IN THE SUPREME COURT OF FLORIDA

LAWRENCE LOGAN,

Petitioner,

v. **FSC No. SC03-1155**

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL STATE OF FLORIDA

MERITS BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES

STATUTES/CHAPTER LAWS/RULES OF CRIMINAL PROCEDURE

SECONDARY AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The petitioner, Lawrence Logan, along with two co-defendants, Terry Lee Gilmore and Bobby Freeman, was charged by information with six counts of armed robbery with a firearm. The offenses were alleged to have occurred on March 17, 1984. (R. 38, 39) The pe-titioner, Logan, was tried November 6-9, 1984. (S.R. vol. I, II, III) The jury returned a verdict of guilty as to counts I, II, III, V, and VI. (S.R. vol. III at 600-602)

The sentencing hearing was convened on December 11, 1984. (S.R. 52) Defense counsel argued that a sentence at the lower end of the guidelines should be the maximum the court should impose. He also suggested that a sentence of probation was appropriate. (Id. at 56) The state submitted there were sufficient grounds to go outside the guidelines and impose a departure sentence. (Id.) The state asked the court to impose a sentence of life imprisonment on each and every count of armed robbery with a firearm. (Id.) The petitioner and his co-defendants robbed five persons at gunpoint with threats of death or serious bodily injury. Upon leaving the scene of the armed robberies, the petitioner and his co-defendant saw fit to fire point blank at Deputies Johnson and Ramirez. (Id. at 57)

Deputy Johnson returned fire and hit petitioner Logan to

save his life. Deputy Ramirez testified that he was shot at almost point blank range by a .44 magnum. The petitioner and his co-de-fendant's testimony was to a large degree untruthful. Based on the backgrounds in the case [of the co-defendants] the state asked the court to depart from the sentencing guidelines and impose a sentence of life imprisonment on each and every count. (Id.) De-fense counsel responded that no one was injured in the incidents. He again submitted that the lower end of the guidelines should be imposed, if that. (Id.)

The court, the Honorable James R. Adams presiding, noted it had sat through the entire trial and had heard all the evidence, and ordered a pre-sentence investigation on each co-defendant. The court first sentenced co-defendant Gilmore. (Id. at 58-62) The trial court then gave its reasons for a departure sentence as to the petitioner. The oral reasons were: 1) Logan participated in the armed robbery of the Clubhouse in Clewiston, Florida; 2) during the robbery, Logan openly carried a firearm and used that firearm to effectuate the robbery of five persons; 3) during the robbery Logan, along with his co-defendant, threatened serious bodily in-jury and death to the victims by verbal threats and by placing the firearm against the bodies of the numerous victims; 4) Logan, with his confederates, physically and forcibly removed property from the victims

coupled with threats of serious injury or death; 5) Logan and his accomplice used a mask or other devices to conceal identity, evincing a premeditated planning of the robbery; 6) Logan after committing the robberies and attempting to escape, fired two shots at Deputy Johnny Johnson after Deputy Johnson ordered him to halt and surrender. (Id. at 64)

The close proximity of the defendant [Logan] to the deputy when the shots were fired placed the life of Deputy Johnson in serious jeopardy, requiring the deputy to return fire to avoid death or serious bodily injury; 7) Logan was convicted in a jury trial of five separate counts of robbery with a firearm, first-degree felonies punishable by life. The defendant [Logan] was also convicted of armed robbery in 1981 and convicted of attempted armed robbery in 1981. (Id. at 64)

Furthermore, the defendant Logan was on probation on March 17, 1984 when he committed the offenses of armed robbery. (Id. at 65) He exhibited an acute propensity for violence coupled with a com-plete lack of respect for the safety, lives, and property of the citizens of the State of Florida. (Id.) Logan had demonstrated that he was not amenable to rehabilitation, retribution or deter-rence.[1]

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[1]The court cited Addison v. State, Kiser v. State, Jean v. State, Hendrix v. State, and Higgs v. State.

In addition, the petitioner was involved in a scuffle in the jail about the bullet. The court did not know the extent of Logan's participation. Even worse, there had been open threats to kill state's witnesses, Deputy Bill Chamness, specifically. (Id. at 65) The guns used in the robbery were stolen; it was unbeliev-able the defendant [Logan] did not know the guns were stolen. Most significant, the defendant [Logan] showed a complete disregard, total lack of respect for law and order by taking the witness stand and lying about how he was shot. (Id.)

Because of the nature and severity of the offenses, the defen-dant's [Logan's] criminal record, and his total disrespect for the laws of the state, the term of 17 to 22 years incarceration, as suggested by the sentencing guidelines, was totally inappropriate for his rehabilitation, punishment, and deterrence.[2] The trial court sentenced the petitioner to life imprisonment in the Depart-ment of Corrections on each count to be served concurrently. (Id. at 66)

The official judgment and sentence were filed December 17, 1984. (Id. at 40-47) Written, supplemental grounds for departure were filed December 19, 1984. These were: 1) the defendant used stolen firearms in the commission of the robbery

[2]The court cites ***Williams v. State***, 454 So. 2d 751 (Fla. 1st DCA 1984).

and knew or should have known the weapons were stolen; 2) the defendant threatened to kill or do serious bodily injury to persons scheduled to testify against him, including the victims of the robbery and investigator Bill Chamess of the Hendry County Sheriff's Office (Id. at 50); 3) the defendant's testimony was so contradictory to the physical evidence that it was obvious he was being untruthful – this ex-hibited a blatant disrespect for the sanctity of truth and honesty of testimony given under oath;

4) The defendant exercised physical violence to Hendry County corrections officers when such officers attempted to execute a court order to obtain physical evidence. The altercation resulted in several officers sustaining broken bones or other injuries requiring medical attention; 5) the foregoing facts further indi-cated that clear and convincing reasons exist to warrant a depar-ture sentence in excess of the guidelines sentence. The defendant " ... exhibited a complete disregard for the laws of this state, the safety of its citizens, and the sanctity of this Court by com-mitting a crime of violence, using stolen weapons, threatening to kill witnesses testifying against him, abusing the oath of truthful testimony and causing injury to officers executing a Court Order. Such conduct compels this Court to impose the maximum sentence pre-scribed under the laws

of this State." (Id. at 51)

On October 18, 1999 the petitioner filed a motion to correct an illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). The motion alleged that in *Smith v. State*, 537 So. 2d 982, 986 (Fla. 1989) the supreme court determined the sentencing guidelines were not valid for crimes committed before July 1, 1984. (R. 1, 2) As a result, a defendant who committed a crime prior to the effective date of the guidelines should be sentenced under the existing procedure as if the guidelines had never been enacted. (Id. at 2)

Alternatively, the *Smith* court noted the affirmative election provision of section 921.001(4)(a) providing that a person whose crime was committed before the effective date of the guidelines but sentenced afterward may affirmatively select to be sentenced under the guidelines. If a defendant chooses to be sentenced under the guidelines, it is the guidelines in effect on the date of the elec-tion which control. (Id.) It is error to impose guidelines sen-tencing for an offense committed prior to the guidelines effective date in the absence of an affirmative election by the defendant, regardless of the defendant's motive for seeking resentencing. (Id.)

The petitioner alleged he was convicted November 9, 1984 for crimes committed on March 17, 1984. He was sentenced under the

guidelines December 11, 1984 and the court found clear and convinc-ing reasons to grant a departure sentence. The petitioner sub-mitted he had been subjected to an illegal sentence since the record was devoid of any discussion of an affirmative election at his original sentencing. (Id. at 3) He requested that his sen-tences be vacated and the case remanded for a new sentencing hearing. (Id. at 4) Upon resentencing, he could choose to be sen-tenced under the pre-guideline procedure or affirmatively elect to be sentenced under the guidelines in effect at the time of resen-tencing. (Id.)

The state responded to the petitioner's motion April 14, 2000 to the effect the failure to offer the right of election at the original sentencing rendered the sentence illegal. (Id. at 9) The state found the petitioner entitled to a resentencing hearing at which he should be given a non-guidelines sentence unless he af-firmatively elects to be sentenced under the current guidelines. The state recommended the petitioner's motion be granted. (Id. at 10)

On May 2, 2000 the trial court entered its order granting the motion to correct illegal sentence. (Id. at 11) On January 16, 2001 the public defender's office of Hendry County was appointed to represent the petitioner at the resentencing hearing. (Id. at 17) On April 10, 2001 petitioner, through

appointed counsel, filed a motion to correct sentence and prohibit a departure sentence upon resentencing. (Id. at 18-23) In this motion, appointed defense counsel argued the petitioner's contention that his sentence is illegal is predicated on the fact that the reasons the trial court relied on for its departure were invalid. (Id. at 18) The reasons for departure were invalid because they were either elements of the armed robbery [sic], charges for which no conviction had been obtained or factors not related to the convicted offense. (Id.)

The relief sought was to allow the petitioner to elect between either the parole system or the guidelines, and then impose a guideline sentence under either system in view of the previously invalid reasons given for departure. (Id. at 23) On May 7, 2001 the trial court entered its order denying the motion to correct and to prohibit departure sentence upon resentencing. (Id. at 24)

The resentencing hearing took place May 8, 2001. (T. 1-40) The state began by recounting the procedural history of the case. (T. 3, 4) It was the state's position the petitioner had two previous opportunities to challenge the validity of the departure reasons – previous motions had twice been denied and affirmed by the Second District. (T. 5) The state found that all that needed to be done in the resentencing was to allow

Logan to affirmatively select whether to be sentenced under the guidelines or not. (Id.) Once an election had been made, the court could impose the same sentence as the original sentence from Judge Adams. (Id.)

The state had a transcript of the original sentencing. According to the Assistant State Attorney, all the trial judge had to do was read off the original departure reasons. (Id.) If the petitioner did not like the departure sentence, he could appeal again, but the departure reasons had been previously appealed and affirmed. (Id.) The Assistant State Attorney also handed the trial judge a copy of the supplemental grounds for departure filed by the original sentencing judge. (T. 6)

The trial judge asked if the reasons for departure should be read or incorporated into the record. The Assistant State Attorney replied the reasons for departure had to be written. (Id.) The trial judge inquired a written order or written into the record. The state responded a written order. The public defender con-curred. (T. 7) The court asked if the state would provide a pro-posed order. The Assistant responded she could do that. (Id.) The trial judge asked if he should reread all the reasons for de-parture or whether it could be handled in a written order. (Id.)

The public defender pointed out the resentencing was de

novo. (T. 7, 8) Defense counsel pointed out that if subsequent case law had invalidated a reason for departure, it could no longer be used, citing *Blackwelder v. State*, 570 So. 2d 1027 (Fla. 2d DCA 1990). (T. 8, 9) Defense counsel asked the court to consider its motion to prohibit departure on resentencing as a brief on the defense position as to each of the grounds the court might consider as a reason for departure. (T. 9) Defense counsel then argued the invalidity of the original reasons for departure. (T. 9-19) He concluded that a guidelines sentence of 17 to 22 years should be imposed. (T. 19)

The state responded that valid departure reasons remained. Under *Blackwelder*, a departure could be affirmed if one reason re-mained valid. (T. 20) The state gave as a reason for departure the petitioner's escalating pattern of criminal behavior. According to the original scoresheet, and, apparently, the original transcript, Logan was convicted of attempted armed robbery in 1981, and armed robbery, with the instant offense being armed robbery with a fire-arm. (T. 20) Another potential reason for departure was Logan threatened the victims with serious bodily injury by placing the firearm against the victims' bodies. (T. 21) While an uncharged crime may not be a reason for departure, the manner and circum-stances by which the crime was committed could be considered. (T. 22)

Thus, substantial risk of injury to a number of persons would be a valid reason to depart. (Id.)

Other potential reasons for departure were that Logan committed the crime with a stolen gun, he wore a mask to conceal his identity, and shot at a police officer while fleeing. (T. 23, 24, 25) Defense counsel argued in rebuttal against the state's reasons for departure. (T. 25-30) The petitioner, Lawrence Logan, was then sworn. The trial court asked the petitioner whether he wanted a non-guidelines sentence or a guidelines sentence. Logan responded that he wished to be resentenced under the guidelines. (T. 30) He then made a submission to the court on his own behalf. (T. 31, 32)

Bobby Freeman, a former co-defendant, spoke on the petitioner's behalf. Robert Christler also spoke on the petitioner's behalf. (T. 32-35) Defense counsel then argued in mitigation of sentence. (T. 36-37) The trial court then, noting Logan's election to be re-sentenced under the guidelines, resentenced him to life in prison on each of the five armed robbery with a firearm convic-tions, to run concurrently. (T. 38, 39) As grounds for departure, the court orally recited an escalating pattern of criminality, substantial risk of injury to a victim, and the method and manner in which the crime was committed, i.e., wearing a mask. (T. 39, 40) The notice of

appeal was filed the same date. (R. 36) It does not appear a scoresheet or a written order with reasons for depar-ture was filed. On appeal, the petitioner argued, inter alia, that no written reasons were filed at the resentencing on the authority of *Smith*. Since no written reasons for departure were filed, the court was required to reverse and remand for a guidelines sentence on the authority of *Pope v. State*, 561 So. 2d 554 (Fla. 1990) (prohibiting departure on reversal and remand for failure to provide written reasons for departure). The petitioner argued that his election was to be sentenced under the original guidelines as enacted in 1983, and to apply the guidelines enacted after January 1, 1994 would violate the ex post facto clauses of the consti-tutions of the United States and the State of Florida.

The other issues presented to the Second District included: II. Whether it was error to impose departure life sentences based on grounds which were all not stated in the written grounds for departure given by the original sentencing judge; III. Whether it was error to impose a departure sentence based on an escalating pattern of criminal activity; IV. Whether it was error to impose a departure based on the ground that a mask was worn when that crime was not charged or factually determined by a jury; V. Whether it was error to impose a departure

sentence on the ground that someone held a firearm against the body of some victim during the commission of the robberies with a firearm; VI. Whether it was error to impose sentence without preparing a guidelines scoresheet. In response, the state took the position that Logan elected to be resentenced under the Criminal Punishment Code, which, regard-less of semantics, is an evolutionary refinement of the sentencing guidelines as originally enacted in 1983. The state found that similarly situated defendants, sometimes claiming the *Smith* right of election at dates much later than their original sentences, and under much evolved versions of the guidelines, had the right to be sentenced under the guidelines on the date of the election. Under the Criminal Punishment Code, the life sentences could be imposed without written reasons for departure. This negated the first, second, third, fourth, and fifth arguments on appeal. Any possible error in not preparing a Criminal Punishment Code scoresheet was harmless error.

The Second District Court of Appeal entertained oral arguments March 11, 2003. On May 30, 2003, the Second District affirmed the petitioner's resentencing, finding:

> A defendant who elects to be sentenced under the guidelines, elects to be sentenced under the guidelines in effect at the time of the election. Smith, 537 So. 2d at 987. Because Logan made his election in 2001, he

> elected to be sentenced pursuant to the Criminal Punish-ment Code. See Quevado v. State, 838 So. 2d 1253, 1254 (Fla. 2d DCA 2003) (holding that defendant sentenced in 1999 had right to choose "either a nonguidelines sentence or one under the 1998 Criminal Punishment Code").
>
> Pursuant to the Criminal Punishment Code, the five concurrent life sentences received here by Logan were not departure sentences. Ac-cordingly, the trial court was not required to file written departure reasons. See s. 812.13 (2)(a), Fla. Stat. (2001). Therefore, we affirm Logan's sentences.

Logan v. State, 846 So. 2d 657 (Fla. 2d DCA 2003). On November 20, 2003 this Honorable Court accepted jurisdiction and dispensed with oral argument. *Logan v. State*, Case No. SC03-1155, (Fla. Nov. 20, 2003).

SUMMARY OF THE ARGUMENT

The opinion of the Second District Court of Appeal should be approved or affirmed. The sentencing structure in place at the time of the petitioner's election, the Criminal Punishment Code (the Code), while semantically and conceptually different from pre-vious versions of the guidelines, e.g., the 1983, 1994 and 1995 guidelines, is controlling. The petitioner had fair warning that a guidelines election in 2001 would mandate sentencing under the Code. The Florida courts of appeal appear to have, for the most part, uniformly followed this Court's decision in *Smith v. State*, *infra*, that the guidelines, or in this case, the Code, the sen-tencing structure in effect on the date of the election, are appli-cable.

The legislature had the authority to change the nature of the sentencing structure and thereby reduce the statutorily created rights which accrued to defendants under earlier versions of the guidelines. The adoption of the Code left intact the election provision which had been in previous versions of the guidelines. The election to be sentenced under the Code did not violate ex post facto considerations since, when the petitioner committed his offenses, there were no effective sentencing guidelines. In addi-tion, there is no due process violation because the petitioner had actual and

constructive notice the sentencing structure on the date of the election was the Code.

ARGUMENT

THE PETITIONER WAS PROPERLY RESENTENCED BE-CAUSE THE GUIDELINES IN EFFECT AT THE TIME OF HIS ELECTION WERE AND ARE THE CRIMINAL PUN-ISHMENT CODE AND UNDER THE CODE THE TRIAL COURT HAD THE DISCRETION TO IMPOSE ANY SEN-TENCE UP TO THE STATUTORY MAXIMUM WITHOUT GIVING ANY REASONS FOR DEPARTURE AND AS A CONSEQUENCE THE USE OF THE CODE IN RESENTENC-ING THE PETITIONER NEGATES MOST OR ALL OF THE ARGUMENTS RAISED ON REVIEW.

On discretionary review, the petitioner raises six issues, yet the critical, decisive issue before the Honorable Court is whether a defendant whose offenses predated the effective date of the sen-tencing guidelines, July 1, 1984, *see Smith v. State*, 537 So. 2d 982 (Fla. 1989), yet faced sentencing after the effective date, and who exercises the right of election at a date much later in time, e.g., this case, May 8, 2001, (T. 30) is to be sentenced under the sentencing structure at the time of the election, i.e., the Criminal Punishment Code (hereinafter the Code).[3]

The state asserts that the sentencing structure in place at the time of the petitioner's election, the Code, while semantically distinct from the various versions of the sentencing guidelines, e.g., the 1983, 1994, and 1995 guidelines, and conceptually dif-ferent, is controlling. The

[3]The legality of a sentence is reviewed de novo. *United States v. Murphy*, 65 F. 3d 758, 762 (9th Cir. 1995).

petitioner argues that an election cannot be interpreted as making a choice between unknown options,
that he was unaware that in making his election, it was an election to be sentenced under the Code, that somehow his allegedly un-knowing election of the sentencing structure in place at the time, the Code, violated principles of due process, fundamental fairness, and ex post facto considerations.

The state asserts the petitioner had "fair warning" that a guidelines election in 2001 would mandate sentencing under the Code. *See Connell v. Wade*, 538 So. 2d 854, 855-56 (Fla. 1989); *Ty-ner v. State*, 545 So. 2d 961, 963 (Fla. 2d DCA 1989). Florida courts appear to have uniformly followed *Smith*, as the Second Dis-trict did below, holding that the guidelines or the Code, i.e., the statutory criminal sentencing scheme, are the sentencing rules to be followed on the date of the election. *Quevado v. State*, 838 So. 2d 1253, 1254 (Fla. 2d DCA 2003) (option to be resentenced under Criminal Punishment Code); *Sheely v. State*, 820 So. 2d 1080 (Fla. 2d DCA 2002) (giving defendant option to be sentenced under guide-lines in effect at time of election); *Kunkel v. State*, 765 So. 2d 244 (Fla. 1st DCA 2000) (defendant entitled to be resentenced under pre-guidelines law or under current guidelines); *Braggs v. State,* 642 So. 2d

129, 131 n. 6 (Fla. 3d DCA 1994) (court to use sen-tencing guidelines in effect on date of election); *Fowler v. State*, 641 So. 2d 941 (Fla. 5th DCA 1994) (defendant may elect sentencing under current guidelines). *Contra Copeland v. State*, 842 So. 2d 1052 (Fla. 3d DCA 2003) (misinterpreting *Braggs*, implying guide-lines prior to election applicable).

Under these cases, similarly situated defendants, sometimes claiming the right of election under *Smith* at dates much later than their original sentences, e.g., *Kunkel*, almost fifteen years later, and under much evolved versions of the guidelines, had the right to be sentenced under the guidelines in effect on the date of the election. In *Kunkel*, assuming he elected guidelines sentencing, this would necessarily have required sentencing under the Criminal Punishment Code, as the *Kunkel* opinion was filed August 9, 2002 and the motion to correct illegal sentence was filed in July, 1999. This was also the case in *Quevado* – he should have been given the option to be sentenced under the guidelines, the "Code," at his June 1999 sentencing for violation of probation.[4]

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[4]The Criminal Punishment Code is applicable to all felony offenses, except capital felonies, committed on or after October 1, 1998. *Fla. Stat*. s. 921.002 (2000). This Court upheld the Code's constitutionality in *Hall v. State*, 823 So. 2d 757 (Fla. 2002). In rejecting the due process challenge to the Code, the Court found the Legislature has provided a

It appears that in *Braggs* and *Fowler*, cases decided respectively in September, 1994, any election for guidelines sentencing would have required sentencing under the 1994 or, at the latest, the 1995 sentencing guidelines. Accordingly, the state takes the position the petitioner's election was to be resentenced under the

Code, which, regardless of semantics, is an evolutionary refinement of the sentencing guidelines as originally enacted in 1983 and con-stitutionally enacted effective July 1, 1984. "[T]here is no con-stitutional right to sentencing guidelines — or more generally, to a less discretionary application of sentences than that permitted prior to the guidelines ..." *Peterson v. State*, 775 So. 2d 376, 379 (Fla. 4th DCA 2000), *mandamus denied*, 817 So. 2d 849 (Fla. 2002).

As a result, "the legislature had the authority to change the nature of the sentencing structure, and, in doing so, to reduce the statutorily created rights which accrued to defendants under the earlier versions of the sentencing guidelines." 775 So. 2d at 379 (discussing Code). Regardless

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reasonable basis for its criminal sentencing scheme, which is "neither discriminatory, arbitrary, nor oppressive." The Court acknowledged that some federal jurisdictions, as well as the First and Fourth Districts, had questioned whether sentencing guidelines are subject to due process violation attacks. *Id*. at 760 n. 2.

of semantics, the Code sets forth guidelines in sentencing criminal defendants convicted of non-capital felonies. It is traditional sentencing. *Hall*, 823 So. 2d at 762. Chapter 97-194, Laws of Florida, the legislative vehicle enacting the Code, retained the election provision from previous versions of the guidelines. Section 1 provides that section 921. 001, inter alia, is repealed as amended by the act effective Octo-ber 1, 1998, except that those sections shall remain in effect with respect to any crime committed before October 1, 1998.

Section 921.001 (4)(b) 1, Florida Statutes (2000) provides, "[t]he guidelines enacted effective October 1, 1983 apply ... [and] to all felonies, except capital and life felonies, committed be-fore October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions."[5] Certainly, when this Court decided *Smith*, it

[5]"Florida law historically, up to and through the 1970s, provided trial judges almost total discretion in sentencing crim-inal defendants, solely limited by statutory maximums and consti-tutional constraints. Judges could sentence felons to death, in-carceration, or to conditional freedom in the form of probation served in lieu of or after incarceration, and no judicial review was available for sentences imposed within legal limits." Chet Kaufman, *A Folly of Criminal Justice Policy-Making: The Rise and Demise of Early Release in Florida, and its Ex Post Facto Impli-cations*, 26 Fla. St. U.L. Rev. 361, 366 (Winter 1999). By per-mitting a right to select the guidelines enacted in 1983 for the class of persons whose offenses were committed before this date, the state takes section 921.001 (4)(b)1 to mean the 1983 guide-lines and subsequent revisions, in contrast to the pre-guidelines regime

recognized that the legislative reference to the 1983 guidelines included revisions to those guidelines. After examining the history of the sentencing guidelines, the *Smith* court found the legislature made a minor amendment to section 921.001 in chapter 84-328 and adopted and implemented the guide-lines as revised by the Florida Supreme Court on May 8, 1984. *Smith*, 537 So. 2d at 984.

Chapter 84-328 became effective July 1, 1984. The Court went on to state:

> Subsequent thereto, this Court has continued to make revisions to rules 3.701 and 3.988. In chapter 96-273, Laws of Florida, the legis-lature adopted our revision of December 19, 1985. However, in chapter 87-110, Laws of Florida, the legislature adopted only a por-tion of our April 2, 1987, revision of the rules. In 1988, the legislature fully ap-proved our April 21, 1988 revision of the rules. Ch. 88-131, Laws of Fla. At the same time, the legislature has continued to make substantive amendments to section 921.001.

Smith, 537 So. 2d at 985. The Court then addressed the appellant's situation:

> However, appellant is in a unique posture. His original sentence was vacated by the dis-trict court of appeal and the trial court was directed to resentence the

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of the 1970s. The article presents an insightful analysis of the history and interplay between the guidelines and early re-lease in Florida.

> appellant. At this point, while the date of his crime continued to predate the effective date of the guide-lines (now determined to be July 1, 1984), the new sentencing took place after the guidelines became effective. Under section 921.001(4)(a), a person whose crime was committed before the effective date of the guidelines but sentenced thereafter may affirmatively select to be sen-tenced under the guidelines. When appellant appeared for resentencing in 1988, his effort to be sentenced under the guidelines consti-tuted the affirmative selection contemplated by section 921.001 (4)(a). Therefore, appel-lant should have been sentenced under the guidelines which were effective on that date.

537 So. 2d at 987. Thus, the *Smith* court, fully aware of ongoing revisions to the sentencing guidelines, determined that the guide-lines in effect on the date of the election are controlling. The *Smith* court also determined no ex post facto violation existed because the appellant's crimes and original sentencing took place at a time when there were no effective sentencing guidelines.[6] The first valid affirmative selection

[6]The ex post facto prohibition is understood to extend to a special class of criminal laws – those that act retrospectively to the disadvantage of the offender. Critical to relief under the ex post facto clause is the lack of fair notice and govern-mental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. William P. Ferranti, Comment, ***Revised Sentencing Guidelines and the Ex Post Facto Clause***, 70 U. Chi. L. Rev. 1011 (2003). Two critical ele-ments must be present for a criminal or penal law to be ex post facto: it must be retrospective, i.e., it must apply to events before its enactment, and it must disadvantage the offender af-fected by it. ***Revised Guidelines***, ***supra***, at 1016. The election

of the guidelines occurred on June 23, 1988. *Smith*, 537 So. 2d at 987 n.3.

In *Connell v. Wade*, 538 So. 2d 854 (Fla. 1989) the Court also held the guidelines in effect on the date of the election are con-trolling. During the course of Connell's criminal proceedings, the October 1, 1983 sentencing guidelines were amended on May 8, 1984 such that the guidelines maximum for his offenses was increased from five and one half years to nine years. Connell appealed the nine year sentence, arguing the guidelines in effect at the time of the conviction should control. This argument failed in the dis-trict court and in this Court. Since no guidelines were in effect on the date his offenses were committed, the guidelines at the time of the election controlled. There was no violation of *Miller* I[7] for this reason. *Id*. at 855.

In the instant case, since the date of the petitioner's of-

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provision does not mandate retrospective application of the guidelines; the defendant elects whether to be sentenced under the guidelines. Since there were no valid guidelines when the petitioner committed his offenses, his election to be sentenced under the Code presents no ex post facto problem. The ex post facto clause does not protect an individual's right to less pun-ishment. *Id*.

[7]*Miller v. Florida*, 482 U.S. 423, 96 L. Ed. 2d 351, 107 S. Ct. 2446 (1987) (proper guidelines are those in effect at time offense committed).

fenses[8] predated the effective date of the guidelines, his election to be sentenced under the Code did not violate ex post facto considerations. Furthermore, the petitioner had notice that if he so elected he would be sentenced under the Code. For example, in his motion to correct illegal sentence he himself states " ... if a defendant chooses to be sentenced under the guidelines, it is the guidelines in effect at the election that are controlling." (R. 2) Thus, he had actual notice of the Code. In addition,:

> By virtue of the Florida Statutes and the laws of Florida, a defendant has constructive no-tice of the penalty for statutory crimes. See *State v. Beasley*, 580 So. 2d 139, 142 (Fla. 1991) ("As to notice, publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the conse-quences of their actions."). Moreover, the Code comports with the due process require-ment of fair warning. It lists every crime and gives a severity ranking for that particu-lar crime. The Code also contains a worksheet form and directions on how to perform the cal-culations to arrive at a permissible sentence. An accused is not deprived of notice of the criminal penalty because he must conduct math-ematical calculations to determine the penal-ty. See

[8]The information charged the petitioner with six counts of armed robbery committed on or about March 17, 1984. (S.R. 38, 39) He was convicted of five counts of armed robbery with a fire-arm, a first-degree felony punishable by life imprisonment, *Fla. Stat.* s.812.13(2)(a) (1983), (S.R. 40, 41) and sentence was im-posed December 11, 1984. (S.R. 52, 63, 67)

> *Gardner v. State*, 661 So. 2d 1274, 1276 (Fla. 5th DCA 1995), overruled on other grounds by *White v. State*, 714 So. 2d 440 (Fla. 1998). Accordingly, the Code provides proper notice of a permissible sentence and does not run afoul of due process for lack of notice.

Hall, 823 So. 2d at 764. The petitioner had fair warning of the potential sentences he faced under the Code, and, aside from actual knowledge, there was constructive knowledge based on the nu-merous cases previously cited that the Code would be the applicable law if the election was for guidelines sentencing. There has been no ambush or surprise.

The fact that the name given to the 1998 guidelines, the Code, distinguishes it from previous versions of the guidelines is not controlling. Despite the different name, the Code is still a guideline[9], though conceptually different from earlier

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[9]According to the Senate Staff Analysis and Economic Impact Statement, the Code would "... encompass the current offense ranking chart that is provided under the sentencing guidelines. The same sentence points, point multipliers, victim injury points and other point enhancements that are currently provided under the sentencing guidelines would remain intact under the Criminal Punishment Code for the purpose of calculating an offender's per-missible sentencing range." Fla. S. Criminal Justice Comm., CS/ SB 716, (1997), Staff Analysis, p. 1 (revised April 8, 1997). The permissible sentencing range would be the result of calcu-lating the total sentence points to establish the minimum prison sentence allowable. A judge would be able to sentence an offen-der up to the statutory maximum allowable prison sentence for the level of the offense for which the offender was convicted. *Id*.

versions of the guidelines. This Court has itself so stated: "The sentencing guidelines as set forth in section 921.0026[10] [sic] apply broadly to all felonies and provide for general sentencing guidelines." *Jones v. State*, 813 So. 2d 22, 25 (Fla. 2002). The Court further states "[t]he 1998 changes to the sentencing guidelines estab-lished the Florida Criminal Punishment Code and made substantial changes in the application of the sentencing guidelines." *Id*.

"Under the former sentencing guidelines, a narrow range of permissible sentences was determined through a strict mathematical formula. See *s.921.0014(2), Fla. Stat*. (2000). It was then with-in the judge's discretion to sentence the defendant within that narrow range. In contrast, under the now applicable CPC, 'the permissible range for sentencing shall be the lowest permissible sentence [as determined by the number of total sentencing points] up to and including the statutory maximum. *921.0024(2), Fla. Stat*. (2000).'" *Nettles v. State*, 850 So. 2d 487, 493 (Fla. 2003). The *Nettles* court found the PRRPA's (Prison Releasee Reoffender Pun-ishment Act) reference to an offender's ineligibility for a guide-lines sentence did

[10]It appears the Court is actually referring to section 921. 0027, "Criminal Punishment Code and revisions; applicability."

not forbid sentencing under the Code.[11] *Id*. Despite the different title and concept, the Code fundamen-tally is an evolutionary adaptation of the original 1983 sen-tencing guidelines. The 1983 sentencing guidelines cannot apply to the petitioner's case, since when he committed his offenses, there were no valid guidelines. At the original sentencing, the parties all assumed the guidelines applied, and the petitioner was sen-tenced to life departure sentences, concurrent as to each count. (S.R. 66, 42-46) *See Kunkel v. State*, 765 So. 2d 244, 245 (Fla. 1st DCA 2000) (at original sentencing all parties assumed the guide-lines applied and the trial court upwardly departed). As in *Kun-kel*, the guidelines were applied to the petitioner without his having any right to affirmatively select the guidelines. As in *Kunkel*, the selection of the current guidelines means the Code.

Under the law as it stood in March of 1984, the petitioner could have been given an ordinary parole eligible sentence up to the statutory maximum, or, if he qualified he could have been sen-tenced under the then applicable version of the habitual

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[11]In his concurring opinion, Justice Cantero explained the Code and the PRRPA were enacted during the same legislative ses-sion. Thus, "when the legislature excluded application of the sentencing guidelines in the PRRPA, it knew that it was simulta-neously, but in a different bill, repealing the sentencing guide-lines and replacing them with a different sentencing scheme." 850 So. 2d at 495-96.

offender statute. *Studnicka v. State*, 679 So. 2d 819, 821 (Fla. 3d DCA 1996). In *Studnicka*, the defendant had attempted to argue that he had selected the guidelines as they stood in 1986, when the guide-lines imposed a cap on any habitual offender sentence, rather than the guidelines in effect on the date of the election.

The Third District rejected the argument. It found this Court made it clear that in exercising the option to be sentenced under the guidelines, the court looks to the law as it exists on the date of the election. There was no ex post facto problem since the defendant was simply exercising an option, a matter of legislative grace, to choose the guidelines. Application of the law existing in 1994 did not impair any vested right of the defendant. The only vested right he had was to be sentenced under the law as it existed on the date of his offenses in 1983. *Id*. at 822.

As in *Studnicka*, the petitioner in the instant case attempts to contort and twist the pertinent sentencing law to his advantage. The problem here is such undue delay in asserting his rights that it approaches laches. Had the petitioner asserted his rights at some earlier date, and the *Smith* case was filed January 5, 1989, he could have chosen to be sentenced under the 1983 version of the guidelines, or under the 1994 or

1995 versions of the guidelines. However, for whatever reason, perhaps ignorance, this petitioner chose to wait until October 18, 1999 to file his motion to correct an illegal sentence. (R. 1-5)

It is certainly not the state's fault the petitioner has inordinately delayed the filing of his claim. As this Court stated in *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997), discussing a tardy claim of ineffective assistance of counsel, filed fifteen years after the fact, "[t]he unwarranted filing of such delayed claims unnecessarily clog the court dockets and represent an abuse of the judicial process." In *McCray*, the court recognized that as time goes by records are destroyed, essential evidence may become tainted or disappear, memories of witnesses fade, and witnesses may die or become otherwise unavailable.

In this case, the petitioner would have the Court reach the patently absurd result of having the parties apply 1983 sentencing law almost twenty years after the fact. This is an undue burden on everyone concerned, defense counsel, state attorneys, and the courts. No one wants to descend into the old "twilight zone" of the guidelines and research whether reasons for departure are still valid, whether the court may depart upwardly again, whether con-temporaneous reasons must be filed,

etc. As a practical and policy matter, application of the law at the time of the election is best for all concerned. It is easier to understand and apply current law since over time the original parties and relevant materials may no longer be available.

Now, the petitioner seeks to have the Court overturn fifteen years of precedent and remand for resentencing under the 1983 guidelines. This is untenable. It is wrong. Why the parties at the resentencing hearing of May 8, 2001 failed to comprehend the applicable law is anyone's guess. Yet one thing is certain: the state correctly asserted the Code was the applicable law at the time of the election. Under the Code, the trial court could impose sentence up to and including the maximum for any offense, including an offense before the court for a violation of probation or com-munity control. *Fla. Stat*. s. 921.002(1)(g) (2000). *See also* Fla. R. Crim. P. 3.704 (d)(25) (permissible range for sentencing lowest permissible sentence up to and including the statutory maximum as defined in s.775.082 for primary and any additional offenses set for sentencing).

Since the petitioner was convicted of five (5) counts of armed robbery with a firearm, first-degree felonies punishable by life, *see Maddox v. State*, 461 So. 2d 176, 178 (Fla. 1st DCA 1984), under the Code he could be sentenced to life imprisonment

without writ-ten reasons for departure. This negates petitioner's issue II, III, IV, and V. As for the absence of a Code scoresheet, this is a mystery. The parties seem to have attempted to comply with the requirement of a written order (T. 6, 7) which presumably would have accompanied the scoresheet, but for whatever reason, perhaps oversight, neither a scoresheet nor a written order was filed. However, under the state's analysis this is a moot point because under the Code departure reasons are no longer necessary.

Any possible error in not preparing a Code scoresheet was harmless, since, under the Code, a correct scoresheet would only indicate the lowest permissible sentence and the petitioner was sentenced to concurrent life sentences. *Cf*. *Murphy v. State*, 761 So. 2d 1247 (Fla. 2d DCA 2000) (error in assessment of community sanction violation points not harmless where defendant sentenced to bottom of guidelines). There is no indication the scoresheet played any role in the original sentences imposed for the armed robberies. A defendant is not entitled to resentencing where the record shows, had the correct scoresheet been used, he would have received the same sentence. *Collins v. State*, 788 So. 2d 1109 (Fla. 2d DCA 2001).

Even assuming a Code scoresheet should have been prepared, the sentence imposed would still have been life. The Second

District’s opinion should be approved or affirmed.

CONCLUSION

The Court should affirm or approve the opinion of the Second District, since the petitioner elected sentencing under the Code, and under the Code departure reasons are not necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carol J.Y. Wilson, Esq., Assistant Public Defender, P.O. Box 9000, Drawer PD, Bartow, Florida 33831 on this ____ day of January, 2004.

CERTIFICATE OF COMPLIANCE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

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OF COUNSEL FOR RESPONDENT