IN THE SUPREME COURT OF FLORIDA

JOHN HALL,

Petitioner,

v. **CASE NO. SC01-42**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

JOEL ARNOLD #0104159
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JOHN HALL,

Petitioner,

v. **CASE NO. SC01-42**

STATE OF FLORIDA,

Respondent.
_____/

ARGUMENT IN REPLY

THE CRIMINAL PUNISHMENT CODE VIOLATES THE STATE AND FEDERAL CONSTITUTIONS.

I. The Code unconstitutionally limits the defendant's right to appeal and restricts access to the courts.

The state's answer brief wrongly asserts that a defendant has no constitutional right to appeal a sentence imposed by the trial court. (AB. 28). However, a defendant has a constitutional right to appeal a sentence imposed by a trial court, and the Legislature lacks the authority to thwart that right. Fla. Const. art. V, §4(b)(1); Griffis v. State, 759 So. 2d 668, 672 (Fla. 2000); State v. Jefferson, 758 So. 2d 661 (Fla. 2000); Amendments to the Florida Rules of Criminal Procedure, 685 So. 2d 773 (Fla. 1996). The First and Fourth Districts found the Code constitutional, in part, because, a defendant may appeal an illegal sentence on direct appeal and otherwise has resort to the collateral or post-conviction relief available by Fla. R. Crim. P. 3.800 and 3.850. John Hall v. State, 773 So.2d 99, 101 (Fla. 1st DCA 2000); James Hall v. State, 767 So.2d 560, 562 (Fla. 4th DCA 2000).

The Hall opinions wrongly equate the constitutional right to

a direct appeal of a sentence with the more limited rules of court regarding collateral and post-conviction relief. The Florida Constitution dictates otherwise. For instance, in Griffis, supra, this Court noted that Florida's constitution provides an express, constitutional right to appeal:

> [T]he Florida Constitution, unlike its federal counterpart, contains an express right of appeal, and logic dictates that this state constitutional right should receive at least the same level of protection as the federal statutory right.

Griffis, 759 So. 2d at 672, citing, Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992) (holding federal law represents the "floor" and the state constitution the "ceiling" for basic freedoms).

In State v. Jefferson, 758 So. 2d 661, 665 n.3 (Fla. 2000) this Court held that the Florida Constitution guarantees a right to appeal, which the Legislature may not limit:

> [T]he constitution grants appellate courts jurisdiction to review criminal appeals in the appellate courts, this constitutional grant does not authorize the Legislature to impose restrictions on these jurisdictional powers.

Jefferson, 758 So. 2d at 664. See, Fla. Const. art. I, § 21 (access to courts); Fla. Const. art. V, §4(b)(right to appeal). Further, the state's right to appeal in criminal cases is purely statutory and therefore subordinate to the defendant's constitutional right to appeal. State v. Macleod, 600 So. 2d 1096 (Fla. 1992).

Both the right to appeal and the reasonable conditions that

may be placed on it encompass sentencing, as shown by the litigation spawned by the Criminal Appeals Reform Act. See, Maddox v. State, 760 So. 2d 89 (Fla. 2000). Moreover, Fla. Const. art. I, § 21, provides that the "courts shall be open to every person for redress of every injury ... ." This provision applies to appellate courts as well as trial court. Bain v. State, 730 So. 2d 296 (Fla. 2d DCA 1999).

Contrary to the Hall opinions, supra, the availability of collateral and post-conviction relief is not an adequate substitute for the constitutional right to appeal a sentence. In the case of Rule 3.800, a defendant may only raise limited issues such as an illegal sentence--which has a high threshold for an entitlement to relief. However, the Code leaves unclear what constitutes an illegal sentence. Further, Rule 3.800(C) for modification of sentence remains completely discretionary and unappealable. Sentencing issues not cognizable under Rule 3.800 because of the necessity of an evidentiary hearing would need to be raised under Rule 3.850. Rule 3.850 does not constitute an adequate substitute for direct appeal because the principle claims of relief generally involve claims of ineffective assistance of counsel, and the threshold for demonstrating an entitlement to relief is that the defendant must show a reasonable probability that the sentence would have been different. There is no right to counsel under either rule.

In the instant case, the Code left Petitioner a meaningless right to appeal the consecutive, maximum sentences imposed. As

the sentences comport to §775.082(3)(d), Fla. Stat., Petitioner has only a futile right to review. The 10-year sentence would be illegal under the former sentencing guidelines, which provide for a maximum of 83 months prison. Fla. R. Crim. P. 3.703.

The Code allows the state to appeal sentences within the "statutory maximum" which are below the lowest permissible sentence, but the Code does not permit the defendant to appeal any sentence within that ceiling. The discretion left to judges is one-dimensional, it may be exercised relatively freely upward, but much more narrowly downward. The Code thus unreasonably constricts the defendant's constitutional rights by eliminating the opportunity to appeal sentences under circumstances corresponding to those in which a state appeal is authorized.

II. The Code's unbalanced scheme violates the protections against double jeopardy, due process and proportionality.

Unappealable sentences allow the trial court to punish defendants for asserting trial rights, thus triggering the need for a prophylactic rule like that adopted in North Carolina v. Pearce, 395 U.S. 711 (1969); see, Wardius v. Oregon, 412 U.S. 470 (1973)(due process requires reciprocity).

The Code's appeal provision reveals an inherent double jeopardy problem, which causes it to materially differ from U.S. v. DiFrancesco, 449 U.S. 117 (1980) and California v. Monge, 524 U.S. 721 (1998), upon which the state erroneously relies. (AB. 24-27). The narrow decisions in those cases involved sentencing schemes which preserved reciprocal rights of appeal and are weak

reeds on which to base an interpretation of the federal double jeopardy clause. DiFrancesco and Monge are also highly unpersuasive regarding the proper interpretation of the double jeopardy clause in the state constitution. See, Harris v. State, 645 So. 2d 386, 389 (Fla. 1994)(Shaw J., concurring in result only)(calling DiFrancesco "unfortunate").

The Code's limited appellate review of sentences within the "statutory maximum" inevitably leads to the imposition of disproportionate sentences, such as that imposed here. Upward "departures" from the lowest permissible sentence presumptively fail the first prong of the constitutional test for a cruel and unusual sentence, *i.e.*, that the gravity of the offense justifies the harshness of the punishment. This is because the lowest permissible sentence generally constitutes the sentence that the gravity of the offense warrants and which an upward departure necessarily exceeds. Appellate review of upward departures is thus necessary to guard against disproportionality.

III. Florida's statutory scheme creates a classification that provides for unequal treatment of felony offenders, violating constitutional guarantees to equal protection of the law.

Offenders are entitled to have every essential fact affecting punishment charged, tried, and found by a jury to have been proved beyond a reasonable doubt. See, Apprendi, infra. However, the Code treats offenders differently, because for some offenders the facts essential to punishment are treated as mere sentencing factors, giving those offenders far less

constitutional protection.

The rights to liberty, due process of law, a fair jury trial, and equal protection of law, certainly are express fundamental constitutional rights. To draw a classification impinging on those fundamental rights, by requiring fewer and less precise rights regarding punishment only to some offenders, requires the state to overcome its burden of strict scrutiny, establishing a compelling interest of the weightiest measure. At the very least the Code provides for an arbitrary and irrational classification. See, e.g., Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000)(statute creating more restrictive successive motion standards for capital petitioners than non-capital petitioners violates equal protection).

IV. The Code is unconstitutional in light of Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) and progeny.

Apprendi held that the due process requirements for jury findings apply to essential sentencing facts, which must be charged, instructed, and found by the jury to have been proved beyond a reasonable doubt. Apprendi applies whether or not facts used against the defendant in sentencing actually "exceed" any particular statutory threshold.

Two arguments support this. First, the Supreme Court's decision in McCloud v. Florida, No. 006289 (U.S. Jan. 8, 2001) suggests that the Court intended Apprendi to apply to sentencing elements irrespective of statutory maximums. Thus, a court may not add victim injury points without the required jury finding,

even if the final sentence falls within the statutory maximum.

Second, if "statutory maximums" are essential, the court must define what the "statutory maximum" is, and this requires a case-by-case analysis because the concept of a statutory maximum has no fixed meaning under Florida sentencing law. At least insofar as Code sentences are concerned, the statutorily authorized maximum punishment can not be determined until a scoresheet is completed. Thus, Apprendi due-process principles apply to every statutory factor used against a defendant on a scoresheet to determine the offender's sentence. In the instant case, Petitioner's consecutive sentences violate Apprendi.

A. Florida's Code mechanisms compel application of Apprendi principles because the statutorily authorized maximum sentence varies any time points are added to a scoresheet.

Even if the McCloud case somehow implicated a "statutory maximum", Apprendi still applies to Code sentences because the "statutory maximum" under Florida law is a floating concept with different definitions applicable to different sentencing mechanisms.

The Code, as well as Florida's previous guidelines, demonstrate this floating statutory maximum. The statutorily authorized maximums vary from one mechanism to another, and they vary on a case-by-case basis whenever an individual is sentenced under the Code. Thus, any time a court finds a fact that adds points to a Code scoresheet, that finding necessarily increases the statutorily authorized maximum punishment for the offender.

History of Florida Sentencing law prior to 1998.

In the decade or so prior to 1983, maximum sentences were prescribed depending on the degree of the felony: a first-degree felony yielded up to 30 years or life in prison; a second-degree felony 15 years; and a third-degree felony 5 years. See, §775.082(4), Fla. Stat. (1973). The maximums generally doubled if a recidivist mechanism, such as habitual offender sentencing, came into play. See, §775.084(3), Fla. Stat. (1973). This scheme provided clear maximums for each sentencing mechanism.

The Legislature substantially reformed non-capital sentencing with the creation of the Sentencing Commission in 1982 and the implementation of the sentencing guidelines in 1983. See, In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So. 2d 848 (1983)(adopting Fla. R. Crim. P. 3.701). The new scheme created three sentencing mechanisms: the guidelines, departures, and recidivist sentences, with various statutorily authorized maximums for each mechanism. See, e.g., Whitehead v. State, 498 So. 2d 863 (Fla. 1986)(holding that habitual offender, guidelines, and departures were separate sentencing mechanisms).

Under the guidelines, a defendant's statutory maximum had to be calculated on a case-by-case basis. A point total was applied to a "guideline grid", which set forth a "range", the high end of which constituted the statutorily authorized maximum sentence. See, Fla. R. Crim. P. 3.701(d). Alternatively, a judge could impose a "departure" sentence which was subject to the statutorily authorized maximums set forth in section 775.082,

Fla. Stat. (1983)(if not elsewhere specified in the statutes). See, §921.001(6), Fla. Stat. (1983). A court could also impose a recidivist sentence (if the defendant qualified under §775.084, Fla. Stat. (1983)) which was subject to the statutorily authorized maximums set forth in §775.084(4), Fla. Stat. (1983).

Another notable sentencing change occurred when the Legislature amended §921.001, Fla. Stat. (1993), and created §§921.001 through 921.0014 and 921.0016, Fla. Stat. (1993), effective for all crimes committed on or after January 1, 1994. With these amendments the Legislature continued the operation of the guidelines, departures, and recidivist sentencing, but modified the outer limits of a guidelines sentence. Now, rather than providing for two distinct ranges ("recommended" and "permitted"), the Legislature gave the trial court a single "recommended guidelines sentence", which the court could shrink or expand by 25 percent. The new statutorily authorized maximum would be 25 percent greater than the recommended sentence, irrespective of what other statutes provided. See, §921.001(5), Fla. Stat. (Supp. 1994); §921.0016(1), Fla. Stat. (1993); Fla. R. Crim. P. 3.990; Floyd v. State, 721 So. 2d 1163 (Fla. 1998); Mays v. State, 717 So. 2d 515, 516 (Fla. 1998).

Sentencing under the Criminal Punishment Code

The Code represents the latest stage in Florida's sentencing laws, effective for all noncapital felonies committed on or after October 1, 1998. See, §921.0024, Fla. Stat. (Supp. 1998); ch. 98-204, §6, 1998 Laws of Fla. 1934, 1962-63. The new scheme

modified the hierarchy of statutory maximums established by Florida's penal laws and has made elusive a precise definition of what constitutes an "illegal" sentence.

Under the Code, a score of 363 or more total sentence points authorizes a maximum sentence of life imprisonment. If less than 363 points, the court would need to calculate the "lowest permissible sentence" to find the statutory maximum on a case-by-case basis. A "lowest permissible sentence" that exceeds the maximum set forth in §775.082, Fla. Stat. (Supp. 1998), constitutes the maximum -- and actual sentence. But if the "lowest permissible sentence" falls below the statutory maximum prescribed by §775.082, the maximum set in §775.082 controls.

Thus, the statutorily authorized maximum under the Code could be life imprisonment, the "lowest permissible sentence," or the limit set in §775.082. But a sentencing court does not -- and can not -- know which of the various statutory maximums apply in any given case until a scoresheet is completed. Only after calculating a score can the court determine whether a term of years defined by §775.082, the "lowest permissible sentence," or life imprisonment, is the statutorily authorized maximum. This presents notice and due process problems. Contra, Floyd, supra.

Every point added to a Code scoresheet necessarily is relied upon to determine the statutory maximum for an offender. This is most obvious where the "lowest permissible sentence" is the applicable statutory maximum, because the "lowest permissible sentence" is different in every case. Thus, even if Apprendi is

narrowly construed to mean that the Constitution requires jury findings only for facts that increase the "statutory maximum", then Apprendi requires jury findings for every fact (other than prior record) that is used to define the maximum Code score.

The history of changes noted above demonstrates, at the very least, that Florida has had a floating statutory maximum for nearly two decades. Each time a sentence is imposed under the Code or guidelines, the "statutory maximum", by definition, is affected whenever points are added or subtracted from the score. Only after defining the statutorily authorized maximum sentence under Florida law on a case-by-case basis can the court determine whether and how Apprendi applies.

The Kansas Supreme Court recently declared unconstitutional that state's statutes relating to upward departures from the guidelines, in light of Apprendi. State v. Gould, 23 P.3d 801 (Kan. 2001). In Gould, the defendant was convicted of three counts child abuse, and the trial court imposed consecutive sentences on two of the counts, which constituted a departure from the guidelines but otherwise fell within that authorized by state law. The Supreme Court rejected the state's argument that the departure sentences were legal since they were within the statutorily authorized maximum:

> The State reasons that the presumed sentence is not the maximum sentence allowed by law. The State here asserts that the maximum sentence Gould could have received for the multiple convictions of abuse of a child, based on her criminal history classification and the limitations of the "double-double

> rule," was 136 months' imprisonment. Thus, the sentence imposed by the district court did not exceed the statutory maximum as contemplated by Apprendi. The State's argument is not persuasive.
>
> Under Apprendi, it does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict. See 530 U.S. at 469, 490-96, 120 S.Ct. 2348. Gould's jury verdict "authorized" a sentence of 31 to 34 months for each child abuse conviction. By imposing two 68-month sentences, the district court went beyond the maximum sentence in the applicable grid box and exposed Gould to punishment greater than that authorized by the jury's verdict. In so concluding, we agree with U.S. v. Nordby, 225 F.3d 1053, 1059 (9th Cir.2000) ("Apprendi makes clear that the 'prescribed statutory maximum' refers simply to the punishment to which the defendant is exposed solely under the facts found by the jury."). Gould's sentence of 68 months for two counts of child abuse exceeded the statutory maximum, and Apprendi applies.

Gould, 23 P.3d at 812-13.

Trial courts should not apply minimum mandatory sentencing unless the supporting facts were charged, tried, and found by a jury to have been proved beyond a reasonable doubt in this case. The same principle applies to any other sentencing mechanism in Florida where either a minimum mandatory or some other form of heightened sentence requires proof of an essential fact. See, Apprendi, 120 S.Ct. at 2368-69 (Thomas, J., concurring):

> [I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact--of whatever sort, including the fact of a prior conviction--the core crime and the aggravating fact together constitute an aggravated crime, just as much

> as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

See also, People v. Chanthaloth, 743 N.E.2d 1043, 1050 (Ill. App. 2d 2001)(convictions of residential burglary and home invasion with extended term sentence 10 years longer than the maximum was not permissible; trial court's determination based on aggravating factors violated "broad" constitutional rule of Apprendi).

B. The Florida Constitution provides independent grounds upon which to apply the Apprendi principles stated above. Fla. Const. art. I, §§ 2, 9, 16, 22.

The Declaration of rights anchoring the state constitution has been interpreted by this Court to be of primary concern, and it provides greater due process protection than rights provided by the U.S. Constitution. See, e.g., Traylor, supra (recognizing primacy of Fla. Const. art. I, §§9, 16); Haliburton v. State, 514 So. 2d 1088 (Fla. 1987)(rejecting Moran v. Burbine, 475 U.S. 412 (1986), and applying Fla. Const. art. I, §9); Jones v. State, 92 So. 2d 261 (Fla. 1956)(on rehearing granted)(holding that unanimous verdict in criminal cases is required the guarantee of a fair trial under Fla. Const. art. I, §22).

The principles discussed in Apprendi, which have their roots in the common law, are deeply rooted in the Florida Constitution as well. For example, in State v. Harbaugh, 754 So. 2d 691 (Fla. 2000), this Court held that when potentially harmful punishment-related facts are alleged in a charging document -- as they must be -- the defendant's due process rights must be protected by

bifurcating the proceeding and withholding the presentation of the sentence-related charges and facts until the guilt determination is made. Harbaugh thus recognizes that punishment-related facts must be charged, presented to a jury, and proved beyond a reasonable doubt, in a separate punishment determination proceeding. Apprendi also is consistent with State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984)(holding that a jury finding is required before imposition of an enhanced or minimum-mandatory sentence for use of a firearm during the commission of a crime).

CONCLUSION

Petitioner John Hall respectfully requests that this Court declare as unconstitutional the Criminal Punishment Code and related statutes and rules and vacate his consecutive sentences and remand for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Charmaine Millsaps, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to John Hall, DOC# E-072031, Holmes Corr. Institution, 3142 Thomas Drive, Bonifay, FL 32425, on this ____ day of July, 2001.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

JOEL ARNOLD
ASSISTANT PUBLIC DEFENDER
FLA. BAR NO. 0104159
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER