IN THE SUPREME COURT OF FLORIDA

WINYATTA BUTLER,

Appellant,

v. Case No. SC01-2465

STATE OF FLORIDA,

Appellee

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ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

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APPELLANT'S AMENDED INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This is an appeal pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(v) and 9.120 on review from the Fifth District Court of Appeal. The Fifth DCA certified the following question:

> MAY A TRIAL COURT SENTENCE A DEFENDANT TO A TERM IN EXCESS OF THE STATUTORY MAXIMUM FOR AN OFFENSE COMMITTED AFTER OCTOBER 1, 1998, WHERE THE LOWEST PERMISSIBLE SENTENCE UNDER THE CODE EXCEEDS THE STATUTORY MAXIMUM?

On March 16, 1999, in the Circuit Court for the Eighteenth Judicial Circuit, in and for Brevard County, Appellant pled guilty to possession of cocaine, possession of cannabis, driving with a suspended license, resisting arrest without violence and driving under the influence, for events that occurred on October 17, 1998. Record on Appeal, page 49 [hereinafter "R."]. A scoresheet was completed, which resulted in a score of 75.6 months. Appellant was sentenced to 75.6 months in prison for the primary offense, possession of cocaine, a third degree felony. § 893.13(6)(a), Fla. Stat. (Supp. 1998). R 54. Appellate counsel filed a brief in the Fifth DCA pursuant to Anders v. California, 386 U.S. 738 (1967). The conviction was affirmed. Butler v. State, 745 So. 2d 558 (Fla. 5th DCA 1999).

Appellant Butler timely filed a Rule 3.850 motion in the trial court on November 23, 1999, arguing, in part, that the sentence of 75.6 months for possession of cocaine exceeded the statutory maximum of five years or 60 months in prison for a third-degree felony provided by section 775.082(3)(d), Fla. Stat. (Supp.1998). R. 40. The trial court denied Appellant's motion on March 11, 2000, ruling that although the sentence imposed for possession of cocaine exceeded the statutory maximum under section 775.082, "a trial court must impose a sentence within the recommended guidelines sentencing range when the median recommended sentence exceeds the statutory maximum. *See* Mays v. State, 717 So.2d 515 (Fla. 1998)." R. 2. The trial court noted that the scoresheet produced a lowest permissible prison sentence of 75.6

months for Appellant's primary offense of possession of cocaine, exceeding the statutory maximum of five years. The trial court held that since Appellant received a "recommended guidelines sentence," it was not an illegal sentence. R. 3.

Appellant timely appealed the denial of his 3.850 motion to the Fifth District Court of Appeal. R. 1. On January 5, 2001, the Fifth District Court of Appeal affirmed the denial of Appellant's Rule 3.850 motion. Butler v. State, 774 So. 2d 925 (Fla. 5th DCA 2001). (See Appendix).

However, the Fifth DCA noted a conflict between section 921.002(1)(g), Florida Statutes (Supp. 1998) and section 921.0024(2), Florida Statues, (Supp. 1998). The Fifth DCA noted that section 921.002(1)(g) provides that a court may impose a sentence up to and including the statutory maximum for any offense. According to the Fifth DCA, "[t]hat provision does not authorize the court to impose a sentence in excess of the statutory maximum." Id. at 926. The Fifth DCA noted, "[t]he provision in section 921.024 [sic] would seem to be at odds with section 921.002 and the ordinary rules of statutory construction, which require penal statutes to be strictly construed in favor of the accused." Id. The Fifth DCA also acknowledged that a defendant cannot agree to an illegal sentence, dispensing with the state's contention of a waiver. Id.

The Fifth DCA affirmed Appellant's sentence but certified the above cited question. Id.

It is uncontroverted that Appellant signed his Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court on January 24, 2001 and gave it to prison officials to mail, utilizing the routine prison mail procedures. This Court has postponed its decision on jurisdiction.

SUMMARY OF THE ARGUMENT

Appellant was sentenced to 75.6 months in prison, a sentence that exceeds the statutory maximum of five years set forth in section 775.082(3)(d). Section 921.002(1)(g) authorizes a court to impose a sentence only up to the statutory maximum. However, the Fifth DCA held that under section 921.0024(2), a sentence in excess of the statutory maximum is authorized when the lowest permissible sentence exceeds the statutory maximum. Section 921.002(1)(g) and section 921.0024(2) are therefore in direct conflict, and only one provision can apply to Appellant. The rule of lenity, which provides that penal statutes must be construed strictly and in favor of the accused, requires that section 921.002(1)(g), which favors Appellant, must apply. In addition, section 921.0024(2) violates the due process requirements of notice provided by the state and federal constitutions. Appellant's sentence may not lawfully exceed the five-year statutory maximum as provided by section 775.082. The trial court erred in sentencing Appellant in excess of the statutory maximum.

The proper remedy is to vacate Appellant's sentence and remand for sentencing

for a period not to exceed the statutory maximum of five years.

ARGUMENT

I. THE TRIAL COURT ERRED IN APPLYING SEC. 921.0024(2) TO SENTENCE APPELLANT IN EXCESS OF THE STATUTORY MAXIMUM BECAUSE SECTION 921.0024(2) DIRECTLY CONFLICTS WITH SECTION 921.002(1)(G).

A. Standard of Review

A conflict between statutory provisions presents an issue of statutory construction and judicial interpretation, and as such is subject to review *de novo* by this Court. Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So.2d 376, 377 (Fla. 5th DCA 1998) ("[J]udicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review.")

B. Section 921.002(1)(g) and Section 921.0024(2) are in direct conflict and cannot be reconciled.

Section 921.002(1)(g), Fla. Stat. (Supp. 1998) provides: "The trial judge may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation." Therefore, this provision prohibits sentences in excess of the statutory maximum as provided by section 775.082(3)(d), Fla. Stat. (Supp.1998).

Section 921.0024(2), Fla. Stat. (Supp. 1998) provides: "If the lowest

permissible sentence under the code exceeds the statutory maximum sentence as provided in section 775.082, the sentence required by the code must be imposed." Therefore, this provision, in direct contradiction to section 921.002(1)(g), authorizes sentences in excess of the statutory maximum when the lowest permissible sentence exceeds the statutory maximum. These two provisions of the Criminal Punishment Code became effective simultaneously on October 1, 1998 and were in effect at the time of Appellant's offenses. The direct conflict between these provisions makes the determination of a person's maximum exposure impossible.

Appellant pled guilty to possession of cocaine under section 893.13(6)(a), Fla. Stat. (Supp. 1998), a third degree felony. Section 775.082(3)(d), Fla. Stat. (Supp. 1998) provides that the maximum sentence for a felony of the third degree is five years or 60 months in prison. However, Appellant was sentenced to 75.6 months in prison, exceeding the statutory maximum of 60 months provided by section 775.082(3)(d). To reach this result the trial court relied on section 921.0024(2), Fla. Stat. (Supp. 1998), which permits a prison sentence to exceed the statutory maximum if the lowest permissible sentence exceeds that statutory maximum. This provision is in direct conflict with section 921.002(1)(g), which provides that the trial court may impose a sentence up to the statutory maximum. The conflict between these two sentencing provisions did not arise until the enactment of the Criminal Punishment Code in 1998,

before Appellant's offense date. Applying the canons of statutory construction, these two provisions cannot be reconciled so as to give effect to both. Therefore, the rule of lenity, which resolves ambiguous statutory language in favor of the defendant, must apply, and Appellant's sentence may not lawfully exceed the statutory maximum of five years. § 775.021(1), Fla. Stat. (1997).

Appellant was sentenced under the 1998 Criminal Punishment Code.[1] The Code was effective for offenses committed on or after October 1, 1998. Like the guidelines that preceded it, the Code requires mathematical calculations based on the offense level of the offender's current and prior offenses, victim injury, legal status and other factors. The resulting total corresponds to the number of prison months. Unlike the guidelines, however, the Code contains a provision that explicitly provides that the sentence may not exceed the statutory maximum. The guidelines did not contain a provision analogous to section 921.002(1)(g), prohibiting sentences in excess of the statutory maximum.

Section 921.0024(2) is in direct conflict with section 921.002(1)(g). Ordinarily, when two statutes conflict, the court must try to construe them as to give effect to

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[1]In 1997, the legislature replaced the sentencing guidelines with the Criminal Punishment Code, codified as Sections 921.002 – 921.0026, Fla. Stat. (1997). Ch. 97-194, §§ 1-8, at 3672-3699, Laws of Fla.

both. Woodgate Development Corporation v. Hamilton Investment Trust, 351 So. 2d 14, 15 (Fla. 1977). However, it is impossible to give effect to two completely contradictory provisions, as is the case here. Section 921.002(1)(g) provides that a sentence may not exceed the statutory maximum. Section 921.0024(2) purports to require a sentence in excess of the statutory maximum if the lowest permissible sentence exceeds the maximum. Both statutes apply to Appellant based on his offense and offense date. However, both provisions cannot be given effect. To give effect to section 921.0024(2), and permit sentences exceeding the maximum, would completely fail to give effect to section 921.002(1)(g).

C. The legislative history of the Criminal Punishment Code does not clarify the conflict between the provisions.

When statutes are ambiguous or contradictory, legislative history may provide an external source of information about legislative intent. However, the legislative history of the Criminal Punishment Code does not explain the conflict between the two provisions at issue here. The legislative history indicates that the legislature's intent in creating the Code was, in large part, to discourage the high number of downward departures received by criminal defendants under the guidelines. Final Bill Research and Economic Impact Statement of the House of Representatives Committee on Crime and Punishment for Bill CS/HB 241.

As originally signed into law in 1997, the Code established the statutory maximum as a fundamental principle, codified as section 921.002(1)(g). The version of Section 921.0024(2) originally signed into law did *not* provide that sentences could exceed the statutory maximum.

Section 921.002(1)(g), Florida Statutes, (1997) provides: "The trial judge may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation." Ch. 97-194, § 3, Laws of Fla.

Section 921.0024(2), Fla. Stat. (1997), provides, in part: "The lowest permissible sentence in prison months that may be imposed by the court, absent a valid reason to depart, shall be calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent….The total sentence points shall be calculated only as a means of determining the lowest permissible sentence. *The permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum, as defined in s. 775.082, for the primary offense*." (Emphasis added.) Ch. 97-194, § 7, Laws of Fla.

Therefore, when it was enacted, section 921.0024(2) did not provide that the sentence under the Code must be imposed when the lowest permissible sentence exceeds the statutory maximum.

In May 1998, before the Code became effective, the Legislature amended the Code, providing "technical, clarifying, and 'housekeeping' changes." Senate Staff Analysis and Economic Impact Statement, section 1. (See Appendix). See Ch. 98-204, § 2 at 1936, Laws of Fla.

In May 1998, section 921.002(1)(g) was amended to read: "The trial court judge may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation or community control." (Additions underlined). Ch. 98-204, § 2 at 1936, Laws of Fla.

At the same time, section 921.0024(2) was amended to read, in relevant part: "The permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum, as defined in s. 775.082, for the primary offense and any additional offenses before the court for sentencing….If the lowest permissible sentence under the code exceeds the statutory maximum sentence as provided in s. 775.082, the sentence required by the code must be imposed." (Additions underlined). Ch. 98-204, § 6 at 1962, Laws of Fla.

Both amendments were effective October 1, 1998 and were in effect on Appellant's offense date.

Sections 921.002(1)(g) and 921.0024(2) were amended at the same time. If the legislature had intended to repeal section 921.002(1)(g), it could have done so. Instead, it amended the provision, expanding it to include violations of community control. This demonstrates the legislature's intent that section 921.002(1)(g) remain a fundamental principle of the Code.

The legislature was aware of section 921.002(1)(g), which did not authorize sentences in excess of the statutory maximum, at the time it amended 921.0024(2) to permit sentences in excess of the statutory maximum. The amendment of section 921.0024(2) to allow sentences in excess of the statutory maximum conflicts with the absolute clarity of section 921.002(1)(g). Thus, the legislative history does not shed light on the direct conflict between the statutes.

D. Under the rule of lenity as codified in section 775.021(1), Fla. Stat. (Supp. 1998), the conflict between sections 921.002(1)(g) and 921.0024(2) must be construed in favor of appellant.

It is a fundamental principle of Florida law that penal statutes must be construed strictly and in favor of the accused. Perkins v. State, 576 So. 2d 1310, 1312, 1314 (Fla. 1991); Trotter v. State, 576 So.2d 691, 694 (Fla. 1990); Cabal v. State, 678 So.

2d 315, 318 (Fla. 1996). The rule of lenity is so deeply embedded in Florida law that it has been codified in section 775.021(1), Fla. Stat. (Supp. 1998): "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."

The rule of lenity is based in fundamental due process principles of fair warning and notice. The principle that penal statutes must be strictly construed "ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited." Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991). *See* Dunn v. United States, 442 U.S. 100, 112, (1979).

The rule of lenity applies to sentencing provisions as well as to the substantive provisions of criminal statutes. Carawan v. State, 515 So. 2d 161, 165 (Fla. 1987), *superseded by statute on other grounds*, section 775.021(4), Fla. Stat. (1989); Bifulco v. United States, 447 U.S. 381, 387(1980). Specifically, the rule of lenity applies to the sentencing provisions of Chapter 921, Florida Statutes. Williams v. Florida, 680 So. 2d 532, 534 (Fla. 1st DCA 1996). *See also* Flowers v. State, 586 So. 2d 1058, 1059 (Fla. 1991) (mandating that the rule of lenity mandated by section 775.021(1) is applicable to sentencing guidelines).

The rule of lenity applies not only to ambiguous terms within a single provision of a statute, but also to a conflict between two statutes. Scates v. State, 603 So. 2d 504, 505 (Fla. 1992).

In the instant case, the statutes contain two separate schemes providing two different constraints on sentencing. Only one of these constraints may apply to an individual case, but it is impossible to discern which one applies. Therefore, the provisions are susceptible of differing constructions: in one construction, the statutory maximum is the maximum penalty. In the other construction, the statutory maximum may be exceeded if the lowest permissible sentence exceeds the statutory maximum. Where statutes are susceptible of more than one interpretation, the statutory and common law rules of lenity must apply, and the Court is required to hold that Appellant's sentence is illegal as it exceeds the statutory maximum.

E. Maddox v. State is not controlling authority in the instant case.

Although the Fifth DCA properly recognized the problem and correctly identified the principle of the rule of lenity, the Fifth DCA erred in failing to apply it to Appellant's case. Instead, the Fifth DCA, in ruling that Appellant was not entitled to relief here, relied on Maddox v. State, 760 So.2d 89 (Fla. 2000). Maddox does not control in Appellant's case. In Maddox, this Court, in a footnote, noted that "for

those who committed their crimes after October 1, 1998, section 921.0024(2), Florida Statutes (1999), provides that 'if the lowest permissible sentence under the code exceeds the statutory maximum sentence as provided in section 775.082, the sentence required by the code must be imposed.'" Maddox, 760 So. 2d at 101 n.9 (Fla. 2000).

Maddox does not control in the instant case because the cited footnote was dicta, as it was not necessary to the holding. The issue in Maddox was whether unpreserved errors related to sentencing could be raised on direct appeal in light of certain provisions of the Criminal Appeal Reform Act of 1996. The holding in Maddox did not address whether the statutory maximum could be exceeded under the 1998 Criminal Punishment Code.

Moreover, as the Fifth DCA pointed out in its opinion, Maddox did not address the contradiction between sections 921.002(1)(g) and 921.0024(2). Before the Fifth DCA certified this question, the Florida courts had not addressed the contradiction between these two provisions. The issue has not yet been briefed for this Court. Therefore, the dicta in the footnote in Maddox is neither persuasive nor controlling in Appellant's case.

F. Mays v. State is not controlling authority in the instant case.

The trial court, in ruling that Appellant was not entitled to relief on his 3.850 motion, cited Mays v. State, 717 So. 2d 515 (Fla. 1998). The Fifth DCA, correctly, did not rely on Mays to deny Appellant relief, as Mays does not control in the instant case. Mays involved a challenge to a sentence imposed under the 1994 guidelines. However, the provisions in conflict here went into effect in 1998 as part of the Criminal Punishment Code, not the 1994 guidelines. The provisions in question here had the same effective date of October 1, 1998. Thus, the textual basis for Appellant's claim did not arise until after the guidelines were replaced with the 1998 Criminal Punishment Code.

Mays appealed a sentence imposed under the 1994 guidelines that exceeded the statutory maximum provided by section 775.082. Mays contended that because a portion of the recommended sentencing range did not exceed the statutory maximum, the court erred in sentencing him above the statutory maximum. This Court affirmed the sentence, holding that after January 1, 1994, the guidelines provided that if the guidelines sentence exceeded the statutory maximum, the sentence under the guidelines must be imposed. Appellant's case, like Mays, involves an appeal of a sentence that exceeded the statutory maximum provided by section 775.082. Although Mays

authorizes a guidelines sentence in excess of the statutory maximum, Mays and the instant case are readily distinguishable and Mays does not control in the instant case.

First, Mays involves a completely different sentencing scheme than the one at issue here. The defendant in Mays was sentenced under the 1994 guidelines, while Appellant was sentenced under the 1998 Code.

Second, in the instant case, there is an explicit conflict between two contemporaneously enacted provisions of the Criminal Punishment Code. This was not the case with the guidelines at issue in Mays. A review of the sentencing legislation at issue in Mays reveals that at the time of Mays' offense, the sentencing statutes did not contain two directly conflicting provisions as is the case here. The Florida Legislature enacted the 1983 sentencing guidelines, effective October 1, 1983. Section 921.001(4), Fla. Stat. (1983); *see* Ch. 83-87, Sections 1-5, at 305-309, Laws of Fla. Under the 1983 guidelines, a court could not impose a sentence exceeding the statutory maximum. Section 921.001(5), Fla. Stat. (1991).[2]

[2] Section 921.001(5), Fla. Stat. (1991) provides: "Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to all other statutory provisions."

The legislature amended section 921.001(5), effective January 1, 1994, to provide that a sentence under the guidelines must, in some cases, exceed the statutory maximum. § 921.001(5), Fla. Stat. (1995); Ch. 93-406, § 5, at 2920, Laws of Fla.[3] When the legislature amended section 921.001(5) in 1993, it completely repealed the prior language in section 921.001(5) that had prohibited sentences in excess of the statutory maximum. *See* Ch. 93-406, § 5, at 2920, Laws of Fla. Thus, the 1994 guidelines eliminated any potential ambiguity or conflict in Chapter 921 regarding sentences exceeding the statutory maximum. Therefore, at the time of Mays' offense, there was no ambiguity or conflict between provisions in the sentencing statutes. Accordingly, this Court can grant the instant appeal without disturbing its opinion in Mays.

The guidelines statutory scheme at issue in Mays did not contain a fundamental overarching principle explicitly constraining the power of the sentencing court to impose sentences within the statutory maximum set forth in section 775.082, as is the case here. In 1997, the Legislature replaced the guidelines with the Criminal Punishment Code, effective October 1, 1998. The conflicting provisions in

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[3] Section 921.001(5), Fla. Stat. (1995), provides: "If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by section 775.082, the sentence under the guidelines must be imposed, absent a departure."

Appellant's case, section 921.002(1)(g) and section 921.0024(2), were enacted as part of the Criminal Punishment Code and had the same effective date of October 1, 1998. This conflict did not exist in the 1994 guidelines, the 1983 guidelines, or at any other time prior to the enactment of the Criminal Punishment Code. The Legislature could easily have avoided the conflict in the Criminal Punishment Code by simply drafting section 921.002(1)(g) and section 921.0024(2) to conform with each other. The Legislature, however, failed to do so. The courts should not ignore the clear, unqualified legislative expression of the fundamental principle of the Criminal Punishment Code as codified in section 921.002(1)(g).

This Court has long held that under the separation of powers, it is the legislature's role to specify penalties. Hamilton v. State, 366 So. 2d 8, 11 (Fla. 1978). It is also a principle of Florida law that it is not the role of the courts to rewrite a statute. State v. Globe Communications Corp., 622 So. 2d 1066, 1080 (Fla. 4th DCA 1993), *aff'd* 648 So. 2d 110 (Fla. 1994). *See also* Sarasota Herald Tribune Co. v. Sarasota County, 632 So. 2d 606, 607 (Fla. 2d DCA 1993) (Courts are not authorized to embellish legislative requirements with their own notions of what might be appropriate; if additional requirements are to be imposed, they should be inserted by the legislature). The courts should not read into the statute substantive language which

the Legislature failed to include. United States v. Evans, 333 U.S. 483, 486 (1948) ("There are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning"). Where a conflict between provisions requires the court to render one of the provisions inapplicable to a defendant's case, the rule of lenity requires that the court render the provision least favorable to the defendant inapplicable. Only one principle, clearly expressed in section 921.002(1)(g), may apply to Appellant Butler under the rule of lenity.

Therefore, since the two conflicting statutes cannot be made to harmonize, the rule of lenity must be invoked and section 921.0024(2) may not be applied to Appellant. The trial court erred in imposing a sentence in excess of the five-year statutory maximum provided by section 775.082.

II. SECTION 921.0024(2), FLA. STAT. (SUPP. 1998), VIOLATES THE NOTICE REQUIREMENT OF THE DUE PROCESS PROTECTION AFFORDED BY ARTICLE I, SECTION 9, OF THE FLORIDA CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

That provision of section 921.0024(2) which conflicts with section 921.002(1)(g) is unconstitutionally vague and ambiguous in that it comprehends two inconsistent penalty schemes and is therefore void. Since section 921.002(1)(g) and

section 921.0024(2) are in direct conflict, only one can apply to Appellant. However, a person of ordinary intelligence cannot guess which provision applies to his or her case. For people who committed offenses after October 1, 1998, and whose lowest permissible sentence exceeds the statutory maximum, this constitutes a notice deficiency and violates due process.

> It is a fundamental tenet of the due process clause of the Fourteenth Amendment

of the U.S. Constitution that "[no] person is required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). There is a higher standard of clarity for criminal statutes than for civil ones. Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991).

The due process requirement of notice is rooted in the principle of fair warning. State ex rel. Lee v. Buchanan, 191 So.2d 33 (Fla. 1966). This Court has held that "our system of jurisprudence is founded on a belief that everyone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property." Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991). *See* Franklin v. State, 257 So.2d 21, 23 (Fla. 1971).

The due process requirement of notice applies to sentencing as well as to the

substantive provisions of criminal statutes. United States v. Evans, 333 U.S. 483 (1948). The United States Supreme Court has made clear that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." United States v. Batchelder, 442 U.S. 114, 123 (1979). Therefore, the sentencing provisions of Chapter 921, Florida Statutes, must satisfy the notice and fair warning requirements of due process.

Criminal statutes that are vague violate due process because they fail to provide fair warning. Connally v. General Constr. Co., 269 U.S. 385 (1926); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Under Florida law, the standard for testing vagueness is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct. Brown v. State, 629 So. 2d 841, 842 (Fla. 1994).

In the instant case, the statutory provisions at issue make it impossible for a person of ordinary intelligence to determine whether section 921.002(1)(g), or section 921.0024(2), will apply to their sentence.

The conflict between provisions regarding the maximum penalty that may be imposed is even sharper than the Fifth DCA stated in the opinion below. All but one of the provisions relevant to determining Appellant's sentence provide that the sentence imposed may not exceed the statutory maximum of five years for a third

degree felony. Sections 893.13(6)(a), 775.082(3)(d), 921.002(1)(g), and part of 921.0024(2) all provide that the statutory maximum will apply. Of all the applicable statutory provisions, only one provision, buried deep in section 921.0024(2), Fla. Stat. (Supp. 1998), suggests that the trial court may impose a sentence exceeding the statutory maximum of five years.

First, section 893.13(6)(a), under which Appellant was charged, expressly provides that possession of cocaine constitutes a third degree felony that is punishable "as provided in section 775.082, 775.083, or 775.084." No mention or reference is made to section 921.0024 in section 893.13(6)(a) that would put any member of the public on reasonable notice that some additional or greater penalty could be imposed for this third degree felony.

Second, if the reader then refers to section 775.082, it provides: "A person who has been convicted of any other designated felony may be punished as follows: …..[f]or a felony of the third degree, by a term of imprisonment not exceeding 5 years." Section 775.082(3)(d), Fla. Stat. (Supp.1998). There is no notice given of the possible imposition of a penalty in excess of five years in prison by operation of any other provision. Section 775.082 does not refer the reader to Chapter 921. The mandatory language of section 775.082(3)(d), "not exceeding 5 years," suggests that

the statutory maximum may not be controverted by another statute. There is no reason for the reader to look further in order to determine the penalty for a third degree felony.

Most significantly, section 921.002(1)(g) expressly provides that a trial court may not impose a sentence in excess of the statutory maximum, in this case, 5 years as provided by 775.082. Further, this provision is established as a fundamental principle of the Criminal Punishment Code.[4]

The prominence of this provision as one of the fundamental principles of the Code leads a reasonable layperson to understand that this provision could not be contradicted or qualified by another provision in the Criminal Punishment Code.

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[4]Section 921.002 Fla. Stat. (Supp. 1998) reads:

921.002 The Criminal Punishment Code.

(1) 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 Criminal Punishment Code embodies the principles that:

(a) Sentencing is neutral with respect to race, gender, and social and economic status.

* * * *

(g) The trial judge may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation.

There is a provision in section 921.0024(2) that repeats this principle. Section 921.0024(2), Fla. Stat. (Supp. 1998) provides, in part: "The permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum, as defined in section 775.082, for the primary offense and any additional offenses before the court for sentencing." Again, this provides that the statutory maximum may not be exceeded.

It is only in one of the final provisions of section 921.0024(2) that the legislature finally provides notice that a sentence might exceed the statutory maximum: "If the lowest permissible sentence under the code exceeds the statutory maximum sentence as provided in section 775.082, the sentence required by the code must be imposed." Section 921.0024(2), Fla. Stat. (Supp. 1998). In order to determine their maximum exposure, readers must first decide that this provision renders nugatory all the prior relevant statutory provisions. In order to determine whether this provision even applies to them, they would have to correctly calculate their lowest permissible sentence, using the scoresheet, to determine whether it exceeds the statutory maximum and that section 921.0024(2) therefore applies.

Given that sections 893.13(6)(a), 775.082(3)(d), 921.002(1)(g), and part of 921.0024(2) all tell the reader in unqualified terms that the statutory maximum of five

years for a third degree felony cannot be exceeded, and only a single provision in section 921.0024(2) authorizes a sentence exceeding the statutory maximum, a person of ordinary intelligence will be in substantial doubt as to whether, and, if so, when, the statutory maximum may be exceeded.

Therefore, a person has no way of knowing if the statutory maximum will apply in their case. A person cannot know, with the certainty required by due process, the upper limit of the penalty that may be imposed.

Chapter 921 provides two different schemes defining the relationship between the Criminal Punishment Code and the statutory maximums provided by section 775.082. Both Section 775.082 and section 921.002(1)(g) refer to the statutory maximum in unqualified terms, without cross-referencing. Section 921.002(1)(g) asserts the statutory maximum as a fundamental principle without exceptions. The Fifth DCA reads an exception into the clearly expressed section 921.002(1)(g), holding that the statutory maximum does not always operate as the statutory maximum and that under certain qualifications and conditions, the statutory maximum may be exceeded. However, section 921.002(1)(g) provides no notice of these qualifications and conditions. Chapter 921 leaves it to the individual to determine whether the statutory maximum will be the actual maximum penalty, but does not provide enough clarity so

that a person could make that determination. This lack of clarity is not merely vague and ambiguous; it is misleading.

Therefore, section 921.002(1)(g) and section 921.0024(2) fail to provide fair warning as to the maximum penalty that may be imposed. Not only is a layperson forced to guess at which provision will apply to him, but an attorney cannot accurately advise a client about the consequences of a guilty plea or conviction.

The contradiction between provisions constitutes a notice deficiency and violates due process.

To satisfy due process notice requirements, a penal statute must be clear on its face. United States v. Harriss**,** 347 U.S. 612, 617 (1954). Therefore, reference to external sources, such as legislative history, in order to determine legislative intent, cannot cure this due process deficiency. United States v. Colon-Ortiz, 866 F.2d 6, 9 (1st Cir. 1989).

"When there is doubt about a statute in a vagueness challenge, the doubt should be resolved 'in favor of the citizen and against the state.'" Brown v. State, 629 So. 2d 841, 843 (Fla. 1998). (Quoting State v. Wershow, 343 So. 2d 605, 608 (Fla. 1977). This conflict between provisions should therefore be resolved in favor of Appellant.

Publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions. Ellis v. State, 762 So. 2d 912 (Fla. 2000) (citing State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991). However, there can be no notice when the provisions of a statute are so contradictory that a person cannot know which provision will be applied. This lack of notice violates due process.

Thus, the application of section 921.0024(2) Fla. Stat. (Supp. 1998) to Appellant violates the notice requirement of due process provided by Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to declare Appellant's sentence illegal, and remand the instant cause to the trial court with directions to resentence Appellant, Mr. Winyatta Butler, to a term in prison not to exceed the statutory maximum of five years set forth in section 775.082(3)(d), Fla. Stat. (Supp.1998) for the offense charged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Initial Brief has been furnished by U.S. Mail to **Pam Koller**, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32116; **Robin Compton,** Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32116; **Robert A. Butterworth**, Attorney General, Department of Legal Affairs, Suite PL-01, The Capitol, Tallahassee, FL 32399-1050; and **Office of the State Attorney**, Government Center, 2725 Judge Fran Jamieson Way, Building D, Viera, FL 32940 on this _____ day of May, 2002.

_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Initial Brief complies with the font requirements of Rule 9.100 (1) and has been formatted in the font, Times New Roman at 14-point.

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