IN THE SUPREME COURT OF FLORIDA

RALPH GROSS,
PETITIONER.

CASE NO. :SC02-1695
Lower Tribunal No.: 4D01-2132

-VS-

STATE OF FLORIDA,
RESPONDENT.
_____/

PETITIONER'S BRIEF ON THE MERITS

On Discretionary Review Based Upon an Express and Direct Conflict

Samuel R. Halpern
Attorney for Ralph Gross
2856 East Oakland Park Blvd.
Fort Lauderdale, Fl. 33306
954-630-1400
Florida Bar No. 444316

CERTIFICATE OF INTERESTED PARTIES

Counsel for defendant/petitioner certifies that the following persons and entities have or may have an interest in the outcome of this case:

Honorable Barry Goldstein
Circuit Court Judge, Seventeenth Judicial Circuit
(Trial Judge originally assigned to this case)

Honorable M. Daniel Futch, Jr.
Circuit Court Judge, Seventeenth Judicial Circuit
(Trial and Sentencing Judge)

Eugene Garrett, Esq.
Trial Counsel for Appellant
Lake Wyman Plaza, Suite 314
2424 North Federal Highway
Boca Raton, FL., 33432-7781

Kathleen George and Cynthia Gelmine Imperato

Office of the Statewide Prosecutor
Assistant Statewide Prosecutors
110 SE 6th Street
Suite 1400
Ft. Lauderdale, FL., 33301

James Carney, Assistant Attorney General
Office of the Attorney General
Charles J. Crist, Attorney General
(Counsel for prosecution/respondent)

Ralph Gross
(Defendant/Petitioner)
Okeechobee Correctional Institution
3420 NE 168th Street
Okeechobee, FL., 34972

TABLE OF CONTENTS

AUTHORITIES CITED

CASES **PAGE**

CONSTITUTIONS, STATUTES AND RULES OF PROCEDURE

PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and was the Appellant in the Fourth District Court of Appeal.

Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and was the Appellee in the Fourth District Court of Appeal.

The following symbols will be used:

"R" Record on Appeal

"T" Transcript of Hearings

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted on September 20, 1996 of multiple counts of criminal conduct including RICO and Conspiracy to Commit RICO, as well as several predicate acts.[1] An appeal was

[1]Petitioner was charged with Count 1, Racketeering (RICO); Count 2, Conspiracy to Commit Racketeering (RICO); Count 8, Armed Burglary With a Firearm (victim: Duffy); Count 9, Armed Burglary With a Firearm (victim: Mattos); Count 10, Armed Robbery With a Firearm (victim: Mattos, corresponding to predicate incident D); Count 12, Armed Burglary With a Firearm (victim: Payne); Count 13, Conspiracy to Commit Armed Burglary With a Firearm (victim: Payne); Count 14, Armed Robbery With a Firearm (victim: Payne, corresponding to predicate incident F); Count 18, Armed Burglary With a Firearm (victim: Jones/McPherson); Count 19, Conspiracy to Commit Armed

taken to the Fourth District Court of Appeal which affirmed the convictions. Gross v. State, 728 So.2d 1206 (4th DCA, 1999). The Florida Supreme Court accepted jurisdiction in case number SC 95,302, Gross v. State,765 So.2d 39 (Fla. 2000). Sentencing issues were not raised in either appeal.

Subsequent to the Florida Supreme Court's opinion which affirmed the guilty verdicts, Petitioner filed a pro se Motion to Correct Sentence pursuant to F. R. Cr.P. 3.800 (a). The thrust of the motion was that the court utilized an incorrect guidelines scoresheet in determining his sentence (R 49-64). Petitioner argued that for those crimes with a continuing criminal enterprise which spanned two periods, both the pre and post-1994 guidelines, the court was required to sentence him pursuant to the 1994 guidelines, which were the guidelines in effect at the end of his criminal activity. It was further

---

Burglary With a Firearm (victim: Jones/McPherson); Count 20, Armed Robbery With a Firearm (victim: Jones/McPherson, corresponding to predicate incident J); Count 21, Armed Burglary With a Firearm (victim: Duffy); Count 22, Conspiracy to Commit Armed Burglary With a Firearm (victim: Duffy); Count 23, Armed Robbery With a Firearm (victim: Duffy, corresponding to predicate incident K); Count 31, Grand Theft in the Second Degree (victim: Allstate Insurance Company, corresponding to predicate incident Q); Count 32, False and Fraudulent Insurance Claims (victim: Allstate Insurance Company, corresponding to predicate incident R), and Count 33, Conspiracy to Commit False and Fraudulent Insurance Claims (victim: Allstate Insurance Company, corresponding to predicate incident, S) (R 1-24).

argued that Fla. Stat. 775.021(1) mandated that the guidelines which afford the most favorable result to Petitioner should be used. The State successfully argued below that the 1995 amendment to Fla. Stat. 921.001 should apply retroactively to mandate utilizing the beginning date of the criminal enterprise rather than the end date (R 67). [2]

The State conceded that Petitioner was entitled to have two separate guideline scoresheets prepared, one for crimes which occurred prior to January 1, 1994 and another for offenses which occurred after that date (R 67). The sole legal issue which remained concerning the Motion to Correct Sentence focused on which was the proper guideline scoresheet to use for those crimes which had a continuing date of enterprise straddling both guideline periods. The question was whether the Court should utilize the guidelines in effect at the beginning of the criminal transaction or at the end of the criminal transaction in a situation such as this where the criminal activity spanned both the pre and the post-January 1994 guidelines. The State argued that the proper guidelines to utilize were those in

---

[2] Fl. Stat. 921.001(4)(b)(3) took effect October 1, 1995. This statute states the following:

"Felonies, except capital felonies, with continuing dates of enterprise shall be sentenced under the sentencing guidelines in effect on the beginning date of the criminal activity."

effect at the beginning of the criminal transaction (R 67). Petitioner argued that the proper guidelines to use were those in effect at the end of the criminal transaction (R 54).

Petitioner was convicted of (5) five offenses wherein the dates of the offenses overlapped the two guideline periods in question. Specifically, counts one and two alleged offense dates between September 10, 1993 and July 31, 1994. Counts 21, 22, and 23 alleged offense dates between September 11, 1993 and January 31, 1994 (R 5,12,18 and 19).

Judge M. Daniel Futch Jr. heard arguments on the motion on May 2, 2001 and May 11, 2001. After considering the arguments of counsel, the trial court denied the motion and resentenced Petitioner to (40) forty years in prison (R 88).[3] This was the same sentence which had originally been imposed.

A timely notice of appeal was filed with the Fourth District Court of Appeal. The district court affirmed the sentence, however it expressly disagreed with the reasoning set forth in Hankin v. State, 628 So.2d 602 (Fla. 2nd DCA 1996). Gross v. State, 820 So.2d 1043 (Fla. 4th DCA 2002).

A timely notice to invoke discretionary review and a brief on jurisdiction were filed with this Honorable Court.

[3] The hearing on the motion did not require the taking of evidence as the legal issues raised could be considered solely by a review of the court file.

Jurisdiction was accepted and this appeal follows.

SUMMARY OF ARGUMENT

The Court should have used the 1994 guidelines for offenses

in which the criminal activity began in 1993 but concluded in 1994. The case law prior to the 1995 amendment to Fla. Stat. 921.001 required the Court use the *end* date of the criminal enterprise in calculating guidelines rather than the *beginning* date of the enterprise if the enterprise spanned two guideline ranges. Fla. Stat. 921.001 (4)(b)(3) which amended the statute to mandate that the guidelines in effect at the *beginning* of the criminal enterprise should be used for those crimes which spanned two guideline ranges did not become effective until after Petitioner had completed his criminal activity. Had the Court followed the existing case law, the maximum sentence which Petitioner could have received pursuant to the guidelines would have been significantly reduced. The use of the pre-1994 guidelines as to those counts with a continuing date of enterprise spanning 1993 and 1994 violated Petitioner's due process rights and constituted an ex post facto application of Fla. Stat. 921.001(4)(b)(3).

Importantly, both the trial court and the Fourth District held that the rule of lenity which was codified in Fla. Stat. 775.021 (1) was inapplicable. This was clear error as the rule of lenity mandates the use of the guidelines which are most favorable to the accused.

For these offenses, the 1994 guidelines should have been

used.

The case should be remanded with instructions to resentence Petitioner pursuant to the 1994 guidelines for counts 1,2, 21, 22, and 23.

POINT ON APPEAL

The Court used the incorrect sentencing guidelines scoresheet for those counts which alleged continuing dates of criminal enterprise spanning both the pre and post-1994 guidelines, resulting in an ex post facto violation contrary to the Due Process clause of the United States and Florida constitutions and contrary to Fla. Stat. 775.021 (1), commonly referred to as the rule of lenity.

ARGUMENT

Petitioner was convicted of numerous crimes in 1996, including five counts which had a continuing date of criminal enterprise which spanned the pre-1994 and post-1994 guidelines. Specifically, counts one and two alleged criminal activity covering September 10, 1993 through July 31, 1994. Counts 21, 22, and 23 alleged criminal activity which took place between September 11, 1993 and January 31, 1994 (R 5,12,18 and 19). In the original sentencing hearing, the Court used only one guideline scoresheet to calculate the sentence (R 60). The remainder of the counts alleged a specific date of occurrence in either 1993 or 1994, and the issue as to which is the proper guidelines to use for those crimes is not in dispute.

Petitioner filed a pro se Motion to Correct Sentence after his appeals were denied on unrelated issues.

A. Ex Post Facto Argument

The issue in dispute is how to treat those crimes which had a beginning date in 1993 but that did not conclude until 1994. The statutes did not address this issue until Fla. Stat. 921.001 was amended in 1995. The legislature amended the statute which became effective October 1, 1995 by adding the following provision:

> Felonies, except capital felonies, with continuing dates of enterprise shall be sentenced under the sentencing guidelines in effect on the beginning date of the criminal activity.

Fl. Stat. 921.001(4)(b)(3).

Until this amendment became effective, the Courts had treated this issue in the exact *opposite* manner. That is, the prevailing law at the time Petitioner committed these crimes, was to use the guidelines in effect at the *end* of the criminal enterprise for those crimes which had a continuing date spanning two guideline periods. Puffinberger v. State, 581 so.2d 897 (Fla. 1991)(use of sentencing guidelines law in effect at the end of the criminal enterprise spanning two guidelines ranges applied); Hankin v. State, 682 So.2d 602 (Fla. 2nd DCA 1996)(the guidelines permissible aggravating circumstances in effect at the *end* of the criminal enterprise were appropriate for crimes completed prior to the 1995 amendment which created Fla. Stat. 921.001(4)(b) (3).

Puffinberger considered, inter alia, the argument that the use of amended guidelines which became effective during the pendency of the criminal enterprise spanning two guideline periods constituted an ex post facto violation. The accused in Puffinberger was convicted of aggravated child abuse which was alleged to have occurred between October 1, 1987 and November 19, 1988. The sentencing guidelines were amended during the pendency of the crime and became effective on July 1, 1988. It was held that because his offense continued after the amendment to the guidelines, there was no ex post facto violation in using the amended guidelines. Puffinberger, at 899. As the Supreme Court stated, "Because he was convicted of an offense which continued *after* the July 1, 1988 effective date of the permitted guideline ranges, use of this range does not violate that prohibition." Puffinberger, at 899 (emphasis added).

The Fourth District held that the use of the guidelines in effect at the beginning of Petitioners criminal activity was legal and that "[T]here simply was no statute or supreme court decision dictating the use of the end dates at the time the trial court resentenced the defendant". Gross v. State,820 So.2d.1043,1045 (Fla. 4th DCA 2002). This position is belied by the language in Puffinberger which indicated that there was *not* an ex post facto violation to sentence pursuant to the

guidelines in effect at the end of the criminal episode because the accused continued to commit his crime during the latter time period. It logically follows that use of the guidelines at the *beginning* of the criminal episode *does* violate the ex post facto clause when such an application results in a harsher penalty, as it does in this case.

The State relied almost exclusively on Fla. Stat. 921.001(4)(b)(3) for the proposition that the guidelines in effect at the beginning date of the crime should be used (R 67). This statute was not amended to address this issue until *after* the conclusion of the crimes for which Petitioner was convicted. The scoresheet in effect at the time that the offense is committed must be used. Wilkerson v. State, 513 So.2d 664 (Fla. 1987); Schneider v. State, 788 So.2d 1073 (Fla. 2nd DCA 2001). Application of Fla. Stat.921.001(4)(b)(3)(1994) to Petitioner violates the ex post facto prohibitions of Art. I., sec. 10, cl. I, U.S. Const. and Art. I, sec. 10, Fla. Const. Smith v. State, 537 So.2d 982 (Fla. 1989)(change in guideline schedules is change in substantive law which may not be applied retroactively); Robertson v. State, 555 So.2d 976 (Fla. 1st DCA 1990)(amendment to rule of procedure creating permitted guidelines ranges may not be applied retroactively to offenses occurring before amendments effective date without violating ex

post facto prohibitions).

In order for a change in the law to be applied ex post facto, it must apply to events occurring before its enactment and may not disadvantage the offender. Further, the change must be merely procedural and may not affect a substantive personal right. Robertson, at 979, citing Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 107 L.Ed.2d 351 (1987). In the instant case, the retroactive application of 921.001(4)(b)(3) cannot be said to be merely a procedural change. It substantially increased the actual prison time which Petitioner was subjected to based on the use of a statute not in effect at the time he committed his crimes.

The guidelines which the Court originally used calculated all of Petitioners' offenses in one, pre-1994 scoresheet. The State conceded that this procedure was error (R 67). That erroneous guidelines scoresheet resulted in a recommended range of twenty-seven (27) years to forty (40) years, with a permitted range of twenty-two (22) years to life in prison (R 60).

Use of a guideline scoresheet in effect in 1993 for those offenses which were completed prior to January 1, 1994 would have resulted in a sentencing guidelines recommended range of between 9 to 12 years with a permitted range of between 7 to 17 years (R 61). Utilization of a guideline scoresheet in effect

in 1994 for those offenses which were completed after January 1, 1994, as well as those which began in 1993 and concluded in 1994, would have resulted in a sentencing guidelines of range of 86.25 to 143.75 months with a suggested range of 115.10 months (R 62-64).

Following Dillard, the Court should have utilized both guideline scoresheets. The Court would have had the discretion to sentence Petitioner to concurrent or consecutive time. Dillard, at 727. Had the Court utilized the appropriate guidelines as set forth above and chosen to sentence Petitioner consecutively, the maximum allowable sentence pursuant to the guidelines would have been 347.75 months, or approximately 29 years. [4]

The State argued successfully in the lower court that the pre-1994 guidelines should have been used to calculate all offenses which either were completed in 1993 or which began in 1993, but continued into 1994. Only those crimes, it was argued, that began and ended in 1994 should have been scored on the 1994 guidelines. The States' calculations using this logic yielded a pre-1993 recommended guidelines range of between twenty-two (22) and twenty-seven (27) years, with a permitted range of

[4] This figure was arrived at by adding the highest permitted score for both guideline scoresheets.

between seventeen (17) to forty (40) years (R 96). Using the 1994 guidelines for crimes Petitioner committed after January 1, 1994 the total sentencing points equals 36.4 (R 74). If the Court were to use it's discretion to increase those points by fifteen percent, the increased sentencing points would be 41.4. This discretionary increase in sentencing points would result in a potential prison sentence of up to 13.4 months (R 75). Petitioner was sentenced to forty (40) years in prison, both originally and at the re-sentencing.

This sentence of forty (40) years in prison constitutes an upward departure from the appropriate guidelines for which the Court offered no reasons, either oral or written, to justify a departure sentence.

Petitioner was entitled to have the sentencing court consider accurate guidelines scoresheets in determining what the appropriate sentence should be. State v. Mackey, 719 So.2d 284 (Fla. 1998).[5] The trial court did not consider the correct guidelines calculations in this case. Rather, the court accepted a calculation of the guidelines which had the effect of suggesting to the court that a sentence of forty (40) years in

[5] The Mackey Court stated: "We agree that it is undoubtedly important for the trial court to have the benefit of a properly calculated scoresheet when making a sentencing decision." Mackey, at 284.

prison was a permissible guidelines sentence. The trial courts' reliance on the improperly calculated guidelines led to an imposition of a de facto departure sentence which may not have been intended. A departure sentence based on a scoresheet error should be reversed unless the record shows that the same sentence would have been given despite the error. Lemon v. State, 769 So.2d 417 (Fla. 4th DCA 2000); Hines v. State, 587 So.2d 620 (Fla. 2nd DCA 1991)(reversal not required where court imposed departure sentence on basis of improperly calculated guidelines where record showed court would have imposed same sentence notwithstanding the guidelines error). There is no indication in the record that Petitioner would have received a departure sentence had it relied on the appropriate guidelines reflecting a lower maximum sentence. Petitioner is entitled to a resentencing.

B. The Rule of Lenity Argument

It is clear from the information that counts 1, 2, 21, 22, and 23 had continuing dates of criminal activity which began in 1993 and continued into 1994 (R 5,12,18 and 19). The Court was not required to conduct an evidentiary hearing to come to this conclusion. It simply had to review the information which formed the basis for the charge.

The legislature is presumed to be acquainted with existing

judicial decisions on subjects in which it subsequently enacts a statute. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984). The legislature substantively amended Fla. Stat. 921.001(4)(b) 3 in 1995. The previous version of this statute in effect at the time Petitioner committed his criminal activity in 1994 was silent on the issue as to which guidelines to use in the case of continuing dates of enterprise spanning two guideline ranges. Case law which addressed this issue prior to the 1995 amendment held that the scoresheet in effect at the *end* of the criminal enterprise must be used. Puffinberger and Hankin, Id. Trial courts are required to follow existing case law from sister jurisdictions if there is not a case on point in their own jurisdiction. Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA 1992). It is axiomatic that they must follow the law as interpreted by the Florida Supreme Court. Here, the Trial Court followed neither.

In this case, the use of the 1994 guidelines for those crimes which spanned the two ranges benefits Petitioner. The rules of statutory construction mandate that "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Fla. Stat. 775.021(1). In Petitioner's case, the statutes were *silent* on the relevant issue. The case law dictated that the law be interpreted in the light most favorable to the Petitioner, not the opposite as was

done in this case. To ignore the existing case law and to apply a statute not in effect at the time of the crime constitutes a blatant disregard for the rule of lenity in criminal prosecutions, due process of law, and an improper ex post facto application of laws. Gilbert v. State, 680 So.2d 1132 (Fla. 3rd DCA 1996)(rule of lenity requires application of the more lenient guideline scoresheet where it was impossible to determine from the evidence or the information whether the crime occurred before or after the 1994 guideline statute).

In Hankin, the offender committed crimes which began in 1991 and 1992, but which concluded in 1994. The trial court used the new 1994 guidelines and cited a 1994 statutory aggravating circumstance, Fla. Stat. 921.0016(3)(n) (1993), to justify an upward departure. It was argued by the accused that the new statute should not be applied to him because the statute was unconstitutionally vague. The State conceded error, but for a different reason. The State argued that because the statute was not in effect at the time he *began* his criminal activity, it did not apply. In rejecting the State's reasoning, the Hankin Court stated:

> The state responds that statutory section does not apply to appellant's offenses because at the operative moment in time, when appellant began committing his offenses, the statute was not in effect. That argument is based on the fact that under 921.001(4)(b)(3), Florida Statutes (1995), felonies with a continuing

> date of enterprise are to be sentenced under the guidelines in effect on the beginning date of the criminal activity, which in Appellant's case was December 1991 or April 1992. Appellant completed his offenses in 1994. However, the just-quoted statute, under section 921.001(4)(b)(3), did not take effect until 1995, with the result that case or statutory law in effect before the enactment of that section would apply. The existing law was Puffinberger v. State, 581 So.2d. 897 (Fla. 1991), where the supreme court held that the law in effect at the end of the criminal enterprise applied. Accordingly, the 1994 sentencing guidelines would apply to appellant's departure sentence. As such, the court did not err in applying the section 921.0016(3)(n) aggravating circumstances to depart from the guidelines in sentencing appellant.

Hankin, at 603.

Subsequent to Gross v. State, 820 So.2d 1043 (Fla. 4th DCA 2002), the Second District Court of Appeal receded from the Hankin decision concerning their earlier interpretation of Puffinberger. Cairl v. State, 833 So.2d 312 (Fla. 2nd DCA 2003). The Court reasoned that the Hankin decision applied an "overly expansive" interpretation of Puffinberger and that the Court is not obliged, based on Puffinberger, to use the guidelines in effect of the end of the criminal episode. Cairl, at 313. Rather, Cairl held that Puffinberger stood for the proposition that there was not an ex post facto violation to use the latter guidelines because the offender continued to commit his criminal activity after those guidelines became effective. As indicated above, an

ex post facto violation does exist in Petitioner's case because the effect of the use of the *earlier guidelines* resulted in a *harsher sentence.* The rule of lenity was not raised as an issue in either Puffinberger or in Hankin.[6]

Cairl held that the rule of lenity *required* the use of the most lenient guidelines in the situation where the criminal episode straddled three different guideline time frames. Cairl, at 312. Cairl cited a number of cases as authority for the position that when sentencing laws change during the period where the offender has committed the offenses, that offender "should be sentenced under the more lenient version of the guidelines". Cairl, at 314, citing Schloesser v. State, 697 So.2d 942 (Fla. 2nd DCA 1997); Duer v. State, 765 So.2d 743 (Fla. 1st DCA 2000); Maitre v. State, 770 So. 2d 309 (Fla. 4th DCA 2000); Gilbert v. State, 680 So.2d 1132 (Fla. 3rd DCA 1996); and State v. Griffith, 675 So.2d 911 (Fla. 1996).

Petitioner urged both to the trail court and the Fourth District Court of Appeal to use the more lenient guidelines based specifically on the rule of lenity(R 54). Petitioner cited Gilbert in support of his position(R 54). Gilbert held

---

[6] The rule of lenity was specifically raised in by Petitioner both in the trial Court as well as on appeal to the Fourth District Court of Appeal. It was likewise raised in Cairl.

that the rule of lenity must be applied to the sentencing guidelines where it is impossible to determine from the information or the evidence when the crime was committed pre-1994 or post-1994, the more lenient version must be used.

The Gross opinion below disagreed with Petitioner's lenity argument and erroneously held that because the statutes were silent on the issue as to which guidelines to utilize in situation where criminal conduct straddled various versions of the guidelines, the rule of lenity does not apply. Gross, at 1045-1046. The Court stated;

> The rule of lenity, which by its own terms requires strict construction, should be construed strictly. What does it require? First, it requires courts to 'strictly construe' provisions of the code and offenses defined by other statutes. Second, when statutory language 'is susceptible of differing constructions', courts are required to construe it 'most favorably to the accused.' What the rule of lenity doesn't address is what to do when the law is silent on an issue.
>
> Sentencing guidelines are subject to the rule of lenity. See, Williams v. State, 680 So.2d 532 (Fla. 1st DCA 1996). However, no statute addresses the issue of which guidelines to apply to a continuing criminal enterprise. Strict construction does not equate to court creation. When there is no statute or rule to construe, the rule of lenity has no application. It cannot apply to that which does not exist.

Gross, at 1045-1046.

It is for the jury, not the trial judge, to determine when a crime has been committed, especially if such a finding

materially affects the sentence to be imposed. Apprendi v. New Jersey, 530 U.S. 466 (2000)(it is the role of the jury, not the trial judge to determine if the crime was a hate crime when such a determination results in an enhanced sentence); State v. Overflelt, 457 So.2d 1385, 1387 (Fla. 1984)(jury is the finder of fact with regard to matters concerning the criminal episode). In the context of determining which guidelines to use, it is the jury, not the judge to determine when the crime occurred. Cairl,at 314 ("[F]urther, we agree with Cairl's contention that without a jury finding as to the offense dates, Cairl is entitled to be resentenced to the most lenient version of the guidelines in effect during the time frame alleged in the information as opposed to the time frame that the trial court determined should apply").

The reasoning in Cairl is persuasive. Fla. Stat. 775.021(1) states "[T]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused".

In the case of Petitioner, he continued to commit offenses which straddled two guideline ranges. There were two separate and distinct sentencing statutes on the books at the time when he continued to commit crimes. Which statute to use? How better

to answer this question than to look to Fla. Stat. 775.021(1) for the answer? It is apparent that the rule of lenity dictates that the proper statute to use is the one which provides the more lenient sentence.[7]

The Cairl opinion appears to erase the conflict which existed between Gross and Hankin to the extent that Hankin interpreted Puffinberger to stand for the proposition that *mandated* the use of the guidelines in effect at the end of the criminal episode.[8] Notwithstanding Cairl, a fair reading of Puffinberger continues to present a conflict between the Fourth District and the Florida Supreme Court. While this issue remains an open question which only the Florida Supreme Court can clarify, there still exists the fundamental conflict between the Second and Fourth Districts as to which guidelines to use in the context of criminal activity which overlaps more than one

---

[7] As noted, neither Hankin or Puffinberger considered the question of how the rule of lenity impacts on the issue presented. Puffenberger simply and directly ruled on the issue of whether there was an ex post facto violation to use the guidelines in effect at the end of the criminal episode.

[8] This Honorable Court accepted jurisdiction based on Fla. R. App. P. 9.030 (a) (2) (A) (iv) and Article V, Section 3 (b) (3) of the Florida Constitution. Not only was there a conflict between the Fourth and Second Districts, but also on a conflict between the Gross decision of Fourth District Court of Appeal and the Puffinberger decision rendered by the Florida Supreme Court. See Petitioner's Brief on Jurisdiction, p. 4-5.

guideline range and whether the rule of lenity applies in such circumstances. For the reasons stated above, it is submitted that the reasoning and analysis of the case law of Cairl is compelling and should be adopted by this Honorable Court.

Reversal of Petitioner's sentencing order is required. The trial court used the guidelines in effect in 1993 for those counts which began in 1993 but which concluded in 1994. Based on the foregoing, this was error. Accordingly, this Court should reverse the sentence with instructions to recalculate the sentencing guidelines utilizing a 1994 scoresheet for counts 1, 2, 21, 22, 23.

CONCLUSION

For the foregoing reasons, this case should be remanded for resentencing using the 1994 guideline scoresheet on counts 1,2, 21,22, and 23.

Respectfully submitted,

Samuel R. Halpern, P.A.
Attorney for Ralph Gross
2856 East Oakland Park Blvd.
Ft. Lauderdale, Fl. 33306
954-630-1400
Fla. Bar No. 444316

By: _____
Samuel R. Halpern

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered by U.S. mail to James Carney, Assistant Attorney General, Department of Legal Affairs, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Fl. 33401-2299, this _____day of March, 2003.

Samuel R. Halpern, P.A.
Attorney for Ralph Gross
2856 East Oakland Park Blvd.
Ft. Lauderdale, Fl. 33306
954-630-1400
Fla. Bar No. 444316

By:_____
Samuel R. Halpern

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared with a 12 point type and Courier New font.

Samuel R. Halpern, P.A.
Attorney for Ralph Gross
2856 East Oakland Park Blvd.
Ft. Lauderdale, Fl. 33306
954-630-1400
Fla. Bar No. 444316

By:_____
Samuel R. Halpern