IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES LEE HALL,

Petitioner,

vs. CASE NO. SC00-2358

STATE OF FLORIDA,

Respondent.

_____ /

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Firth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent, the State of Florida, was the appellee and the prosecution in the lower courts, respectively. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record proper, bound at the top and contained at the beginning of the one-volume record on appeal

"T" Transcript of proceedings in the lower tribunal, bound at the side and contained at the end of the one-volume record on appeal

"SR" Supplemental record, consisting of transcript of hearing on Appellant's change of plea

CERTIFICATION OF TYPE SIZE AND STYLE

In accordance with this Court's Administrative Order of July 13, 1998, Respondent hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Petitioner was informed against in separate informations for burglary of a conveyance (Circuit Court Case No. 99-611, R 1) and using false identification to receive more than $300 from a pawnbroker (Count I), burglary of a dwelling and causing more than $1000 property damage (Count II), grand theft of jewelry (Count III), trafficking in stolen property (Count IV), possession of cocaine (Count V) and possession of drug paraphernalia (Count VI) (Case No. 99-762, R 2-3, 4-5).

Petitioner entered pleas of nolo contendere to all the charges against him, including burglary of a dwelling (Count II),[1] grand theft (Count III), and trafficking in stolen property (Count IV) "in his best interest." There were no negotiated agreements with the State: the plea was "open" to the court (R 6-11, SR 3). The trial court accepted Petitioner's pleas as voluntarily and intelligently made (SR 7), after finding that there was a factual basis for them (SR 3-4) and determining that Petitioner understood the rights he was giving up by entering them, as reflected in the written plea form (SR 5-6).

On October 15, 1999, Petitioner was adjudged guilty of each offense to which

[1]The State apparently abandoned its prosecution of burglary of a dwelling with more than $1000 damage, as it accepted defense counsel's statement of the charge as burglary of a dwelling (SR 2) and included no allegation regarding property damage in its factual basis for this offense (SR 3-4).

he had pled nolo contendere (R 23-24, 29-30) and sentenced to serve concurrent terms of five years imprisonment in Case No. 99-611CF (R 25-27) and Counts I, II, III, IV, and V in Case No. 99-762CF (R 31-32, 33-34, 35-36, 37-38, 39-40). On Counts II and IV in that case, Petitioner was further placed on concurrent three year terms of probation to follow the prison sentences (R33-34, 37-38, 45-51). A concurrent one-year prison term was imposed on Count VI (R 41-43). Credit was given on each sentence for 224 days time served.

The State and defense agreed that a sentencing guidelines scoresheet reflecting a total of 73 points and a minimum permitted sentence of 33.7 months in prison (R 18-22) would be utilized (T 3). The offenses for which Petitioner was convicted were alleged to have been committed on February 20, 1999, after the effective date of the Florida Criminal Punishment Code.

Petitioner noticed his pro se appeal from the sentence of the court on October 26, 1999 (R 52-53).

SUMMARY OF THE ARGUMENT

1. Section 812.025 prohibits conviction for both theft and dealing in the same stolen property. The fact that Petitioner entered pleas to the offenses does not excuse the trial court from compliance with this statute. Petitioner's conviction for grand theft must be vacated.

2. The Criminal Punishment Code, which provides for a minimum permissible sentence based on a sentencing guidelines scoresheet but authorizes the trial court to impose any sentence between that minimum and the maximum statutory sentence for the offense, violates the due process clause of the United States and Florida Constitutions. It permits arbitrary sentencing decisions by the trial courts. The Code's denial of the defendant's right to appeal a departure from the sentencing guidelines recommendation while authorizing the State's appeal from any downward departure from the minimum permissible sentence creates an unbalanced sentencing scheme which is fundamentally unfair.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADJUDGING PETITIONER GUILTY OF BOTH GRAND THEFT AND DEALING IN THE SAME STOLEN PROPERTY.

Petitioner was charged in a single information with both grand theft (Count III) and dealing in stolen property (Count III) on the same day (R 4-5). Moreover, in its statement of the factual basis for these charges, the State agreed that

> In the case of 99-762-CF, the State would show that on [February 20, 1999], Mr. Hall gave false verification of ownership to a pawn broker for – for goods that – that did not belong to him, that being, that being jewelry.
>
> On Count II, the same day, uh, burglary of a dwelling, uh, Mr. Hall entered the dwelling of Joe and Cindy McNeil [sic] with the intent to commit an offense therein.
>
> With regard to Count III on that same day the offense with the, uh, dwelling was the – was the, uh, theft of jewelry that had a value in excess of three hundred dollars, but less then [sic] five, uh, a thousand dollars.
>
> In Count IV on that same day, upon arrest, Mr. Hall trafficked in stolen property and placed *that jewelry* into the stream of commerce that I mentioned earlier belonging to the *McNeils* [sic].

(SR 3-4, emphasis added). Thus, Petitioner was charged with and convicted of dealing in stolen property and stealing the *same* property during the *same* "scheme or

course of conduct."

But Section 812.025, Florida Statutes (1997), expressly prohibits such a result:

> 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, of the counts.

This prohibition dates from the enactment of the Omnibus Theft Statute, which substantially broadened the definition of theft and significantly stiffened the penalty for dealing in stolen property. As a result:

> It is clear that the legislature recognized that it had expanded the definition of theft. Section 812.025, *Florida Statutes* (1997), provides that convictions for theft and dealing in stolen property are in the alternative; the statute prohibits convictions for both offenses, when they relate to the same stolen property and the same defendant.

Jackson v. State, 736 So. 2d 77, 83 (Fla. 4th DCA 1999). In accordance with this statutory mandate, the courts of this State have not hesitated to vacate convictions for grand theft where the defendant was also convicted of dealing in stolen property. *E.g.*, Barnlund v. State, 724 So. 2d 632 (Fla. 5th DCA 1998); Parnell v. State, 661 So. 2d 128 (Fla. 1st DCA 1995); T.S.R. v. State, 596 So. 2d 766 (Fla. 5th DCA 1992); Stallworth v. State, 538 So. 2d 1296 (Fla. 1st DCA 1989) [dual convictions prohibited

even where property was stolen in one county and sold in another]; Hudson v. State, 408 So. 2d 224 (Fla. 4thDCA 1981); G.M. v. State, 410 So. 2d 659 (Fla. 3d DCA 1982).

Nor does the fact that Petitioner's convictions were the result of pleas to the charges against him alter the result. It has been held that, considering the prohibitory language of the statute, the bar against convictions for both theft and dealing in stolen property could be raised even though there had been no objection at trial to jury instructions which failed to advise that only one verdict could be returned as to the two charges. To hold otherwise "would be analogous to allowing Petitioner to be convicted of a nonexistent crime." Rhames v. State, 473 So. 2d 724, 727 (Fla. 1st DCA 1985). Likewise, in Rife v. State, 446 So. 2d 1157 (Fla. 2d DCA 1984), the appellate court considered the propriety of dual convictions following the defendant's entry of pleas to theft and dealing in stolen property where the factual basis recited by the prosecutor at the change of plea hearing simply tracked the allegations in the information. The Second District Court of Appeal held that

> Without something more to meaningfully disrupt the flow by a clearly disjunctive interval or set of circumstances, defendant's conviction of and sentence for grand theft must be set aside.

446 So. 2d at 1158. *See also* Victory v. State, 422 So. 2d 67 (Fla. 2d DCA 1982),

where the defendant was convicted of grand theft in Pasco County and charged with dealing with the same stolen property in Manatee County. His motion to dismiss the Manatee County charge having been denied, he pled nolo contendere, reserving the right to appeal. The appellate court agreed that his conviction for the Manatee County dealing in stolen property charge had to be vacated. *Cf.* Cleaves v. State, 450 So. 2d 511 (Fla. 2d DCA 1984), where the defendant sought, after the revocation of his probation, to raise a challenge to his original convictions for both theft and dealing in stolen property on an information which alleged that the offenses occurred on different days. In rejecting his claim on the merits, the appellate court distinguished Victory

> since there was evidence that one scheme or course of conduct, as prohibited by section 812.025, was involved. Here we have nothing in the record before us to disclose any facts as to the underlying crimes, except that the same property was involved on dates inclose proximity with each other. 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. An appeal from an order revoking probation may only review proceedings subsequent to the order of probation. [Citations omitted.]

Cleaves v. State, 450 So. 2d 512. No such impediment to reversal exists in the present case, where the factual basis recited by the prosecutor at the time that Petitioner's

pleas were entered made it clear that the theft and dealing in stolen property involved the same property and were part of the same "scheme or course of conduct."

Nevertheless, the Fourth District Court of Appeal refused to grant relief in the instant case, relying on the reasoning stated in Brown v. State, 464 So. 2d 193, 195 (Fla. 1st DCA 1985), *approved on other grounds*, 487 So. 2d 1073 (Fla. 1986). In Brown, the appellate court stated that

> section 812.025 is inapplicable in situations where, as in the present case, the defendant pleads nolo contendere to both offenses pursuant to a plea bargaining arrangement. By its own terms, the statute is limited to cases involving a jury verdict as to one or both of the offenses. Because there is no double jeopardy prohibition against defendant being convicted and sentenced for both offenses [citation omitted], we affirm on [this issue].

This rationale, however, ignores the trial court's role as arbiter of the voluntariness of a defendant's plea, in particular, its duty to determine that there is a factual basis for the plea. R. Crim. P. 3.172(a) requires that

> Before accepting a plea of guilty or nolo contendere, the trial judge shall be satisfied that the plea is voluntarily entered and *that there is a factual basis for it.* Counsel for the prosecution and the defense shall assist the trial judge in this function.

This is consistent with the procedure mandated in Boykin v. Alabama, 395 U.S.238 (1969). Where the factual basis set forth by the State is inadequate, the plea is open

to challenge where the defendant suffers prejudice or manifest injustice. Kight v. State, 377 So. 2d 37 (Fla. 1st DCA 1979). Thus, in Meredith v. State, 508 So. 2d 473 (Fla. 4th DCA 1987), the defendant was permitted to withdraw guilty plea to first degree murder where there was no factual basis for plea. Manifest injustice demonstrated where the record before the trial court reflected lack of premeditation. Where the defendant raises the possibility of a defense during the plea colloquy, the potential prejudice is considered apparent, and further inquiry is necessary. Absent such inquiry, the defendant's conviction predicated on the plea may be reversed. Williams v. State, 534 So. 2d 929 (Fla. 4th DCA 1988). A trial court errs in accepting a plea where the factual basis given by the State indicates that the defendant did not commit the offense. Dydek v. State, 400 So. 2d 1255 (Fla. 2d DCA 1981); Waugh v. State, 388 So. 2d 253 (Fla. 2d DCA 1980). In essence then, even in the context of a plea, the trial court is required to act as a trier of the undisputed facts to ensure that the defendant does not unknowingly enter a plea to charges for which the State could not, by its own admission, obtain a conviction at trial.

In the present case, the factual basis established, as a matter of law, that the theft and dealing in stolen property to which Petitioner was offering his pleas both involved the same property, thereby triggering the proscription of Section 812.025: Petitioner could not have been convicted of both offenses at trial. No facts were in

dispute, and the undisputed facts before the court thus demonstrated that Petitioner was, in fact, pleading to "a nonexistent crime." Rhames v. State, 473 So. 2d 724, 727. Under these circumstances, the trial court was obligated to reject Petitioner's plea to the grand theft charge, absent Petitioner's affirmation *on the record* that he understood that he could not legally be convicted of both offenses and that his waiver of this protection was voluntary and knowingly made. Hoover v. State, 530 So. 2d 308 (Fla. 1988), which permits the acceptance of a plea to a *lesser included offense* even where that offense was not actually committed by the defendant, does not authorize a different result in this case, where Petitioner was improperly being required to plead to *two* separate crimes.

Consequently, the trial court erred in entering judgment of conviction for both offenses. The proper remedy is to remand this cause with directions to vacate the conviction for grand theft. Daniels v. State, 422 So. 2d 1024 (Fla. 1st DCA 1982).

POINT II

THE CRIMINAL PUNISHMENT CODE VIOLATES THE FEDERAL AND FLORIDA CONSTITUTIONAL GUARANTEES REGARDING DUE PROCESS OF LAW.

The trial court sentenced Petitioner pursuant to the Criminal Punishment Code. Although Petitioner's sentencing guidelines scoresheet suggested a sentence of only 33.7 months in prison, the trial court imposed concurrent prison terms of five years in prison for each offense of which Petitioner was convicted, adding a three year probationary term to the dispositions of the two second degree felonies. Because the Criminal Punishment Code supporting these sentences violates due process of law and proportionality, this Court should vacate Petitioner's sentence and remand for resentencing pursuant to the sentencing guidelines.

This Court in State v. Saiez, 489 So. 2d 1125, 1128 (Fla. 1986), set forth the following test to determine whether a statute violates due process:

> [T]he guarantee of due process requires that the means selected shall have a reasonable and substantial relation to the object sought to be obtained and shall not be unreasonable, arbitrary, or capricious.

See, Lasky v. State Farm Insurance Company, 296 So. 2d 9, 15 (Fla. 1974) (holding that the test is "whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive"). The Criminal

Punishment Code, located at sections 921.002-921.0026, *Florida Statutes* (1999), is unreasonable, arbitrary and capricious and violates state and federal guarantees of due process in several respects.

A brief history of the development of the Florida sentencing guidelines will show why the newly fashioned Criminal Punishment Code must be stricken as unconstitutional. In 1977, Ben Overton, then-Chief Justice of the Florida Supreme Court, appointed a Judicial Planning Committee to consider the issue of sentencing disparity in Florida's courts. Chet Kaufman, "A Folly of Criminal Justice Policy-Making: the Rise and Demise of Early Release In Florida, And its Ex Post Facto Implications," 26 Fla. St. U. L. Rev. 361, 373 (1999) [hereinafter Kaufman].

Soon after, in 1978, Justice Overton created the Sentencing Study Committee, largely comprised of judges, to explore sentencing alternatives because of the public's concerns about sentencing disparities and inequities. Kaufman at 374; Alan C. Sundberg, Kenneth J. Plante, Kenneth Palmer, "A Proposal for Sentence Reform in Florida," 8 Fla. St. U. L. Rev. 1, 1-2 (1980) [hereinafter Sundberg]. Alan Sundberg, former Florida Supreme Court Justice, stated the Committee's goal as follows:

> [T]he Committee's fundamental goal has been to devise a system in which individuals of similar backgrounds would receive roughly equivalent sentences when they commit similar crimes, regardless of the differing penal philosophies of legislators, correctional authorities, parole

authorities, or judges.

Sundberg, *supra*, at 3.

The Sentencing Study Committee recommended implementation of the sentencing guidelines, finding that "there is unjustified disparity created and imposed by judges". Kaufman, *supra*, at 374, *citing*, Sentencing Study Committee, Interim Report of the Sentencing Study Committee to the Florida Supreme Court 1 (undated) (on file with Fla. Sup. Ct., Collected Papers of Justice Alan C. Sundberg, ser. 5 carton 3, file 131).

The sentencing guidelines concept, as articulated by Sundberg, is based on federal parole guidelines which were themselves established to "achieve equity in parole decisions." Sundberg, *supra*, at 8. Other principals adopted from the federal guidelines include the requirement of written reasons for departure and review of departures. *Id*. at 11-12. Thus, Florida's sentencing guidelines would "articulate sound sentencing policy, devoid of the influence of extra-legal considerations or the biases of individual judges." *Id*. at 13. The Florida Legislature subsequently implemented the Florida sentencing guidelines statewide.

The legislative intent behind the guidelines reflects the Committee's recommendations and is embodies at Chapter 82-145, Laws of Florida, which provides in pertinent part:

WHEREAS, disparity in sentencing practices exists in Florida because of the sentencing discretion our current system gives to our trial judges, leading some judges to give longer or shorter sentences than others for the same crime committed indifferent localities, and

WHEREAS, the Legislature has previously acknowledged its concern over the disparity in sentencing practices between the various judicial circuits in Florida be enacting chapter 79-362, Laws of Florida, and

WHEREAS, the Legislature by it previous act has acknowledged and approved of the continuing work of the Sentencing Study Committee of the Florida Supreme Court, which was charged with identifying the extent and causes of sentence disparity, to explore the range of sentencing reform alternatives available, and to reduce unreasonable and unjustifiable sentence variation, and

WHEREAS, the Sentencing Study Committee's first step in the development of the sentencing guidelines pilot project was to gather the empirical data necessary to describe the implicit sentencing policy operating within each of the four judicial circuits where the study was to be carried out, and

WHEREAS, reports from the four judicial circuits where the test was conducted indicate that a system of sentencing guidelines is a viable solution to the problem of ending sentence disparity and will likely lead to more certainty and fairness in the sentencing process, and

WHEREAS, the Legislature believes that it is in the public interest for a system of sentencing guidelines to be developed and implemented on a statewide basis within the sentencing parameters established by the Florida Statutes and in furtherance of this goal it is necessary for the

> Legislature and the courts to join together in a cooperative sentencing reform effort aimed at assuring certainty of punishment for the guilty and equality of justice for all, NOW, THEREFORE [the Legislature enacts the sentencing guidelines].

See Chapter 79-362, Laws of Florida (where the Legislature states that it "acknowledges and shares the widespread public concern about disparity in sentencing" and authorizes Supreme Court to direct pilot project to develop and implement sentencing guidelines). *See also* Section 921.001(4), Florida Statutes (1997):

> The purpose of the sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision making process. The guidelines represent a synthesis of current sentencing theory, historical sentencing practices, and a rational approach to managing correctional resources. The sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining the relative importance of those criteria in the sentencing decision.

Thus, in accordance with the Legislative intent behind the sentencing guidelines, it has been held that the purpose of the sentencing guidelines is to eliminate unwarranted variation in sentencing. Jones v. State, 718 So. 2d 1271, 1274 (Fla. 1st DCA 1998); Capers v. State, 670 So. 2d 967, 971 n.7 (Fla. 1st DCA 1995),

affirmed, 678 So. 2d 330 (Fla. 1996).

In consequence, the Florida sentencing guidelines were designed to reduce unwanted variation and disparity found in the prior system of indeterminate sentencing. In fact, without the sentencing standards afforded by the guidelines, "it is virtually impossible for consistent scales of punishment to emerge." Sundberg, *supra*, at 16, *citing*, Tyler, "Sentencing Guidelines: Control of Discretion in Federal Sentencing", 7 Hofstra L. Rev. 11, 19 (1978). Florida's guidelines apparently have worked to reduce disparities between jurisdictions and to reduce disparities based on race. *See*, Roger Handberg & N. Gary Holten, Florida's Sentencing Guidelines: Surviving –But Just Barely, 73 Judicature 259 at 267.

The new Florida Criminal Punishment Code, Section 921.002-921.0027, Florida Statutes (1999) (R. Crim. P. 3.704) (herein after the "CPC") dispenses with the principle of uniform sentencing without justification or explanation. The CPC merely asserts that sentencing is a matter of substantive law properly addressed by the Legislature. Section 921.002(1) provides:

> The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority and responsibility to establish sentencing criteria, to provide for the imposition of criminal penalties, and to make the best use of state prisons so that

> violent criminal offenders are appropriately incarcerated, has determined that it is in the best interest of the state to develop, implement, and revise a sentencing policy.

The Legislature thereupon enacted a sentencing scheme which imposes in every case a minimum permissible sentence, below which the trial court may not go without stating written reasons for its departure decision, while setting as the ceiling for sentence severity the statutory maximum term, Section 921.002(1)(g), Florida Statutes (1999) – unless, of course, the sentencing guidelines score suggests a higher sentence, in which case it is the higher, sentencing guidelines term which controls, not the statutory maximum. In effect, then, the Criminal Punishment Code sets no fixed maximum sentencing ceiling at all, while at the same time it limits judicial discretion at the *bottom* only by providing for the determination of a lowest permissible sentence, deviation from which requires the court to justify in writing. Moreover, while the State may appeal from *any* downward departure sentence, the defendant is specifically precluded from appealing from a decision by the trial court to depart from the lowest permissible sentence.

The Legislature enacted the CPC without the same testing and consideration which took place prior to implementation of the Florida sentencing guidelines. *See*, Sundberg, *supra*, at 7:

> Changes must be approached cautiously over a minimum

> period of two to three years. This period of time is necessary because of the complexity of the sentencing problem and the need to gather and analyze base line data regarding the adequacy of the current sentencing structure.

Despite the success of the sentencing guidelines in reducing unwarranted sentencing disparity, particularly as it relates to minority defendants, the Criminal Punishment Code will dispense with sentencing uniformity, and, therefore, violates an accused's right to equal protection and due process of law as guaranteed by the 14th Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution.

Professors Robert Batey and Stephen M. Everhart recently articulated significant concerns about this new, hybrid sentencing scheme represented by the Criminal Punishment Code in their article, "The Appeal Provision of Florida's Criminal Punishment Code: Unwise and Unconstitutional" U of Fla. Journal of Law and Public Policy, Fall, 1999, vol. II, page18 *et seq.* (hereinafter "Batey and Everhart").

First, the CPC invites discriminatory and arbitrary application by the trial court because it gives full discretion to judges to impose the statutory maximum for each offense and also allows the court to impose the sentence consecutively**.** Batey and Everhart at 18. The CPC allows judges to impose the statutory maximum for each

offense before that court. Section 921.002(1)(g). The CPC further permits courts to impose *consecutive* sentences, regardless of the circumstances of the alleged crimes. Section 921.0024(2). Therefore, sentencing judges have unfettered discretion to impose the *maximum* sentence for each offense before the court and then to order that the sentences run consecutively; regardless of the circumstances of the offenses, the criminal history – or lack thereof – of the defendant, and any mitigating circumstances. See Batey and Everhart at 18-19. In addition, the CPC does not discriminate between career felons and first-time felons and will therefore necessarily entail arbitrary application by the sentencing courts.

Florida's courts traditionally have not permitted the types of excessive sentences which the Criminal Punishment Code now grants to all sentencing judges to routinely impose at his or her whim. For instance, Florida's courts have deemed that trial courts may not enhance sentences pursuant to the habitual offender statute and then increase the total penalty by ordering that the sentences run consecutively. *See e.g.*, Hale v. State, 630 So. 2d 521, 525 (Fla. 1993), *cert. denied*, 513 U.S. 909 (1993); Taylor v. State, 658 So. 2d 635 (Fla. 2d DCA 1995). There is no rational basis for the unfettered judicial discretion permitted under the CPC. Thus, the CPC violates due process of law as guaranteed by the14th Amendment and the Florida Constitution.

Second, the CPC disparately creates a right to appeal for the State, while denying that right for the defendant. All Florida criminal defendants have a constitutional right to appeal their criminal convictions. See Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla.1996); *See* Bain v. State,730 So. 2d 236(Fla. 2d DCA 1999); *See also* Batey and Everhart at 24-26. But the CPC expressly grants *only the state* the right to appeal a downward departure from the presumptive sentence, while expressly *denying a defendant* the right to appeal any sentence that is within the statutory maximum. Section 921.002(1)(h); Section 924.07(i).

Petitioner has argued in his appeal that this provision of the CPC violates Petitioner's double jeopardy rights and rights to equal protection of law as guaranteed by the Fourteenth Amendment. Batey and Everhart, at 26, cogently explain:

> The C.P.C. creates a guidelines scheme establishing a presumptively correct sentence, allows the state to appeal downward departures from this presumptively correct sentence, but disallows defense appeals of upward departures. It is difficult to imagine a less "reasonable " scheme or any clearer effort to" thwart" the "legitimate appellate rights" of criminal defendants. The C.P.C.'s modification of the state's sentencing guidelines is unreasonable because it is an unprecedented skewing of appellate rights. . . . . Even more importantly, Florida's scheme thwarts the legitimate expectation of litigants by constructing an enforceable guidelines system, and then tantalizing defendants by giving the state the right to that

> system *but depriving defendants of the same right. The Florida courts should exercise their responsibility to vindicate federal and state constitutional rights, as well as their jurisdiction over appellate practice and procedure, by disproving the appeal provision of Florida's C.PC.*

(Emphasis supplied.) This sentencing scheme that gives just one side the right to appeal denies the right to a level playing field and violates fundamental fairness and equal protection of the law.

The scheme adopted by the Florida Legislature is analogous to Oregon's one-sided discovery format, which was condemned by the United States Supreme Court in Wardius v. Oregon, 412 U.S. 470, 479 (1973). Thus, when Oregon tried to force defendants to provide notices of alibi without in turn permitting them any of the benefits of reciprocal discovery, the Supreme Court found that due process was violated. In contrast, the Court approved Florida's discovery system, which, as it noted,

> provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant.

Wardius, 412 U.S. at 474-475, *quoting* Williams v. Florida, 399 U.S. 78, 81 (1970). As Batey and Everhart explain:

> Like discovery, sentencing appeals should be a two way street. The state should not be able to protect its "winnings"

> in the sentencing game played in the trial court by prohibiting defense appeals of upward departures and, while sanctimoniously searching for sentencing "truth" by exercising its right to appeal downward departures. Due process should not allow the balance of forces between the state and the defendant to be so viciously skewered. . . . Whether the *Wardius* principle is viewed as a matter of federal or state constitutional law, it strongly counsels the unconstitutionality of the appeal provision of the C.P.C."

The Fourth District Court of Appeal refused to recognize the disparity created by the legislative scheme, on the basis that the defendant may appeal an *illegal* sentence via a motion to correct his sentence pursuant to R. Crim. P. 3.800 and 3.850. This right to appeal does not include the right to challenge any *upward* departure from the lowest permissible sentence, however, and that is the right which the State has when it is granted the right to appeal any *downward* departure from the lowest permissible sentence. After all, the State, too, may appeal any illegality in the sentence, independent of the operation of the sentencing guidelines: it is the additional right to maintain the lower border of the sentence which is afforded by the right to appeal a departure, and it is the corresponding right to maintain any *upper* limit to sentencing discretion which is entirely destroyed under the Criminal Punishment Code. In essence, as observed by Batey and Everhart, the legislatively-constructed scheme creates a sentencing guideline on behalf of the State – no sentence lower than that arrived at via the guidelines scoring is permitted absent an appealable downward

departure decision – while *eliminating* the sentencing guidelines which would have protected the defendant – the judicial sentencing discretion on the upper end of the sentence is limited only by the statutory maximum, just as it was before the sentencing guidelines were ever enacted, *except that if the guidelines sentence is greater than the statutory maximum, the guidelines sentence must be imposed!* The Legislature has not enacted sentencing guidelines at all: it has enacted a minimum mandatory sentencing scheme which applies to all criminal cases, not just those where the State proves an aggravating factor (*e.g.,* use of a firearm or the defendant's serious criminal history). And since no jury is required to make a finding on any of the factors considered in arriving at the guidelines sentence, a guidelines sentence which is in excess of the statutory maximum otherwise applicable would violate Apprendi v. New Jersey, 13 Fed. L Weekly S457 (U.S. June 26, 2000).

It is fundamentally unfair to give the State the right to block a trial judge's discretion to impose the statutory minimum by requiring a guidelines sentence, with appeals for downward departures, while giving free rein to such discretion at the maximum level, including consecutive sentences. *See*, Sundberg, *supra*, at 17 (discussing the Sentencing Study Committee's decision to extend the privilege of an appeal to both the State and the defendant under the guidelines). It is also important to note that parole is no longer available in Florida as a means of reducing sentencing

disparity. *See*, Sundberg, *supra*, note 4, at 2. Thus, the Fourth District Court of Appeal's reliance on federal cases upholding the concept of federal sentencing guidelines, *e.g.*, United States v. Brierton, 165 F. 2d 1133, 1139 (7th Cir. 1999); United States v. Wivell, 893 F. 2d 156 (8th Cir. 1990), is unpersuasive in the context of the hybrid, one-sided guidelines scheme developed in Florida.

Certainly, the Legislature has some discretion in establishing a sentencing system, but it is not rational or fair for the Code to protect only the State's interests – including the increased bargaining power of the statutory maximum – while severely restricting the defendant's right to appeal a non-uniform sentence. Moreover, the Legislature cannot limit the appellate jurisdiction of the Court in criminal cases, State v. Jefferson, 758 So. 2d 661 (Fla. 2000), but that is what the Legislature has done in implementing the Criminal Punishment Code.

Sentencing must be according to the guidelines which limit judicial discretion in *either* direction, or according to discretionary sentences limited only by the statutory maximum and minimums. Any system which gives just one side the right to appeal denies the right to a level playing field and violates fundamental fairness.

Consequently, the Criminal Punishment Code dispenses with the sentencing guidelines which have been an integral part of Florida law for the last two decades. The guidelines were created in response to the very sorts of sentencing discrepancies

which are highlighted by this case. The Criminal Punishment Code is therefore unconstitutional. This Court should accordingly vacate Petitioner's sentence.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court reverse the judgment and sentence below and remand this cause with such directions as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JAMES J. CARNEY, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of January, 2001.

_____
Of Counsel