, with no obligation to conform to any particular theory of punishment or even to explain why they acted as they did."); United States v. Dorszynski, 418 U.S. 424, 441, 94 S.Ct. 3042, 3051, 41 L.Ed.2d 855 (1974)(stating that if there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a

sentence which is within the limits allowed by a statute); Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958)(noting that while the English and the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them.... This Court has no such power).

Appellant's argument improperly seeks to create a bill of rights from the Florida Sentencing guidelines. However, there is no right to a particular type of sentencing statute.

In Booker v. State, 514 So.2d 1079 (Fla. 1987), the Florida Supreme Court held the amendment to the guidelines that prohibited appellate review of the extent of a departure that did not violate separation of powers. This Court explained that there "is no inherent judicial power of appellate review over sentencing". This Court noted that both it and the United States Supreme Court have embraced the notion that so long as the sentence imposed is within the maximum limit set by the legislature, an appellate court is without power to review the sentence. In effect, this rule recognizes that setting forth the range within which a defendant may be sentenced is a matter of substantive law, properly within the legislative domain.

The Booker Court explained that appellate review of the extent of departure under an abuse of discretion standard furthered the purpose of the guidelines, i.e., uniformity in sentencing, and that the legislature, by eliminating appellate review on the extent of departure has, in fact, undermined the purpose of the

guidelines. But this "observation, however, goes to the wisdom of the amendment and not to its constitutionality." Booker, 514 So.2d at 1082.

It is not accurate to say that the Code abolished appellate review of upward departures. In fact, the Code abolished the entire concept of "upward" departures. In effect, what the legislature did was to greatly expand the permissible range. The range now includes anything up to the statutory maximum (and in some case the range now includes sentences beyond the statutory maximum). Sentences within the range were never cognizable on appeal. Melton v. State, 678 So.2d 434 (Fla. 1st DCA 1996)(holding that a sentence within applicable Sentencing Guidelines range was not a proper basis for appeal); Reaves v. State, 655 So.2d 1189 (Fla. 3d DCA 1995)(holding that a sentence, which was within guidelines range, was not appealable). See also Hale v. State, 630 So. 2d 521, 526 (Fla. 1993)(the length of sentence imposed is a matter of legislative prerogative).

In conclusion, the fact that the legislature has made a shift in penological style or approach does not implicate any protected rights. Therefore, this Court should uphold the Code and affirm Appellant's conviction and sentence. See Peterson v. State, 775 So. 2d 376 (Fla. 4th DCA 2001); Hall v. State, 767 So. 2d 560, 561-62 (Fla. 4th DCA 2000) and Hall v. State, 773 So. 2d 99 (Fla. 1st DCA 2000). See also United States v. Wivell, 893 F. 2d 156, 160 (8th Cir. 1989) (There is no constitutional right to sentencing guidelines and "a defendant's due process rights are unimpaired by

the complete absence of sentencing guidelines."); United States v. Brierton, 165 F. 3d 1133 (7th Cir. 1999)(no constitutional right to sentencing guidelines, citing Lockett v. Ohio, 438 U.S. 586, 603 (1978) and State v. Wagner, 194 Ariz. 310, 982 P.2d 270, 273 (Ariz. 1999)(no constitutional right to be sentenced under guidelines).

CONCLUSION

Based on the preceding argument and authorities, this Court should decline to accept jurisdiction. Alternatively, this Court should affirm.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been sent by courier to: Tanja Ostapoff, Criminal Justice Building\6th Floor, 421 Third Street, W. Palm Beach, FL 33401, this ___ of February, 2001.

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Of Counsel

CERTIFICATE OF FONT

I certify that this brief was prepared with 12 point Courier New type.

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Of Counsel