IN THE FLORIDA SUPREME COURT

JOHN HALL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. SC01-42

AMENDED ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, JOHN HALL, the defendant in the trial court will be referred to as Petitioner, defendant, or by his proper name. Appellee, the State of Florida, will be referred to as the State.

The symbol "R" will refer to the record on appeal. Pursuant to Rule 9.210(b), FLA.R.APP.P. (1997), this brief will refer to the volume number. The symbol "T" will refer to the trial transcripts. The symbol "IB" will refer to the Petitioner's Initial Brief. Each symbol is followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts with the following additions:

Petitioner was convicted of possession of cocaine and resisting arrest with violence. Both are third degree felonies with a statutory maximum of five years. According to the criminal punishment code worksheet, the total sentence points were 94.4 (R. 42). The worksheet's calculation provide that 49.8 was the "lowest permissible prison sentence in month". The worksheet states that "the maximum sentence is up to the statutory maximum". The worksheet states that sentence may be either concurrent or consecutive. At the sentencing hearing, defense counsel stated that the worksheet must have been prepared in a "spirit of humor" or according to "the new math in action". (T. 183). Defense counsel then stated that the actual recommended sentence was 62.4 in prison

with 57 months being the minimum and 67.8 months the maximum. (T. 183). The prosecutor informed the trial court that under the Code a trial court may impose consecutive sentences for two separate offenses. (T. 186). The prosecutor described petitioner's significant criminal history and informed the trial court that the instant offense occurred while petitioner was conditional release. (T. 187). The prosecutor told the trial court "you've got 25 years of chronic criminal history in front of you". The prosecutor sought five years on count I to be followed by five years for count II. (T. 188). The trial court noted petitioner's criminal history included an attempted first degree murder; an aggravated battery; a shooting into a building and an aggravated assault convictions. (T. 190). The trial court sentenced petitioner to five years incarceration for the possession count and to five years incarceration for the resisting with violence count. (T. 192). The trial court imposed consecutive sentences. Defense counsel objected to the consecutive sentences to preserve the issue for appellate review. (T. 192).

SUMMARY OF ARGUMENT

Petitioner argues that the new Criminal Punishment Code, which replaced the Florida Sentencing Guidelines, is unconstitutional. Specifically, petitioner asserts the Code (1) violates due process because it allows disparity in sentencing; (2) constitutes cruel and unusual punishment because there is no proportionality requirement; (3) violates double jeopardy; (4) limits access to courts and infringes on the state constitutional right to appeal; (5) violates separation of powers and (6) the holding of *Apprendi*. The State respectfully disagrees.

The Code does not violate the due process clause. Due process simply does not require strict uniformity in sentencing. If due process required uniformity in sentencing then only minimum mandatory sentences would be constitutional. Petitioner asserts that the Code is a mixture of traditional discretionary sentencing and a minimum mandatory sentencing which creates an "unbalanced scheme" that violates due process. Petitioner is attacking the wisdom of the legislation, not presenting a due process challenge. Innovative sentencing schemes do not violate due process. The Code's stated objectives are rationally related its means which is all that substantive due process requires. Thus, the Code does not violate due process.

Nor does the Code violate the cruel or unusual punishment clause. An entire Code cannot be challenged on this basis. Cruel and/or unusual punishment analysis is a case specific inquiry. Moreover, only grossly disproportionate sentencing are prohibited. Petitioner, who was convicted of two offenses, had a significant

and violent criminal history. Petitioner asserts that the Code imposes cruel or unusual punishment because it permits consecutive sentences and that minimum mandatory sentences constitute cruel or unusual punishment. Consecutive sentences do not constitute cruel and unusual punishment when imposed for separate crimes. Furthermore, as this Court has repeatedly and consistently held, minimum mandatories do not constitute cruel or unusual punishment. Thus, the Code does not constitute cruel or unusual punishment.

Furthermore, the Code does not violate double jeopardy. Fundamental fairness and skewing of the sentencing process are due process, not double jeopardy attacks. Appellate review of sentences does not violate double jeopardy. Double jeopardy protections apply only to capital sentencing. Nor does appellate review give rise to valid a due process vindictiveness claim. Thus, the Code does not violate double jeopardy.

Petitioner contends that the Code violates the state constitutional provision granting access to courts and the state constitutional right to appeal. However, there is no state constitutional right to appeal the length of a sentence. Furthermore, the legislature did not abolish the right to appeal upward departures; rather, the legislature abolished the entire concept of upward departures. Quite simply, there is nothing to appeal under the Code. The Code did not remove Petitioner's right to appeal a sentence within the guidelines; there never was such a right. Furthermore, a defendant still may appeal a sentence that exceeds the statutory maximum. Thus, the Code does not violate the state constitutional right to appeal.

Nor does the Code violate separation of powers. The Code, like the sentencing guidelines, is substantive not procedural. The legislature not the judiciary has the power to set the penalties for crimes.

Additionally, the Code does not violate the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Apprendi* requires that any fact that increases the statutory maximum be treated as an element of the crime. Here, petitioner has no standing to raise an *Apprendi* challenge to the Code. He was not sentenced beyond the standard statutory maximum of five years for a third degree felony. No fact increased his sentence beyond the statutory maximum. There simply is no *Apprendi* issue in this case. Consecutive sentencing does not give rise to an *Apprendi* claim. In consecutive sentencing, the issue is solely a matter of law involving whether the offenses are separate offense which is a purely legal matter. Furthermore, the Code provision allowing sentences above the normal statutory maximum, referred to a wandering or floating or individualized statutory maximum, does not violate *Apprendi*. *Apprendi* excluded the fact of a prior conviction from its holding. Often the reason for the individualized sentence exceeding the standard statutory maximum is the defendant's prior record. Under *Apprendi*, a defendant's prior record is not an element; rather, it is a sentencing factor that the judge may determine at the preponderance standard of proof. Thus, the Code does not violate the holding of *Apprendi*.

Accordingly, the Criminal Punishment Code is constitutional.

ISSUE I

IS THE CRIMINAL PUNISHMENT UNCONSTITUIONAL? (Restated)

Petitioner argues that the new Criminal Punishment Code, which replaced the Florida Sentencing Guidelines, is unconstitutional. The State respectfully disagrees. The Criminal Punishment Code does not violate due process, constitute cruel or unusual punishment, double jeopardy, infringe the state constitutional right to appeal; separation of powers or the holding of *Apprendi*. Accordingly, the Criminal Punishment Code is constitutional.

The trial court's ruling

The Criminal Punishment Code worksheet's recommended sentence was 62.4 in prison with 57 months being the minimum and 67.8 months the maximum. (T. 183). Noting petitioner's significant criminal history, the trial court sentenced appellant to the statutory maximum sentence of five years on each offense, to run consecutively. Defense counsel objected to the consecutive sentences but did not state the basis of his objection. He said: "I would lodge any specific objection to the consecutive nature of the sentencing pronounced by the Court as being not allowed under the guidelines . . ." (T. 192)

Preservation

While defense counsel objected to the consecutive sentences, defense counsel did not specify the basis of his objection. Boilerplate objections that do not identify the basis for the

objection are not sufficient.[1] One purpose of contemporaneous objection rule is to place the trial court on notice that it may have committed error, thereby providing an opportunity to correct it.[2] When a party objects but does not state the basis for the objection, the trial court is put in the position of having to guess what the error is. *York v. State*, 232 So.2d 767 (Fla. 4th DCA 1969)(observing, in a case where defense counsel had made a blanket objection, if such objection were approved as sufficient, it would enable counsel to cloak a meritorious objection from the trial court and when used by an "adroit" defendant could build error into the record and which, had it been revealed with specificity, would have been remedied and noting that busy trial judges have enough to do to conduct trials in accordance with law without having to play guessing games with counsel as to the true basis of their objections, *cited with approval in Castor v. State*, 365 So.2d 701, 703 (Fla.1978)). Thus, the consecutive sentences issue is not preserved.

Furthermore, the various constitutional challenges to the Code are not preserved. Counsel did not file a motion to declare the Code unconstitutional in the trial court nor did he obtain a ruling. However, while sentencing errors including constitutional challenges to a sentencing statute must now be preserved in the

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[1] *Bertolotti v. Dugger*, 514 So.2d 1095, 1096 (Fla.1987); *Steinhorst v. State*, 412 So.2d 332, 338 (Fla.1982).

[2] *Hammond v. State*, 727 So.2d 979,980 (Fla. 2d DCA 1999), citing, *Castor v. State*, 365 So.2d 701, 703 (Fla.1978)(explaining that an objection must sufficiently specific to apprise the trial judge of the putative error).

trial court either by contemporaneous objection or via rule 3.800(b) filed in the trial court prior to the initial brief,[3] at the time of this sentencing, constitutional challenges to a sentencing statute could be raised for the first time on appeal.[4]

The standard of review

The constitutionality of a statute is reviewed *de novo*. *United States v. Reynolds*, 215 F.3d 1210, 1212 (11th Cir. 2000)(reviewing the constitutionality of the Armed Career Criminal Act *de novo*); *Dept. of Ins. v. Keys Title and Abstract Co., Inc.*, 741 So.2d 599

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[3] *Salters v. State*, 758 So.2d 667, 668 n. 4 (Fla.2000)(stating that for "those defendants who have available the procedural mechanism of our recently amended rule 3.800(b), we would require that such defendants in the future raise a single subject rule challenge in the trial court prior to filling the first appellate brief."); *Harvey v. State*, 26 Fla. L. Weekly D554 (Fla. 1st DCA Feb. 20, 2001), reh'g denied and questions certified, 26 Fla. L. Weekly D1151 (Fla. 1st DCA May 1, 2001)(certifying whether the concept of fundamental sentencing error has been abolished in a case involving a single subject challenge to a statute); *Garrett v. State*, No. 4D99-4116 (Fla. 4th DCA May 23, 2001)(holding that errors raised in briefs filed after the effective date of the Amendments II may not raise even fundamental sentencing errors if the defendant does not follow the *Maddox* procedure); *Miller v. State*, No. 4D00-518 (Fla. 4th DCA May 23, 2001)(stating that this includes constitutional errors); *Capre v. State*, 773 So.2d 92 (Fla. 5th DCA 2000)(stating that under *Maddox*, sentencing errors occurring after the effective date of amended rule 3.800(b), even fundamental ones, are barred if not raised at trial or in post- trial proceedings pursuant to rule 3.800.").

[4] Sentencing was held on March 31, 1999. (T. 183). There is some dispute as to the effective date of the Amendments to the rule. The First district has stated that the effective date was November 1999. *Harvey v. State*, 26 Fla. L. Weekly D1151, n.2 (Fla. 1st DCA May 1, 2001) The Fifth District has states that the effective date was Jan. 13, 2000. *Malone v. State*, 777 So.2d 449, 450-451 (Fla. 5th DCA 2001). Sentencing in this case was held prior to both dates.

(Fla. 1st DCA 1999)(explaining that the constitutionality of a statute is reviewed *de novo*).

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).

HISTORY OF THE CRIMINAL PUNISHMENT CODE

In 1982, the Legislature created the Sentencing Commission and in 1983, they enacted the Sentencing Guidelines. ch. 83-87, § 2, Laws of Fla., codified at Fla. Stat. § 921.001(4)(1983). Fifteen years later, in 1997, the Legislature decided to replace the Sentencing Guidelines with the Florida Criminal Punishment Code. ch. 97-194, § 1-8, Laws of Fla. codified as Fla. Stat. § 921.002-921.0026 (1998). The Code became effective Oct. 1, 1998 and applies to all felonies committed after that date. The Code permits a judge to impose the higher of either the guidelines sentence or the statutory maximum. The court may impose

consecutive sentences for additional counts under the Code. The Code abolished upward departures but not downward departures. The trial court must enter written departure reasons for downward departures but may sentence a defendant up to the statutory maximum without giving any reason. The Code allows limited appellate review of sentencing, in contrast to the pre-guidelines situation, which did not allow for appellate review of sentencing. However, the Code limits appellate review of sentencing decisions to downward departures and sentences beyond the statutory maximum.

The Criminal Punishment Code was enacted in 1997. 97-194, Laws of Fla. The legislative history of the Code establishes the legislative intent. *Leonard v. State*,760 So.2d 114, 118 (Fla. 2000)(relying on the Staff Analysis to determine legislative intent). The Senate Bill Staff Analysis explains that the purpose was to repeal the sentencing guidelines and abolish the Sentencing Commission. Staff Analysis of CS/SB 716 dated April 1, 1997. The Code would have the same offense severity ranking chart and the same point scheme as the guidelines. However, the trial court would be allowed to sentence an offender up to the statutory maximum. The Analysis explains that the guidelines were significantly amended twice. The guidelines were amended in 1993 when prisoner were serving only 33% to 40% of their imposed sentence and again in 1995 to "toughen the recommended sentence" by increasing the severity ranking of many offenses and increasing the points. The Analysis noted that the only 1% of cases involved upward departure; whereas, 63% to 85% of cases involved downward departures. Senate Staff Analysis at 4. The Analysis explains

that upward departure would be eliminated. Staff Analysis at 5. The final version of the of the Senate Staff Analysis dated April 15, 1997 includes all of the above language but adds a section on the impact on the prison population and observes that because downward departures are still allowed under the Code and judges routinely depart downward, there may not be any increase in the length of sentences under the Code. Staff Analysis at 6.

The House Bill Analysis of CS/HB 241 dated April 14, 1994 observed that downward departure occurred more frequently than sentences within the guidelines for defendant who are sentenced to prison. House Bill Analysis at 3. The downward departure rate varied from 30% in Key West to 85% in Miami, with an overall state wide departure rate of 62%. By contrast 12% of defendant are habitualized or sentenced to minimum mandatory sentences. The Analysis then attempts to explain some of the reasons for the high incidence of downward departures. Among the possible reasons is that prosecutors do not appeal downward departures but defendant "regularly appeal their sentences" and the fact that 98% of convictions are the result of pleas. The Analysis also notes that of those convicted 20% result in a prison as opposed to probation or county jail time and 55% do not score prison sentences. Staff Analysis at 5. The Analysis explains that the Code will probably increase incarceration for drug offenses. Analysis at 6. The Analysis also explains that the present Sentencing Commission will be replaced with the Sentencing Reform Commission. The Analysis also points out that one of the present inequities under the guidelines was a defendant who was sentenced for two separate

criminal acts at one time scores fewer points that the same defendant scores if each of the two offenses is resolved separately. Analysis at 15. The Analysis also states the belief of prosecutors that the guidelines "create more issues for a defendant to appeal".

DUE PROCESS

Petitioner asserts that the Code is a mixture of traditional discretionary sentencing and a minimum mandatory sentencing which creates an "unbalanced scheme" that violates due process. The State respectfully disagrees. Petitioner is attacking the wisdom of the legislation, not presenting a due process challenge. Innovative sentencing schemes do not violate due process. The legislature is free to combine two types of sentencing. Neither traditional discretionary nor minimum mandatory sentencing schemes violate due process. *O'Donnell v. State*, 326 So.2d 4, 6 (Fla.1975)(holding a 30 year minimum mandatory for kidnapping did not violate due process by prohibiting individualized sentencing). So, a mixture of both does not violate due process either.

Petitioner argues that the Code will increase disparity in sentencing. 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 required uniformity in sentencing, only determinate or narrow minimum mandatory sentencing schemes would be constitutional. Moreover, prior to the guidelines, disparity in sentencing did not

render an otherwise legal sentence illegal.[5] Thus, increased disparity in sentencing, if it occurs under the Code, cannot render a sentence scheme unconstitutional merely because in the intervening years the Legislature enacted the guidelines. Additionally, contrary to Petitioner's claim, uniformity is not the only desirable goal in a sentencing scheme. There are other desirable goals in sentencing such as the protection of society from violent offenders by increasing the length of sentences. 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). Quite simply, the legislature may change its mind about the importance of uniformity in sentencing and change the sentencing scheme to reflect that change.

Additionally, it is not clear that the Code will increase disparity in sentencing. Given the high incidence of downward departures under the guidelines, the Code may well increase

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[5]*Dennis v. State*, 549 So.2d 228 (Fla. 3d DCA 1989)(rejecting a disparity in sentencing claim where the co-perpetrator received a 25 years sentence whereas the defendant received a 75 years sentence); *Stanford v. State*, 110 So.2d 1, 2 & n. 4 (Fla.1969)(while acknowledging that the length of the sentences imposed on these young men sounds harsh when viewed in the cold light of this record but adhering to the principle that if a trial judge imposes a sentence that is within the limits defined by statute, the only relief is before the parole authorities).

uniformity in sentencing by encouraging pleas at the low end of the Code range.

Florida's substantive due process analysis is limited to the reasonable relation test. Courts do not impose on an elected legislative body their own views regarding the wisdom of a particular statute.[6] Instead, the reasonable relation test merely requires that the means selected shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary, or capricious.[7] The Code's stated objectives are that: (1) the primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment; (2) the penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense and (3) the severity of the sentence increases with the length and nature of the offender's prior record. § 921.002(1), Florida Statutes, (2001). Petitioner fails to even attempt to explain how the Code's provision are not reasonably related to the legislature's stated objectives.

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[6] *State v. Rife*, 26 Fla. L. Weekly S226(Fla. 2001)(citing *State v. Mitro*, 700 So.2d 643, 646 (Fla.1997) and *Hamilton v. State*, 366 So.2d 8, 10 (Fla.1978)); *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").

[7] *State v. Saiez*, 489 So.2d 1125, 1128 (Fla.1986)(striking a statute which imposed a criminal penalty for the possession of credit card embossing machines, regardless of whether the machines were being used legitimately); *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).

In *Hall v. State*, 767 So.2d 560 (Fla. 4th DCA 2000), the Fourth District held that the Criminal Punishment Code was constitutional. Hall 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.[8] The First District, agreed with this reasoning and cited the same two federal circuit cases in their opinion in this case. *Hall v. State*, 773 So.2d 99, 100 (Fla. 1st DCA 2000).

In *Peterson v. State*, 775 So.2d 376 (Fla. 4th DCA 2001), the Fourth District rejected a due process challenge to the Criminal Punishment Code. Peterson contended that the Code invited discriminatory and arbitrary sentencing because it gives judges unfettered discretion to impose the statutory maximum sentence for each offense. Peterson argued that this was inconsistent with the historical purpose of sentencing guidelines which was to eliminate unwarranted variation in sentencing. The Fourth District reasoned that because there is no constitutional right to sentencing

[8] *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).

guidelines or to a less discretionary application of sentences than existed prior to the Guidelines, the contention must fail. The Fourth District explained that the legislature had the authority to change the nature of the sentencing structure.[9] Thus, the Criminal Punishment Code does not violate due process.

CRUEL OR UNUSUAL PUNISHMENT

Petitioner asserts that the Code imposes cruel or unusual punishment because it permits consecutive sentences. Petitioner argues that his sentence constitutes cruel and unusual punishment because under the sentencing guidelines the maximum sentence he would have received was 83 months but due to the provision in the Code permitting consecutive sentencing, he received 120 months. Petitioner also asserts that minimum mandatory sentences constitute cruel or unusual punishment. The States respectfully disagrees. Consecutive sentences do not constitute cruel and unusual punishment when imposed for separate crimes. Furthermore, as this Court has repeatedly and consistently held, minimum mandatories do not constitute cruel or unusual punishment.

The Eighth Amendment provides:

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[9] See Cf. *Rollinson v. State*, 743 So.2d 585, 588-589 (Fla. 4th DCA 1999)(rejecting a substantive due process attack on the prison releasee reoffender statute where the defendant claimed that the statute invited arbitrary and discriminatory application by the prosecutor and had the potential to discriminate between two defendants with identical criminal records because the Legislature's intent of protecting the public by ensuring that reoffenders receive the maximum sentence and serve the entire sentence satisfied the rational basis test because legislature's stated objectives were reasonably related to this goal and observing setting penalties for crimes is within the legislature's powers).

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The cruel or unusual punishment provision of Florida's Constitution, Article I, section 17, provides:

> Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.[10]

The federal constitution requires that the punishment be both cruel and unusual to violate the Eighth Amendment. Other states have state constitutions that use the word "or" rather than "and", like the Florida Constitution. Their respective state Supreme Courts have held that the use of the word "or" rather than "and" in the text does not mean that there is a difference in the state provision from the federal provision.[11] However, the Florida

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[10] The citizens of Florida adopted a conformity amendment requiring this Court to construe the provision in the same manner as the United States Supreme Court construes the Eighth Amendment. However, this Court recently declared this constitutional amendment invalid. *Armstrong v. Harris*, 773 So.2d 7 (Fla. 2000)(holding proposed constitutional amendment did not comply with an implied accuracy requirement), *cert. denied*,- U.S. -, 121 S.Ct. 1487, 149 L.Ed.2d 374 (2001). However, the legislature recently passed a resolution to again submit a conformity amendment to the voters. The ballot will include the entire text of the proposed amendment.

[11] Other states also have state constitutions that use the word "or" rather than "and". Their respective state Supreme Courts have held that the use of the word "or" rather than "and" in the text does not mean that there is a difference in the state provision from the federal provision. *State v. Scott*, 961 P.2d 667 (Kan. 1998)(declining to interpret the federal constitution as different from the state because "[t]he wording of both clauses at issue is nearly identical); *State v. Green*, 502 S.E.2d 819, 828 & n.1 (N.C. 1998)(noting that article I, section 27 of the North Carolina Constitution prohibits cruel or unusual punishments but explaining that the Court historically has analyzed cruel and/or unusual punishment claims as the same under both the federal and state Constitutions); *but see People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992)(citing the textual discrepancy between the federal

constitution has been interpreted to require a showing of either cruel or unusual.[12]

The Eighth Amendment does not require strict proportionality between crime and sentence. *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). At most, only "extreme" sentences that are "grossly" disproportionate to the crime are subject to cruel and unusual punishment challenges. In *Harmelin*, Justice Scalia, writing for himself and Justice Rehnquist, argued that the proper question for a cruel and unusual analysis is whether the sentence is illegal, not whether is it proportionate. Any sentence that is within the statutory maximum set by the legislature is *per se* not a violation of the Eighth Amendment. The Eighth Amendment provided protection with respect to modes and methods of punishment, not the length of incarceration. *Harmelin,* 501 U.S. at 966-67, 111 S.Ct. at 2686-87. Justice Kennedy, writing for himself Justice O'Connor and Justice Souter, argued that proper cruel and unusual analysis requires the courts give broad deference

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Constitution which prohibits cruel "and" unusual punishment, and the Michigan constitution which bans cruel "or" unusual punishment and holding that a mandatory penalty of life imprisonment without possibility of parole for possession of 650 grams or more of mixture containing cocaine violated cruel "or" unusual punishment prohibition).

[12] *Armstrong v. Harris*, 773 So.2d 7 (Fla. 2000)(stating that use of the word 'or' instead of 'and' in the Clause indicates that the framers intended that both alternatives were to be embraced individually and disjunctively within the Clause's proscription); *Allen v. State*, 636 So.2d 494, 497 n. 5 (Fla.1994)(concluding that unlike the federal Constitution, the Florida Constitution prohibits 'cruel or unusual punishment.' which means that alternatives were intended."); *Tillman v. State*, 591 So.2d 167, 169 n. 7 (Fla.1991)(explaining that use of the word 'or' indicates that alternatives were intended).

to the sentencing policies determined by the state legislature without undue comparison to the policy decisions of other states. *Harmelin,* 501 U.S. at 998-99, 111 S.Ct. at 2680. However, while the plurality in *Harmelin* disagreed about the test, they agreed that a mandatory life sentence without parole for possession of cocaine was not cruel and unusual punishment.

The Code itself is not subject to a cruel or unusual punishment challenge. An entire Code cannot be cruel and unusual. The *Harmelin* test is case specific and defendant specific. *Harmelin* depends on the punishment being grossly to the crime. You must know the crime including the actual level of violence involved. Moreover, the defendant's criminal history is part of the equation.[13]

Furthermore, any case specific attack must fail. Here, one of the instant crimes, resisting with violence, involved some violence. Additionally, Hall committed the instant offenses while he was on conditional release. (T. 187). Moreover, Hall has a significant and violent criminal history. As the trial court

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[13] *Blackshear v. State*, 771 So.2d 1199 (Fla. 4th DCA 2000)(holding that consecutive life sentences for three robberies with firearm did not constitute cruel and unusual punishment because the robberies were violent and the juvenile also had a long history of other convictions, including five for strong armed robbery, many convictions for burglary, grand theft, and additional misdemeanors); *United States v. Kaluna*, 192 F.3d 1188,1199(9th Cir 1999)(en banc)(recognizing that legislatures may punish recidivists more severely than first-time offenders citing *Solem v. Helm*, 463 U.S. 277, 296, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) and rejecting a cruel and unusual punishment challenge to the federal three strikes law); *United States v. DeLuca*, 137 F.3d 24, 40 n.19 (1st Cir. 1998)(observing that given the defendant's lengthy history of violent criminal activity, the "three strikes" sentence cannot be considered grossly disproportionate)

noted, petitioner's criminal history included an attempted first degree murder; an aggravated battery; a shooting into a building and aggravated assault convictions. (T. 190). *Harmelin* by contrast was a first time offender who was convicted solely of one non-violent crime. As one Court observed, because the cruel and unusual punishment clause permits life imprisonment for a single drug crime .... Life for a repeat bank robber whose record includes murder and attempted murder is an "easy case". *United States v. Washington*, 109 F.3d 335, 338 (7th Cir.1997). Given Hall's lengthy history of violent crimes, this is also an easy case. The 10 year sentence imposed in this case is not disproportionate much less grossly disproportionate to the crime.

Permissible consecutive sentencing is not cruel or unusual punishment because statutorily mandated consecutive sentencing is not.[14] Both this Court and the United States Supreme Court have rejected cruel and unusual punishment challenges to consecutive sentencing.[15]

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[14] *United States v. Parker*, 241 F3d 1114, 1117 (9th Cir. 2001)(holding that the mandatory consecutive sentences imposed by § 924(c) do not violate the Eighth Amendment); *Commonwealth v. Alvarez*, 596 N.E.2d 325 (Mass. 1992)(holding that statutorily mandated consecutive mandatory minimum sentence did not violates the state constitutional provision against cruel or unusual punishment).

[15] *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982)(holding that two consecutive 20-year prison terms imposed on a defendant who had been convicted on separate counts of possession with intent to distribute and the distribution of nine ounces of marijuana did not violate the ban against cruel and unusual punishment); *Chavigny v. State*, 112 So.2d 910, 915 (Fla. 2d DCA 1959)(upholding consecutive life sentences imposed for second degree murder convictions cited with approval in *O'Donnell v. State*, 326 So.2d 4, 5-6 (Fla. 1975)).

In *Hall v. State*, 773 So.2d 99, 101 (Fla. 1st DCA 2000), the First District held that the consecutive sentences imposed in this case did not constitute cruel and unusual punishment. Hall contended his consecutive sentences are disproportionate given the facts of this case and cited two case as authority.[16] The *Hall* Court noted that, unlike the cases cited as authority, the present case involves consecutive sentences for two distinct offenses.[17]

Additionally, petitioner asserts that the Code violates proportionality because it provides for mandatory sentences with

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[16] *Kenimer v. State*, 59 S.E.2d 296 (Ga. 1950)(holding cruel and unusual punishment clause contravened when defendant sentenced to consecutive sentences of five days in jail on 238 counts of criminal contempt where statutory maximum on each count was twenty days in jail), and *State ex rel. Garvey v. Whitaker*, 19 So. 457 (La.1896)(holding it was cruel and unusual to impose consecutive sentences for 72 violations of city ordinance resulting in six year prison sentence).

[17] The *Harmelin* Court actually discussed one of the two case petitioner cited in his brief to the first district. *Harmelin* discussed *Garvey* in a footnote explaining that *Garvey* was not a proportionality case; rather, it was a illegal sentence case. The *Harmelin* Court explained:

> In *Garvey*, the defendants were sentenced to nearly six years in jail for trespassing on public property. The sentence prescribed by the relevant city ordinance was 30 days, but the defendants' 1-hour 40-minute occupation had been made the subject of 72 separate counts, "each offence embracing only one and one-half minutes and one offence following after the other immediately and consecutively," 48 La., at 533, 19 So., at 459. The Louisiana Supreme Court found the sentence to have been cruel and unusual "considering the offence to have been a continuing one," ibid. We think it a fair reading of the case that the sentence was cruel and unusual because it was illegal.

Harmelin v. Michigan, 501 U.S. 957, 984 n.10, 111 S.Ct. 2680, 2696 n.10, 115 L.Ed.2d 836 (1991).

few exceptions. First, the Code is not a minimum mandatory sentencing scheme. While Staff Analysis refers to the minimum established by the Code as "somewhat like minimum mandatory sentences", in fact, they are not. Senate Staff Analysis dated April 1, 1997 at 4. In true minimum mandatory sentencing, a trial court has no discretion and must impose the minimum mandatory sentence. Here, by contrast, under the Code, a trial court is free to sentence below the minimum established by the Code provided that the trial court enters written reasons for doing so. More importantly, this Court has repeatedly held that minimum mandatory sentencing schemes do not constitute cruel or unusual punishment.[18] If pure minimum mandatory sentencing schemes do not constitute cruel or unusual punishment, then even if the Code had aspects of minimum mandatory sentencing, it would also not constitute cruel or unusual punishment. Thus, the Code does not constitute cruel or unusual punishment.

DOUBLE JEOPARDY

Petitioner next asserts that the Code violates double jeopardy. The State respectfully disagrees. Fundamental fairness and skewing

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[18] *Scott v. State*, 369 So.2d 330 (Fla.1979)(holding three minimum mandatory for a crime committed with a firearm did not unconstitutionally bound trial judges to a sentencing process wiping out any chance for reasoned judgment); *Owens v. State*, 316 So.2d 537 (Fla.1975); *Dorminey v. State*, 314 So.2d 134 (Fla.1975); *Banks v. State*, 342 So.2d 469, 470 (Fla.1977); *McArthur v. State*, 351 So.2d 972 (Fla.1977)(holding statute requiring person convicted of capital felony and sentenced to life imprisonment to serve no less than 25 years before becoming eligible for parole does not impose constitutionally proscribed cruel and unusual punishment); *State v. Benitez*, 395 So.2d 514 (Fla.1981)(holding mandatory minimum sentences drug trafficking statute did not violate cruel and unusual punishment clauses of State and Federal Constitutions).

of the sentencing process are due process, not double jeopardy attacks. Appellate review of sentences does not violate double jeopardy. Double jeopardy protections apply only to capital sentencing. Nor does appellate review give rise to valid a due process vindictiveness claim.

Both the federal and Florida constitutions prohibit being twice put in jeopardy. The Fifth Amendment of the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Florida Constitution provides: "No person shall ... be twice put in jeopardy for the same offense." Art. I, § 9, Fla. Const.

To the extent that petitioner is raising a judicial vindictiveness claim based on *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), no such claim is possible under the Code. If a trial court imposed a downward departure and is reversed on appeal and then at resentencing imposes a guideline sentences, this is not vindictive. Rather, the trial court merely would be following the mandate of an appellate court. *Harris v. State*, 624 So.2d 279 (Fla. 2d DCA 1993)(stating that the imposition of the habitual offender sentence on remand, pursuant to the mandate of this court, was effected without a scintilla of the vindictiveness focused upon in *North Carolina v. Pearce*). While *Pearce* places a due process limit on increasing a sentence after an appeal prohibiting the judge from retaliating for the defendant appealing by increasing his sentence, minus the improper motive, *Pearce* does not bar the judge from increasing a

sentence after appeal. Moreover, *Pearce* is not a double jeopardy case. It is a due process case. *Wood v. State*, 582 So.2d 751, 752 (Fla. 5th DCA 1991)(explaining that the Pearce majority specifically rejected the double jeopardy argument and prohibited the increased sentence on due process grounds only).

Petitioner relies on the arguments presented in Robert Batey and Stephen M. Everhart, *The Appeal Provision of Florida's Criminal Punishment Code: Unwise and Unconstitutional*, 11 U. FLA. J.L. & PUB. POL'Y 5 (1999). Batey asserts that the exception to double jeopardy announced in *United States v. DiFrancesco*, 449 U.S. 117, 141, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) depended on both the defendant and the government being permitted to appeal. The problem with this argument is that was not the logic of the *DiFrancesco* Court. The Court explained:

> Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence.

DiFrancesco, 449 U.S. at 139, 101 S.Ct. at 438-39. The *DiFrancesco* relied upon the fact that Congress specifically allowed appeals of that type of sentencing error by the government and the defendant should know via statutory notice that his sentence is subject to being appealed. Moreover, the *DiFrancesco* Court relied on common law practice which allowed a judge to increase a sentence during the same term of court. *DiFrancesco*, 449 U.S. at 133-134, 101 S.Ct. at 435. The *DiFrancesco* Court also relied on the policy underlying

the double jeopardy provision, which is to bar repeated attempts to convict, that subject the defendant to embarrassment, expense, anxiety, insecurity, and the possibility that he may be found guilty even though innocent. The Court noted that these policy considerations have no application to the prosecution's statutorily granted right to appeal a sentence rather than a conviction. Nowhere in the opinion is there even an implied reliance on the concept of reciprocal rights.

Moreover, since the decision in *DiFrancesco*, the United States Supreme Court has held that the Double Jeopardy Clause does not apply to sentencing. *Monge v. California*, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998). *Monge* involved California's three-strikes law which provided for increased incarceration after a jury trial at the beyond a reasonable doubt standard established his prior criminal history. Monge waived his right to a jury trial on the sentencing issues. The judge determined that Monge qualified for three striking sentencing and doubled his five years term of incarceration. Monge appealed and the California appellate court determined that was insufficient evidence to support the three strikes findings. The State had conceded but requested another opportunity to prove the allegations on remand. The court rejected that remedy holding that retrial on the three strike findings would violate double jeopardy. Monge argued that the three strike sentencing proceedings have the "hallmarks of a trial on guilt or innocence" because the sentencer makes an objective finding as to whether the prosecution has proved a historical fact beyond a reasonable doubt in contrast to traditional sentencing

proceedings. The United States Supreme Court noted that double jeopardy protections have been inapplicable historically to sentencing proceedings because sentencing determination do not place a defendant in jeopardy for an offense. *Monge*, 524 U.S. at 728, 118 S.Ct. at 2250. The Court also observed that it was a "well established part of our constitutional jurisprudence that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal," *Monge*, 524 U.S. at 730, 118 S.Ct. at 2251.

Here, unlike California's three strike sentencing procedures involving a jury and the reasonable doubt standard, sentencing under the Code is traditional sentencing. Code sentencing has none of the "hallmarks of a trial on guilt or innocence". Florida's Criminal Punishment Code may not be attacked on federal double jeopardy grounds in the wake of *Monge*.

Batey also argues that the Code violates the state constitutional provision. He asserts that the Florida Supreme Court position was that a sentence cannot be increased once a defendant started to serve it and only "relented from this position to allow implementation of the sentencing guidelines". However, the case he cites for support is not a guidelines case. *Harris v. State*, 645 So.2d 386 (Fla.1994).[19] Rather, *Harris* involved habitual

[19] In *Harris v. State*, 645 So.2d 386 (Fla.1994), habeas corpus denied sub nom, *Harris v. Moore*, No. 95-1755-CIV-T-17A, 1999 WL 223167 (M.D.Fla. Feb.19, 1999)(denying habeas relief on the double jeopardy claim for the same reasons that the Florida Supreme Court had denied the claim). At the original sentencing, Harris was not sentenced as a habitual offender because the trial court mistakenly

offender sentencing that is exempted from the guidelines. Furthermore, the federal and state double jeopardy prohibitions are the same.[20] Thus, the Code does not violate either the federal or the state double jeopardy clauses.[21]

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believed that the defendant's convictions were not subject to habitualization. The trial court sentenced Harris to a guidelines sentence of 27 years. Harris appealed his conviction and the State cross-appealed the trial court failure to impose habitual offender sanctions. The Second District affirmed the conviction but held that the offense were subject to habitualization and remanded the case for resentencing. *Harris v. State*, 593 So.2d 301 (Fla.2d DCA 1992). At the resentencing, the trial court habitualized Harris. Harris appealed, arguing the sentence violated the double jeopardy clause. The second District upheld the imposition of habitual offender sanctions, concluding that the trial court's initial decision not was based solely on a misconception of law not an exercise of discretion. *Harris v. State*, 624 So.2d 279 (Fla. 2d DCA 1993). This court affirmed citing *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) and that Harris was not deprived of any reasonable expectation of finality in his original sentence, nor has he been subject to repeated attempts to convict. This Court reasoned that "sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." This Court held that the Double Jeopardy Clause is not an absolute bar to the imposition of an increased sentence on remand from an authorized appellate review of an issue of law concerning the original sentence.

[20]*Cohens v. Elwell*, 600 So.2d 1224, 1225 (Fla. 1st DCA 1992)(concluding that the scope of the double jeopardy clause in the Florida Constitution is the same as that in the federal constitution); *Carawan v. State*, 515 So.2d 161, 164 (Fla. 1987)(noting that Double jeopardy clause of State Constitution was intended to mirror double jeopardy clause of United States Constitution).

[21] Batey rejects as a remedy for the double jeopardy concern the option of not allowing state appeals of downward departures because that would lead to pre-guideline total discretion, and recommends instead that the Court strike the appeal provision of the Code and reinstate the guideline provision relating to appeal. 11 U. FLA. J.L. & PUB. POL'Y at n.104. But this is not an available remedy. First, the Code abolished the entire concept of "upward departures" so there is nothing to appeal. Moreover, the court would have to strike the part of the Code that allows sentencing up

ACCESS TO COURTS & STATE CONSTITUTIONAL RIGHT TO APPEAL

Petitioner contends that the Code violates the state constitutional provision granting access to courts and the state constitutional right to appeal. The State respectfully disagrees. There is no state constitutional right to appeal the length of a sentence. Furthermore, the legislature did not abolish the right to appeal upward departures; rather, the legislature abolished the entire concept of upward departures. Quite simply, there is nothing to appeal under the Code. Furthermore, a defendant still may appeal a sentence that exceeds the statutory maximum.

The appeal provision of the Criminal Punishment Code, § 921.002(1)(h), provides:

> A sentence may be appealed on the basis that it departs from the Criminal Punishment Code only if the sentence is below the lowest permissible sentence or as enumerated in s. 924.06(1).

A defendant has no federal constitutional right to appeal.[22] However, a defendant does have a state constitutional right to appeal a conviction. *Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla.1996)(receding from *State v. Creighton*, 469 So.2d 735 (Fla.1985) and holding that there is a right to appeal in Article V, § 4(b)(1) of the Florida

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to the statutory maximum - or even in some case beyond the statutory maximum - as well as the appeal provision of the Code. In other words, this Court would have to set the range.

[22] *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985)(stating that almost a century ago the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors); *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983); *Abney v. United States*, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038-39, 52 L.Ed.2d 651 (1977).

Constitution). But the state constitutional right to appeal is limited to the conviction, it does not apply to the length of the sentence. During the period of 1956 to 1972 when "there was no question that the right of appeal was protected by our constitution", the length of a sentence was not appealable.[23] *Amendments*, 696 So.2d at 1104 n.1; but see *Peterson v. State*, 775 So. 2d 376 (Fla. 4th DCA 2001)(holding that there is a state constitutional right to appeal a sentence citing *State v. Jefferson*, 758 So.2d 661, 663 (Fla.2000)). Thus, petitioner has no state constitutional right to appeal the length of his sentence.

Moreover, Hall has no standing to raise a right to appeal issue. Petitioner was sentenced to 60 months incarceration on each count for a total of 120 months. The 60 months sentence was within the old guideline range. Under the sentencing guidelines, petitioner could have been sentenced within a range of 49.8 to 83 months. IB at 10. The recommended sentence under the guidelines was 66.4 months. IB at 9. Thus, petitioner's sentence under the Code was slightly under the recommended sentence under the guidelines. Petitioner's sentence would have been the same under the guidelines as it was under the Code. The provision allowing consecutive sentences is what increased petitioner's sentence.

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[23] During this period this Court twice held that a defendant may not appeal the length of his sentence. *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)

Moreover, prior to the guidelines, the length of the sentence was not appealable at all.[24] This was also true in the federal system.[25] 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). After the guidelines were enacted, sentences within the range were never cognizable on appeal.[26] Under

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[24]*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).

[25] *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).

[26] *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).

the Code, just like the guidelines, sentences within the range are not appealable. *Hochhauser v. State*, No. 4D00-761 (Fla. 4th DCA May 23, 2001)(dismissing an appeal of a sentence within the guidelines because a challenge to a sentence within the guidelines will not support this court's criminal appellate jurisdiction). In sum, defendant never had the right to appeal a sentence within the range.

The Florida Legislature created the "right" to appeal the length of a sentence as part of the guidelines. What the legislature giveth, the legislature may taketh away. *Cf. Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)(statute abolishing intoxication defense does not violate due process because the defense is not a common law defense; rather, the legislature created the defense and therefore may abolish it).

In *Willingham v. State*, 781 So.2d 512, 514 (Fla. 5th DCA 2001), the Fifth District affirmed a statutory maximum sentence imposed pursuant to the Code. Willingham's Code worksheet resulted in a minimum sentence of 13 months in prison. The trial court imposed fifteen years' incarceration which was the statutory maximum for the offense. The *Willingham* Court explained that under the Code, there is no longer an upward departure nor may a defendant appeal so long as the sentence is within the statutory maximum. The Fifth District explained that to challenge a sentence which is within the statutory maximum, it is now necessary for a defendant to argue vindictiveness. Willingham argued his sentence was vindictive on its face due to its length, his youth, his lack of a prior adult criminal record, and a complete absence of enhancing factors on the

scoresheet. The Fifth District rejected these arguments reasoning that length of sentence alone is not a legally sufficient basis for a defendant to challenge a sentence. The Court concluded that Willingham was unable to adduce any evidence of vindictiveness as there were no plea negotiations or actions by the trial judge to force him to accept a plea offer. Nor was there evidence the sentence was imposed as retribution for having exercised his right to have a jury trial. The *Willingham* Court observed that the Code will probably lead to considerable disparities in lengths of sentences but the wisdom of this is for the Legislature, not the courts.

Moreover, the Code did not abolish the right to appeal an upward departure; rather, the Code abolished the entire concept of upward departures. As the Staff Analysis explains, "upward departures would be eliminated." Senate Analysis at 5. What the legislature actually did was greatly expand the permissible range. The range now is anything from the low end of the Code's worksheet to the "wandering" statutory maximum. It expanded the old guidelines sentence range. The argument falls because the legislature has the right to make the "range" anything it wants. Petitioner is actually arguing not just that he has a constitutional right to appeal but as an inherent corollary of that argument that he also has the constitutional right to a narrow range. And that any sentence outside the narrow range may be appealed. Petitioner is attempting to constitutionalize the guidelines in a particular form. If this Court were to adopt this view, then this Court would

have to decide the range. Of course, the legislature and not this Court sets the penalties, as this Court has repeatedly stated.[28]

In *Scott v. United States*, 997 F.2d 340, 342 (7th Cir. 1993), the Seventh Circuit explained that until the Guidelines took effect, federal district judges had all but total control over sentencing. Prior to the Guidelines, federal district judges "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." *Scott*, 997 F.2d at 342. The *Scott* Court also explained that the Guidelines were not designed to protect the interests of defendants. The Seventh Circuit noted that the Sentencing Reform Act instructs the judiciary to produce more consistency among sentences, for the benefit of society rather than of particular defendants, many of whose sentences rise dramatically as a result. But as the *Scott* Court observed, the Sentencing Guidelines are not exactly a Bill of Rights for criminals.

Here, Petitioner is attempting to do just that. Petitioner seeks to create a bill of rights from the Florida Sentencing Guidelines. Petitioner has no right to a particular type of sentencing statute.

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[28]*Bates v. State*, 750 So.2d 6, 19 (Fla. 1999)(Harding, C.J., concurring)(observing that the Legislature has the exclusive power to set criminal penalties, limited only by the Constitution and noting that neither this Court nor a defendant can simply choose what penalty will apply in any given case); *McKendry v. State*, 641 So.2d 45, 47 (Fla. 1994)(explaining that it is within the legislature's power to prescribe punishment for criminal offenses); *Rusaw v. State*, 451 So.2d 469, 470 (Fla. 1984)(noting that it is "well settled that the legislature has the power to define crimes and to set punishments").

Relying on *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973), Batey argues that appeals should be a two-way street and that due process should not allow the balances of forces between the defendant and the State to be so skewed. Robert Batey and Stephen M. Everhart, *The Appeal Provision of Florida's Criminal Punishment Code: Unwise and Unconstitutional*, 11 U.FLA. J.L. & PUB. POL'Y 5, 28 (1999). The United States Supreme Court in *Wardius*, held that an Oregon rule that required the defendant to give pretrial notice of the use of an alibi defense violated due process. At trial, defendant was not allowed to present his alibi defense because he failed to give notice to the prosecution. Oregon did not allow criminal defendants any discovery against the government. The State did not have to disclose the names of witnesses it would use to refute the alibi defense. Unless defendant engaged in one-sided discovery designed to provide a unilateral benefit to the State, he was completely foreclosed from presenting his defense. The Court held that, absent reciprocal discovery rights, the Oregon alibi rule violated the due process clause of the Fourteenth Amendment. *Wardius*, 412 U.S. at 478-79, 93 S.Ct. at 2213-14. The Court noted that although the Due Process Clause says little about the amount of discovery a defendant must be afforded, it does "speak to the balance of forces between the accused and his accuser." *Wardius*, 412 U.S. at 474, 93 S.Ct. 2208. The Court stressed that discovery must be a two-way street. *Wardius*, 412 U.S. at 475, 93 S.Ct. at 2212.

Wardius, of course, involved the constitutional right of a defendant to present a defense at trial. By contrast, here, there

is no constitutional right to appeal a sentence. Moreover, the balance of forces between the state and the accused is not skewed. The right to appeal under the Code is reciprocal. The State may appeal a downward departure and the defendant may appeal a sentence beyond the statutory maximum. Thus, both the State and the defendant may appeal extreme sentences.

In *Hall v. State*, 767 So.2d 560 (Fla. 4th DCA 2000), *review granted,* No. SC00-2358 (Fla. Apr. 25, 2001), Hall argued that the Code violates due process because the State has the right to appeal a downward departure without providing a corresponding right to the defendant. The Fourth District rejected this argument by recognizing that a defendant can appeal an illegal sentence under the Code.

In *Hall v. State*, 773 So.2d 99 (Fla. 1st DCA 2000), the First District held that is was not a violation of due process to permit the state to appeal a downward departure without providing for an appeal from an "upward departure" as well. Hall argued that the CPC was unreasonable because it permits the state to appeal a downward departure. The First District explained that rather than providing for a sentencing range within which the trial court may exercise its discretion as the guidelines did, the CPC permits the judge to sentence within its discretion from the lowest permissible sentence up to the statutory maximum without written explanation. Under the CPC, there is no upper limit to the possible sentence other than the statutory maximum. The Code provides a sentence may only be appealed as a departure if it is below the lowest permissible sentence. However, the Court noted that a defendant

may appeal a sentence on the basis that it is illegal or exceeds the statutory maximum. Thus, the Code does not violate the state constitutional right to appeal.

SEPARATION OF POWERS

Hall next asserts that the Code violates separation of powers by infringing on this Court constitutional powers to make procedural rules. Fla. Const. Art. V. § 2(a). The State respectfully disagrees. The Criminal Punishment Code is substantive not procedural. The legislature has the power to establish the penalties for crime not the judiciary. Thus, the Code does not violate separation of powers.

While it is the exclusive province of the Florida Supreme Court to promulgate rules of judicial procedure, the Code, like the sentencing guidelines, constitute substantive law which is within the province of the legislature. *Smith v. State*, 537 So.2d 982 (Fla.1989).[29]

In *Booker v. State*, 514 So.2d 1079 (Fla. 1987), this Court held the amendment to the guidelines that prohibited appellate review of the extent of a departure that did not violate separation of powers. The *Booker* Court explained that there "is no inherent judicial power of appellate review over sentencing". This Court

[29] In a footnote, the *Peterson* Court observed that both *Smith v. State*, 537 So.2d 982 (Fla.1989)and *Booker v. State*, 514 So.2d 1079 (Fla.1987) were decided when the law was that the Florida Constitution did not provide a right to appeal and probably are no longer valid in light of *Amendments*. *Peterson,* 775 So. 2d 376 at n.1. This observation is incorrect. Both *Smith* and *Booker* are still valid. As explained above, the state constitutional right to appeal does not include the right to appeal the length of a sentence.

noted that both the Florida Supreme Court 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. This Court observed that setting 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."

Mandatory minimum sentencing statutes do not violate the separation of powers.[30] If mandatory minimums do not violate separation of powers, then discretionary consecutive sentencing statutes cannot.

The federal sentencing guidelines contain a provision covering sentencing on multiple counts.[31] This provision makes consecutive

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[30] *Lightbourne v. State*, 438 So.2d 380 (Fla. 1983); *Scott v. State*, 369 So.2d 330 (Fla. 1979); *Sowell v. State*, 342 So.2d 969 (Fla. 1977).

[31] The provision, § 5G1.2(d), provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other

sentencing mandatory in certain cases. The Second Circuit has rejected an unconstitutional delegation of authority attack on this provision. *United States v. Kapaev*, 199 F.3d 596, 597, n.** (2d Cir. 1999)(citing *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) which held that the federal sentencing guidelines do not violate federal separation of powers principles). Thus, the Code does not violate separation of powers.

Due process notice & *Apprendi*

Petitioner asserts he lacked notice of the penalty for his crime and that his sentence violated the recent United States Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The State respectfully disagrees. Petitioner had statutory notice of the penalty. Petitioner lacks standing to raise an *Apprendi* claim. He was sentenced to the statutory maximum of five years for each offense, not beyond. Furthermore, the Code as a whole does not violate *Apprendi*. Thus, the Code does not violate the due process clause's notice requirement or *Apprendi*.

Petitioner had statutory notice of the penalty. A defendant has constructive notice of the penalty for any new crime he commits through Florida Statutes. *Ellis v. State*, 762 So.2d 912, 912 (Fla.2000)(recognizing that publication in the Florida Statutes gives all citizens constructive notice of the consequences of their actions quoting *State v. Beasley*, 580 So.2d 139, 142 (Fla.1991)).

> respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

The Code comports with the due process clause requirement of fair warning of the punishment for a crime. The Code lists every crime and gives a severity ranking for that particular crime. The Code also contains a worksheet form and detailed directions on how to perform the calculations. Any defendant with a piece of paper and a pencil can follow these directions and determine the penalty. An accused is not deprived of notice of the criminal penalty merely because he must add to determine the penalty. *Gardner v. State*, 661 So. 2d 1274, 1276 (Fla. 5th DCA 1995)(requiring an accused to add to know the penalty does not deprive the accused of notice). Contrary to petitioner's claim, the Code provides more notice of what the actual sentence will be than the pre-guidelines statutory maximum. The First, Fourth and Fifth District Courts have addressed the related issue of notice under the guidelines and have held that guidelines did not violate the due process clause requirement of fair notice.[32] Thus, the Code provides adequate notice of the penalty.

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[32] *Floyd v. State*, 707 So.2d 833, 835 (Fla. 1st DCA 1998)(holding that the "wandering" statutory maximum provision of the guidelines did not violate due process because it provided adequate notice because defendants are imputed with constructive notice by publication of the Florida Statutes and the maximum sentence can be determined simply by completing a sentencing guidelines scoresheet); *Myers v. State*, 696 So.2d 893, 898 (Fla. 4th DCA 1997)(rejecting a lack of notice challenge to the "wandering" statutory maximum provision of the guidelines, § 921.001(5), Judge Farmer, writing for a unanimous panel, stated: "every defendant is presumed to know the law and has actual knowledge of one's own criminal history, there is no possible claim of lack of notice as to the guidelines maximum that will be imposed for an offense."); *Gardner v. State*, 661 So. 2d 1274 (Fla. 5th DCA 1995)(same).

First, petitioner has no standing to raise an *Apprendi* claim. He was not sentenced beyond the standard statutory maximum of five years for a third degree felony. No fact increased his sentence beyond the statutory maximum. There simply is no *Apprendi* issue in this case.

Furthermore, an *Apprendi* claim must be preserved. And to be preserved, the defendant must object at trial. An objection at sentencing when the jury has been dismissed is too late to cure the problem and therefore, not timely. *United States v. Strickland*, 245 F3d 368, 376 (4th Cir. 2001)(rejecting a claim that the *Apprendi* issue had been preserved by objection at sentencing where the issue was not preserved at trial by jury instruction or special interrogatory). Hall did not object at the charge conference or when the jury was instructed. (T. 145-149; 168-177). Hall did not object at sentencing either. Thus, the issue is not preserved. Moreover, an *Apprendi* error is not fundamental error.[33]

In *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), the United States Supreme Court held that due process and the right to a jury

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[33] *United States v. Terry*, 240 F.3d 65, 74 (1st Cir. 2001)(applying harmless error analysis to an *Apprendi* issue and concluding that there was no plain error because the evidence regarding these facts was so strong that jury would surely have made such findings if issue had been submitted to it and the defendant did not contest the amount at trial); *United States v. Anderson*, 236 F.3d 427, 429-30 (8th Cir. 2001)(concluding that the *Apprendi* error was harmless because there was overwhelming evidence of drug quantity); *United State v. Jackson*, 236 F.3d 886 (7th Cir. 2001)(holding that the failure to have jury determine beyond a reasonable doubt whether more than five grams of crack cocaine was involved as required by *Apprendi* was harmless in light of overwhelming evidence of sale of hundreds if not thousands of grams of crack).

trial require that any fact that increases the penalty for a crime beyond the statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 120 S.Ct. at 2362-63. Apprendi fired several .22-caliber bullets at the home of an African-American family. Apprendi admitted to the police that he targeted the family because of their race. Apprendi pled guilty to possession of a firearm for an unlawful purpose. The judge sentenced Apprendi to twelve years' incarceration. The standard maximum sentence for this crime was ten years. However, a New Jersey hate crime statute doubled the maximum sentence to twenty years if the defendant committed the crime for the purpose of intimidation based on race, color, gender, handicap, religion, sexual orientation or ethnicity. The statute allowed the trial court to find biased purpose based on a preponderance of the evidence standard. Apprendi argued that due process required that the jury rather than a judge make the determination of biased purpose and that the State must prove biased purpose beyond a reasonable doubt rather than by a preponderance of the evidence. In other words, Apprendi asserted that biased purpose was an element of the crime rather than a "sentencing factor". The *Apprendi* Court agreed. The *Apprendi* Court explained that the effect of New Jersey's scheme was "unquestionably to turn a second-degree offense into a first-degree offense, under the State's own criminal code." *Apprendi*, 120 S.Ct. at 2365. The Court noted that the distinction between an element of the offense and a "sentencing factor" was not made at common law. However, the *Apprendi* Court expressly declined to overrule

its earlier holding in *McMillan v. Pennsylvania*, 477 U.S. 79, 91 L.Ed.2d 67, 106 S.Ct. 2411 (1986).[34] The *Apprendi* Court explained that *McMillan* was limited to facts that do not involve the imposition of a sentence more severe than the statutory maximum. *Apprendi*, 120 S.Ct. at 2361 n. 13. In a footnote, the *Apprendi* majority expressed no view of the effect of its holding on the Guidelines. *Apprendi* at n.21. The *Apprendi* majority, citing *Edwards v. United States*, 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998) and the federal sentencing guidelines provision § 5G1.1, stated that it would be different constitutionally if the sentence imposed exceeded the statutory maximum.[35]

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[34] *McMillan* had held that sentencing factors may determined by the judge and used to increase the penalty at the preponderance standard. *McMillan* involved the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons.Stat. § 9712 (1982). That statute provided that anyone convicted of certain felonies was subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense. As the Court put it, "[t]he Act operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony; it does not authorize a sentence in excess of that otherwise allowed for that offense." 477 U.S. at 81-82, 106 S.Ct. 2411. The Court found that Pennsylvania had merely taken one factor traditionally considered by sentencing judges--the instrumentality used to commit the crime--and dictated the precise weight it was to receive. Id. at 89-90, 106 S.Ct. 2411. That act alone did not transform what the state legislature plainly regarded as a factor for sentencing into an element of the offense that the Constitution requires to be proved beyond a reasonable doubt before a jury.

[35] In *Edwards v. United States*, 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998) the United States Supreme Court held that the judge may determine whether crack was involved. The defendants were convicted of conspiring to distribute cocaine or crack. The general verdict did not specify whether cocaine or crack was involved. The federal sentencing guidelines treat crack more severely than cocaine. Edwards argued that the jury rather than

Thus, while the jury must determine facts that increase the statutory maximum, the judge may still determine facts that are within the statutory maximum. *Apprendi*, 120 S.Ct at 2358. In other words, facts that increase the sentence above the statutory maximum are elements of the offense rather than sentencing factors. Facts within the statutory maximum are "*McMillan*" facts which a judge may determine; whereas, facts above the statutory maximum are "*Apprendi*" facts that must found by the jury.[36]

Apprendi really is not a who case. It is a standard of proof case. The actual concern of the *Apprendi* Court is not whether the judge decides a fact versus the jury but the legislature's ability to completely get around the beyond a reasonable doubt standard of *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). One of the reasons that the Court was unwilling to overrule *Walton*

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the judge make the determination that only cocaine was involved. The *Edwards* Court observed that the issue would be different if the sentence exceeded the statutory maximum but Edwards' sentence did not exceed the statutory maximum. The *Edwards* Court noted that the statutory maximum trumps a higher guidelines sentence according to the guidelines themselves.

[36] *Kijewski v. State*, 773 So.2d 124 (Fla. 4th DCA 2000)(explaining that proof of the date of the defendant's release from prison is not an "*Apprendi* fact" that must be proven to a jury to subject the defendant to Prison Releasee Reoffender sentencing because the PRRA does not increase the statutory maximum rather it requires that the maximum sentence be imposed); *United States v. McIntosh*, 236 F.3d 968, 974-976 (8th Cir.)(holding that *Apprendi* did not apply to enhancement that did not result in sentence above statutory maximum which was life; rather, the fact of death or serious bodily injury required to impose a minimum mandatory of twenty years remains a sentencing factor that the judge may determine), *cert. denied*, No. 00-1551, 2001 WL 378439 (U.S. May 14, 2001);*United States v. Smith*, 223 F.3d 554, 565-66 (7th Cir. 2000)(explaining that *Apprendi* is inapplicable where defendants faced a life sentence irrespective of the challenged factual finding made by the sentencing court).

v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) and hold that the death penalty must be imposed by the jury was that judges use the higher beyond the reasonable doubt standard when determining whether aggravators exist. In those states where the judge imposes the death sentence rather than the jury, aggravating circumstances must be proven beyond a reasonable doubt.[37] If a judge or a jury were allowed to find aggravating circumstances at the preponderance standard rather than the reasonable doubt standard such a death penalty statute would give rise to an *Apprendi* concern. But this would be true regardless of whether it was the judge or the jury who was the factfinder. Cf. *Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990)(holding that although aggravating circumstances are not elements of any offense, the *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) standard applies to capital

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[37] *Hildwin v. State*, 727 So.2d 193, 194 (Fla. 1998)(stating that like guilt itself, aggravators must be proven beyond a reasonable doubt); *State v. Soto-Fong*, 928 P.2d 610, 625 (Ariz. 1993)(explaining that when a death sentence is imposed, the Arizona Supreme Court determines independently whether the aggravating circumstances have been proven beyond a reasonable doubt); *State v. Wood*, 967 P.2d 702, 720 (Idaho 1998)(noting that in order to impose the death penalty, under I.C. § 19-2515(c), at least one aggravating factor needs to be proven beyond a reasonable doubt); *Weeks v. State*, 761 A.2d 804, 806 n.5 (Del. 2000)(explaining that Delaware's death penalty scheme provides that the jury must determine whether the evidence shows beyond a reasonable doubt the existence of at least 1 aggravating circumstance and then the trial court also must then determine the existence beyond a reasonable doubt of at least 1 statutory aggravating circumstance citing 11 Del.C. § 4209); *Slaton v. State*, 680 So.2d 909, 926 (Ala. 1996)(explaining that the provision, Ala. Code 1975, § 13A-5-45(e), provides that the State has the burden of proving beyond a reasonable doubt the existence of an aggravating circumstance for a capital defendant to be sentenced to death).

sentencing to safeguard the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty).

Florida Courts have held that *Apprendi* does not apply to recidivist sentencing schemes such as the prison releasee reoffender or the habitual offender statute.[38] Similarly, consecutive sentencing do not give rise to an *Apprendi* claim. *People v. Amaya*, 2001 WL 520924 (Ill. App. 2001)(holding *Apprendi* does not apply to consecutive sentences because the imposition of consecutive sentences does not increase the penalty for a crime beyond the prescribed statutory maximum; rather, it only determines the manner in which the sentence for each individual offense is to be served).[39] In consecutive sentencing, the issue is solely a

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[38] *Kijewski v. State*, 773 So.2d 124 (Fla. 4th DCA 2000)(explaining that proof of the date of the defendant's release from prison is not an "*Apprendi* fact" that must be proven to a jury because Prisonr Releasee Reoffender sentencing does not increase the statutory maximum rather it requires that the maximum sentence be imposed); *Gray v. State*, 780 So.2d 1042 (Fla. 4th DCA 2001)(rejecting claim that a habitual offender sentence was unconstitutional because *Apprendi* does not apply to enhanced sentences based on prior conviction); *Robbinson v. State*, 2001 WL 514313 (Fla. 3d DCA May 16, 2001)(stating that the jury trial requirement of *Apprendi* does not apply to the Florida habitual offender statute).

[39] The Illinois consecutive sentencing statute, unlike Florida, required that sentence be concurrent when the crimes were part of a single course of conduct unless the trial court made a determination that the crimes involved serious bodily injury. Florida trial court are free to impose consecutive sentences without any such factual determinations. But see *People v. Harden*, 741 N.E. 1063 (Ill.App. 2000)(concluding that the section of Illinois statute that allows trial court to impose consecutive sentences upon making one or more factual findings held unconstitutional under *Apprendi*). Florida consecutive sentencing provision does not require any such factual findings.

matter of law involving whether the offenses are separate offense under *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Double jeopardy claims are not submitted to the jury because the issue is purely legal. Thus, *Apprendi* does not apply to consecutive sentencing in Florida.

Petitioner seems to be challenging the entire Code as violative of *Apprendi*. The Criminal Punishment Code, § 921.0024(2), Florida Statutes (1999), provides:

> . . . 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.

The Florida Legislature has statutorily authorized individual or "wandering" statutory maximums. In effect, Florida has two statutory maximums, a standard statutory maximum and an individualized statutory maximum for certain offenders. The federal guidelines provision cited by the *Apprendi* Court is the provision governing sentencing on a single count of conviction. § 5G1.1. This provision of the federal sentencing guidelines specifically provide that if a guidelines sentence exceeds the statutory maximum, then the statutory maximum, not the guidelines sentence, will be imposed. However, this is not true of Florida's Criminal Punishment Code. Florida's Code specifically provides the exact opposite, *i.e.* that if a Code sentence exceeds the statutory maximum, then the Code sentence, not the standard statutory maximum, will be imposed. *Apprendi* did not address the issue of whether "wandering" or individualized statutory maximums violate due process.

Relying on a bar journal article, petitioner also asserts that many of the facts considered in Code worksheet will have to be determined by the jury and proved beyond a reasonable doubt like any other element of the crime. Robert Batey, *Sentencing Guidelines and Statutory Maximums in Florida: How Best to Respond to Apprendi* 74 Fla. Bar. J. 57 (Nov. 2000).[40] He claims that facts, such as victim injury points, legal status, probationary status, membership in a criminal street gang and whether the domestic violence was committed in the presence of a child, as well as facts that only partially depend on a prior conviction, such as whether the previous felony was serious or committed within three years of being on community control, will have to be submitted to the jury. Batey argues that a special verdict or bifurcated trials will be necessary under *Apprendi* unless Florida repeals the statutory provision allowing the guideline sentence to exceed the standard statutory maximum. However, if the Code provision allowing floating statutory maximum is viewed as the statutory maximum, then

[40] The dissent in *Apprendi* pointed out that the legislature could circumvent the holding of *Apprendi* merely by increasing the statutory maximum. *Apprendi*, 120 S.Ct. at 2389. The majority responded that if a legislature attempted to do so, such actions would be constitutionally questionable. *Apprendi* at n.16. The author refers to this as the "*Apprendi* evasion" problem. But there is no *Apprendi* evasion problem with Florida's Code. The Florida legislature was not attempting to avoid the holding in *Apprendi*, when six years prior to that decision, it amended the guidelines to provide for wandering statutory maximums. The United States Supreme Court will have to decide which facts a jury must determine in the case of a penalty scheme that involves a "wandering" or "floating" statutory maximums violate due process. *Apprendi* does not address the issue of wandering statutory maximums and does not require the Florida Legislature to repeal the Code provision that allows wandering statutory maximums.

no fact on the worksheet will have to be determined by the jury because the facts are within the individualized statutory maximum. All of these facts may be determined by the trial court at the lower standard of proof. All of these facts merely increase the sentence within the statutory maximum, albeit a floating one, which is permissible under *Apprendi*.

Even if *Apprendi* applies to a sentencing scheme like the Code, thereby requiring the jury to determine certain facts, the question then becomes which facts. *Apprendi* did not reach that issue because it was clear in *Apprendi* that biased purpose was the one fact that increased the statutory maximum. It is not so clear in Florida which facts increase the statutory maximum. In most cases, where the Code sentence exceeds the standard statutory maximum, it is because the offender has a significant prior record. If it is the offender's prior convictions that are causing the standard statutory maximum to be exceeded, *Apprendi* specifically excludes the fact of prior convictions from its holding. If the primary offense and/or additional offenses are causing the Code sentence to exceed the standard statutory maximum, these convictions already involve jury findings of fact due to the guilty verdict. *Apprendi* does not require additional fact finding for primary and additional offenses. Many categories, such a legal status or a community sanction violations, involve only minor points that are unable to cause the Code sentence to exceed the standard statutory maximum. Therefore, most of the facts involve minor points that cannot be viewed as facts that increase the statutory maximum; rather, it is other facts, such as prior record, that are increasing the

statutory maximum. *Apprendi* either does not require these facts be determined by the jury or the jury has already determined those facts by convicting the offender of the offenses.

Moreover, even in the areas of victim injury points, it is unclear that the jury rather than the judge will have to make factual determinations.[41] In the victim injury category, it is death or severe injury that truly increases the point and the offense of conviction will likely already involve an implied jury finding of the death. With sexual penetration or sexual contact points, it still cannot be said that it is the sexual points that caused the Code sentence to exceed the standard statutory maximum. Rather, one could equally view the sexual points as the points that brought the sentence up to the standard statutory maximum and the primary or additional offense or prior record points as the points that caused a particular defendant's sentence to wander above the standard statutory maximum. Thus, in the great majority of cases, no special verdict or bifurcated trials will be necessary for the trial court to impose a Code sentence which is greater than the statutory maximum. Thus, the Code does not violate *Apprendi*.

The Code may be unwise but it is not unconstitutional. The Criminal Punishment Code does not violate due process, constitute

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[41] *McCloud v. State*, 741 So.2d 512, 513 (Fla. 5th DCA 1999) (on reh'g en banc)(holding sexual penetration points were sentencing factors not an element of the crime based on legislative intent), review denied, 767 So.2d 458 (Fla.2000), cert. granted & judgment vacated, - U.S. -, 121 S.Ct. 751, 148 L.Ed.2d 654 (2001). *McCloud* was decided prior to *Apprendi*. The United States Supreme Court reversed for reconsideration in light of *Apprendi*. The Fifth District has not yet decided the case on remand.

cruel or unusual punishment, double jeopardy, infringe the state constitutional right to appeal; separation of powers or the holding of *Apprendi*. Accordingly, the Code is constitutional.

CONCLUSION

The State respectfully requests this Honorable Court affirm the judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Joel Arnold, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 21st day of June, 2001.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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