IN THE SUPREME COURT OF FLORIDA

LAWRENCE LOGAN,	:	
Petitioner,	:	
vs.	:	Case No. SC03-1155
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Lawrence Logan was charged along with Terry Lee Gilmore and Bobby Freeman with six counts of robbery with a firearm, offenses occurring on March 17, 1984 in Hendry County. (R38-39). After a jury trial before Judge James R. Adams, Mr. Logan was convicted of five of the six counts. (R40-41).

Under the sentencing guidelines, the recommended sentence was 15 years, with a range of twelve to seventeen years. (R48-49). At a sentencing hearing on December 11, 1984, the trial court decided to impose departure sentences of concurrent life sentences under the sentencing guidelines. (R42-47, 63-67). The trial court filed written reasons for the departure sentence on December 19, 1984. (R50-51).

In the written order the trial court stated that it set forth the written grounds "in addition to those grounds enunciated at the Defendant's Sentencing on December 11, 1984. . . ." (R50). The written grounds in the order stated that the trial court was imposing a departure sentence on the grounds that (1) the defendant used firearms in the commission of the crime and knew or should have known the firearms were stolen; (2) that Mr. Logan told numerous people of his intent to kill or seriously harm the witnesses against him, including the victims of the robbery and

the lead investigator, Bill Chamness; (3) that after being placed under oath the defendant testified about events that were contradictory to the physical evidence and therefore "shows a blatant disrespect for the sanctity of truth and honesty of testimony given under oath;" (4) because the defendant was physically violent when corrections officer tried to execute a court order to obtain physical evidence and the resulting fight resulted in broken bones and other injuries; (5) the defendant exhibited a complete disregard for the laws of the state, the safety of its citizens and the sanctity of the court by doing the foregoing four acts. (T50-51).

On October 18, 1999, Mr. Logan filed a Motion to Correct An Illegal Sentence, in which Appellant stated that his sentence under the guidelines was illegal because the sentencing guidelines did not apply to crimes committed prior to July 1, 1984. (R1-3). The state conceded that Mr. Logan was entitled to resentencing. (R6-10). The trial court then granted the defendant's motion to correct sentence and ordered resentencing. (R11).

The defense filed a Motion to Correct Sentence and to Prohibit a Departure Sentence Upon Resentencing. (R18-23). The trial court denied this motion on the grounds that resentencing

had already been ordered and because "the Court at resentencing is free to impose any legal sentence. . . ." (R24-25).

A sentencing hearing was held before G. Keith Cary on May 8, 2001. (T1). At no time during the sentencing hearing did the state raise the issue of the applicability of the Criminal Punishment Code. (T2-7, 20-25). Instead the state argued that various departure grounds under the sentencing guidelines permitted the trial court to once again impose the life sentences previously given. (T2-7, 20-25). The criminal punishment code was not mentioned by either party or by the trial court during the entire resentencing proceeding. (T3-40). Instead the parties focused entirely on the sentencing guidelines and argued whether departure grounds could apply in sentencing Mr. Logan. (T3-40).

The prosecutor at the departure hearing gave a procedural history of the case, describing generally that prior appeals had resulted in affirmances after Mr. Logan had attacked the departure grounds then given by Judge Adams. (T3-6). The state claimed that those same departure grounds could once again be used by the trial court in imposing a departure sentence under the sentencing guidelines. (T5-7). The prosecutor handed Judge Cary a copy of the written departure grounds filed in 1984 by Judge Adams. (T6). The prosecutor then told the trial court, "They have to be

written. Whatever reasons have to be written, even though you're the resentencing judge." (T6-7). The trial court then asked, "Now when you say written, you mean I have to do a written order or it has to be written into the record?" (T7). The prosecutor then informed the trial court, "No. A written order." (T7).

The defense position was that the hearing was a sentencing hearing and that Mr. Logan was appearing before the court to elect the sentencing system he wished to be sentenced under and for the trial court to then again newly sentence him to an appropriate and legal sentence. (T7-8). The defense then discussed the reasons for the departure sentence which were orally given by Judge Adams at the sentencing hearing, only some of which were included in the written order justifying the original departure sentences. (T8-19).

The prosecutor argued to the trial court that a departure sentence could then be imposed on the grounds that Mr. Logan engaged in an escalating pattern of criminality because he was previously convicted of armed robbery and attempted armed robbery and was convicted in this case of robbery with a firearm. (T20-21). The prosecutor did not produce certified copies of the prior convictions or the informations for those convictions which would show exactly what form of armed robbery was involved in the prior

convictions and whether a firearm was at issue in those cases as well.

The state urged the trial court to depart based on the fact that Mr. Logan "threatened the victims with serious bodily injury by placing the firearm against their bodies." (T21). The prosecutor, who did not try the case back in 1984, did not cite to any portion of the trial transcript which would support this factual assertion in a case involving three codefendants and at least five victims and the prosecutor did not name which specific victim was involved.

The state also urged the trial court to impose a departure sentence on the grounds that Mr. Logan used a mask or other device to conceal his identity, without specifying exactly what facts adduced at trial proved this conclusion. (T23-24). The state argued other reasons, including the possession of a stolen gun and the firing at police officers as grounds to depart. (T23-25).

The defense then advised the trial court that it could only look at the reasons given by the original sentencing court as valid departure grounds. (T25-26). The defense advised the trial court it could not depart based on an escalating pattern of criminality, when the original sentencing judge had not found that fact or relied upon it in imposing the departure sentences. (T26).

The defense argued that the other grounds relied upon by Judge Adams, the original sentencing judge, and by the state concerned either unproved crimes or elements inherent in the crime of robbery with firearm. (T28-30).

When Mr. Logan was asked to elect between sentencing schemes, Judge Cary stated the following to Petitioner:

> Mr. Logan, we are here for your resentencing this morning. And, of course, you have had an opportunity to talk to Mr. Rinella and you have heard the arguments that were made. But I do need to have you actually make the official decision on **whether you want to elect to go under the guidelines or do you want a nonguidelines sentence.**

(T30). When Mr. Logan made his election, he stated, “I would like to go under the guidelines, Your Honor.” (T30).

Concerning his sentence, Mr. Logan stated that he had rehabilitated himself in prison and that he had been really "wild and stupid" when the crimes were committed. (T31). He asked that he not be forced to pay for these crimes with the rest of his life because he felt he could be a productive citizen. (T31-32). Prior codefendant Bobby Freeman testified for Mr. Logan and stated that Mr. Freeman had been acquitted of the charges against him and had supported Mr. Logan while he has been imprisoned. (T32-33). Mr. Logan's parents and his brothers and sisters had all died since he was imprisoned. (T33). Mr. Freeman stated that Mr. Logan could

work for his trucking business and could live with him. (T34). Mr. Freeman stated that Mr. Logan had studied law and learned five foreign languages and had made an overall change in his life. (T34).

The defense lawyer asked the trial court to consider that Mr. Logan had been eighteen at the time of the crimes and had since made serious improvements in prison. (T37). The state presented no testimony at the sentencing hearing.

The trial court then imposed departure life sentences under the sentencing guidelines. (T38-39). The trial gave oral reasons for the departure sentences, which in summary were: 1) that the crimes evidenced an escalating pattern of criminality based on two unnamed prior convictions in 1981; 2) that the firearm was placed by someone against the body of at least one unnamed victim, producing a substantial risk of injury to that victim; 3) and because Mr. Logan was wearing an undescribed "mask." (T39-40).

The trial court failed to file written reasons for the departure sentences imposed. On May 31, 2002, appellant's counsel served a Motion to Correct Sentence in the trial court, stating that written reasons were required to be given when imposing a departure sentence under the applicable 1984 sentencing guidelines and that the failure to file written reasons required resentencing within the sentencing guidelines range. (App. 1-2). On June 12, 2002, the trial court rendered an Order denying the Motion to

Correct Sentence on the grounds that the trial court believed Davis v. State, 661 So.2d 1193 (Fla. 1995) held that the issue of the failure to file written reasons for a departure sentence cannot be raised in a post conviction motion. (App. 3). Mr. Logan timely appealed to the district court. (R36).

In the district court Petitioner argued that the trial court's failure to file written reasons for the departure sentences required sentencing Mr. Logan within the sentencing guidelines. Petitioner argued in detail to the district court why the applicable sentencing statutes require sentencing under the originally enacted 1983 sentencing guidelines and not under any other version of the guidelines or under the Criminal Punishment Code. Petitioner additionally argued why each orally stated departure grounds was not a legal departure ground in this case.

The State first argued the applicability of the Criminal Punishment Code to Mr. Logan's case in its Answer Brief filed in the district Court. In so arguing, the State opined for the first time in the history of this case that "Logan elected to be sentenced under the Criminal Punishment Code, which, regardless of semantics, is an evolutionary refinement of the sentencing guidelines as originally enacted in 1983." Answer Brief at 3. Oral argument was held before the district court on March 11, 2003. district court's reliance on the Criminal Punishment Code was selected by Mr. Logan, even though that sentencing law was never mentioned in the trial court. Logan v.

State, 846 So.2d 657, 658 (Fla. 2d DCA 2003). The district court noted "Logan erroneously concluded that he was entitled to be sentenced under the guidelines applicable as of the date of his original sentencing." Id. The district court, relying on this Court's decision in Smith v. State, 537 So.2d 982 (Fla. 1989), explained that since Mr. Logan elected to be sentencing under the "guidelines" in 2001, he "elected" to be sentenced under the Criminal Punishment Code. Id. The district court affirmed the trial court's denial of the motion to correct sentences on the basis that the life sentences imposed are lawful sentences under the Criminal Punishment Code, the sentencing provision in effect in 2001 when Mr. Logan "elected" to be sentenced under the "guidelines." Id.

Petitioner timely sought review in this Court's, and this Court accepted jurisdiction over this case on November 20, 2003.

STATEMENT OF THE FACTS12. The district court's decision violates the due process and ex post facto clauses of the state and federal constitutions. U.S. Const. Art. I, §9, c.3; Art. I, §10, c.1; Amend. XIV; Art. I, §10, Fla. Const.

The Florida Legislature, in 1983, enacted section 921.001 of the Florida Statutes, which directed the Florida Supreme Court to develop statewide sentencing guidelines, to become effective October 1, 1983. 1983 Fla. Laws ch. 83-87. The legislature enacted the sentencing guidelines with the following provision: "the guidelines shall be applied to all felonies ... committed prior to October 1, 1983, for which sentencing occurs after such date when the defendant affirmatively **selects** to be sentenced pursuant to the provisions." §921.001(4)(a), Fla. Stat. (1983)(emphasis added). See In re Rules of Crim. Pro., 439 So.2d 848, 849 (Fla. 1983)("The sentencing guidelines adopted herein will be effective for all applicable offenses committed after 12.01 a.m., October 1, 1983 and, if affirmatively selected by the defendant, to sentences imposed after that date for applicable crimes occurring prior thereto."). This Court, on September 8, 1983, promulgated the sentencing guidelines in the form of rules 3.701 and 3.998, Florida Rules of Criminal Procedure. In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla.1983). The legislature amended section 921.001 slightly in chapter 84-328, Laws of Florida, which became effective on July 1, 1984. This Court, in Smith v. State, 537 So.2d 982 (Fla.1989), held that the sentencing guidelines were unconstitutional for offenses committed prior to July 1, 1984, but were valid thereafter. This Court in Smith held that for

offenses committed before July 1, 1984, a court was without legal authority to impose a guideline sentence upon a defendant absent his or her affirmative selection to be sentenced according to the guidelines. Id. at 987-988.

At the trial level Mr. Logan selected at the May 8, 2001 sentencing hearing, to be sentenced under the sentencing guidelines, and not under the parole system. (T30). There was no mention by the state, the defense or the trial judge of the Criminal Punishment Code at the time Mr. Logan made this choice. (T3-40). The state, in the district court, however, argued for the first time, that Mr. Logan's life sentences were legal under the Criminal Punishment Code, and that Mr. Logan, by selecting to be sentenced under the "guidelines" elected to be sentenced under the Code, the sentencing law in effect on the date of his selection. The state justifies its argument on the premise that the Code is an "evolutionary refinement" of the sentencing guidelines, so selecting sentencing under the guidelines is in reality selecting sentencing under the Code. Brief of Respondent on Jurisdiction at 6. The district court in this case adopted the state's position and found Mr. Logan had elected to be sentenced under the Code when he elected guidelines sentencing. Logan v. State, 846 So.2d 657, 658 (Fla. 2d DCA 2003).

If a "selection" between sentencing provisions has any plain meaning, that meaning was lost or ignored in the district court decision below. Webster's Dictionary defines the term "select" to mean "to choose from a number or group: pick out." www.webster.com. Nehme v. Smithkline Beecham Clinical Laboratories, 2003 WL 22207887 at 3 (Fla., filed Sept. 25, 2003)(a court may refer to a dictionary to find the plain and ordinary meaning of a word within a statute). Mr. Logan did not chose the Criminal Punishment Code as the sentencing law applicable to his crimes. The only person who "selected" the Criminal Punishment Code in this case is the state, which determined for the first time in its Answer Brief to the district court that the Code applied to Mr. Logan's case.

If a "selection" under the sentencing guidelines has any fair due process meaning, it must be afforded its plain meaning of making a choice between known options. "Select" cannot rationally or plainly be interpreted to mean making a choice between unknown options. Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942); State v.

Bowen, 698 So.2d 248, 251 (Fla. 1997) (choosing self representation over the right to counsel should be done "with eyes open"); Guzman v. State, 2003 WL 22722404 at 10 (Fla., filed Nov. 20, 2003)(waiver of jury trial must be knowing); State v. Ginebra, 511 So.2d 960 (Fla. 1987)(defense attorney must tell a defendant of the direct consequences of his plea to render effective assistance of counsel). Rather than a history of jurisprudence of choice by ambush or surprise, the consistent constitutional thread throughout this country's and this state's jurisprudence requires that a person know with open eyes the implications of his choices. Id. Since the legislature in the sentencing guidelines statute provided the selection option for a small defined group of defendants, basic principles of statutory construction, as well as, the federal and state constitutional principles of due process, fundamental fairness, and the ex post facto clauses, require that any selection between the parole system and the sentencing guidelines system, be limited to a choice between those two sentencing laws and not be deemed to include some other unspecified of sentencing law. See Bunkley v. Florida, 538 U.S. 835, 123 S.Ct. 2020, 2023 (2003)(due process requires determination of whether, in evolving process of changing law regarding the state supreme court's determination that a knife less than 4 inches long is not a weapon but an ordinary pocket knife, the ordinary pocket knife determination was applicable at the time Buckley's conviction became final); Miller v. Florida, 482 U.S. 423 (1987)(application of sentencing guidelines revisions to petitioner whose crimes occurred prior to the effective date, violated ex post facto clause).

Due process and ex post facto principles do not permit the state to determine that a law has "evolved" so that the "evolved" law now applies to a defendant never previously deemed affected. While there is a considerable body of law concerning retroactivity of legal holdings which uses the term "evolutionary refinement" as the counterpoint to the term "jurisprudential upheaval," Witt v. State, 387 So.2d 922 (Fla. 1980), there is no "evolutionary refinement" principle of statutory construction. The state's use of the term "evolutionary refinement," then to explain how the Code, which repealed the sentencing guidelines, is actually "an evolutionary refinement" of those repealed sentencing guidelines, is an argument that defies plain English, common sense, and is grounded in no sound jurisprudence or logic.

Since Mr. Logan did not actually know that the Criminal Punishment Code was a choice, basic principles of constitutional due process and fairness dictate that he cannot be deemed to have elected or chosen to be sentenced under

that provision. Although Smith held that an election to be sentenced under the guidelines meant an election to be sentenced under the guidelines in effect at the time of the election, Smith did not hold that an election to be sentenced under the sentencing guidelines was an election to be sentenced under any body of sentencing laws that happened to be enacted at the time of election.

At a minimum, Mr. Logan should be afforded an opportunity to select between stated and known sentencing schemes, and then resentenced under a validly selected sentencing law. See Quevado v. State, 838 So.2d 1253 (Fla. 2d DCA 2003). If this Court determines the Code does apply to Mr. Logan's selection, then the interests of justice require remand to the trial court to afford Mr. Logan the opportunity to select between the Code and the parole system. Id.

Affirmance of the district court's decision and adoption of the state's arguments requires construing the 1983 sentencing guidelines and the Criminal Punishment Code as the same sentencing provision, of which the Code is only the latest "evolutionary refinement." Brief of Respondent on Jurisdiction at 6. The legislature did not, in enacting the Criminal Punishment Code, describe that law as an "evolutionary refinement" of the sentencing guidelines. The Criminal Punishment Code states that it applies only to crimes committed after October 1, 1998, §921.002, Fla. Stat. (2001), and contains no language in the statute about electing to be sentenced under its provisions. Indeed, the law enacting the Criminal Punishment Code, 97-194 repealed the sentencing guidelines, and therefore is not an evolutionary refinement of the sentencing guidelines. Ch. 97-194. Chapter 97-194 begins by describing the Criminal Punishment Code as follows: "An act relating to criminal justice; ***repealing*** ss. 921.0001, 921.001, 921.0011, 921.0012, 921.0013, 921.0014, 921.0015, 921.0016, 921.005, F.S., ***relating to the statewide sentencing guidelines***; providing for application; creating the Florida Criminal Punishment Code; providing for the code to apply to felonies committed on or after a specified date; creating s. 921.002, F.S.; providing for the Legislature to develop, implement, and revise a sentencing policy; specifying the principles embodied by the Criminal Punishment Code. . . ." (emphasis added). This law is hardly an extension of the sentencing guidelines, but an outright repeal of them.

This Court has recently acknowledged that the sentencing guidelines and the Code are completely different sentencing laws. Justice Cantero, in his concurring opinion in Nettles v. State, 850 So.2d 487, 495 (Fla. 2003), described 97-194 and the Code as follows: "the law adopting the CPC expressly repealed the sentencing guidelines, leaving them in effect for crimes committed before October 1, 1998, and established the CPC as the new sentencing scheme." The state itself has conveniently acknowledged that the Code is not the sentencing guidelines when it has suited its argument to do so. See State Answer Brief in Nettles v. State , SC02-1523, at 19 ("the *particular* provision that prison releasee reoffenders are 'not eligible for sentencing under the sentencing guidelines' would not even implicate the Code.").

Common sense dictates a finding that the guidelines and the Code are two completely separate sentencing laws. The guidelines required sentencing within a sentencing range, and the range of years could not be departed from either to decrease the sentence or to increase it, absent valid legal grounds for doing so. Rule 3.701(d)(12) Fla. R. Crim. Pro. (1983). A guidelines sentence was legal generally only if it was within the guidelines range, unless a valid departure ground was stated in writing. Id. The maximum sentence was generally the top of the sentencing range and no longer generally the statutory maximum. A defendant could appeal a sentence imposed outside the sentencing guidelines. §921.001(5), Fla. Stat. The Code, however, abolished the guidelines and replaced them with a sentencing law that specifies the minimum required sentence and permits a maximum sentence up to the statutory limit. §921-002(1)(f) & (g), Fla. Stat. (2001). The

Code then abolished the ceiling on sentencing that the guidelines contained. Under the Code, although the State could appeal a downward departure sentence, there was no more right for a defendant to appeal an upward departure, since the upper end of the sentencing range was abolished in the Code.

This distinction is crucial in Mr. Logan's case, in which the recommended guidelines sentence requires sentences within a 12 to 17 year range, In re Rules of Criminal Procedure, 439 So.2d 848 (Fla. 1983), while the Code permits life sentences. These two sentencing laws are not connected, but different and distinct. An election under the sentencing guidelines cannot be deemed an election to be sentenced under the Code.

The cases that appear to or do hold otherwise, including this one, have not undergone a statutory analysis of the applicable sentencing laws, but have merely relied on the dicta in Smith that states that an affirmative selection to be sentenced under the guidelines by section 921.001(4)(a), Fla. Stat., requires sentencing "under the ***guidelines*** which were effective on that date." Smith v. State, 537 So.2d at 987. (emphasis added). Quevado v. State, 838 So.2d 1253 (Fla. 2d DCA 2003)(concluding without analysis of the sentencing statutes, that Quevado must elect to be sentenced under the preguidelines laws or the "guidelines" in effect in 1999, the Criminal Punishment Code) ; Sheely v. State, 820 So.2d 1080 (Fla. 2d DCA 2002)(Sheely can affirmatively elect to be sentenced under the guidelines in effect at the time of his selection, but no discussion of what those guidelines are); Kunkel v. State, 765 So.2d 244 (Fla. 1st DCA 2000)(court notes that Kunkel can elect to be sentenced under the parole system or "the current guidelines" without stating what the current guidelines means). None of these cases or the district court decision below explain how the Code can be considered the guidelines. Instead these cases rely on this Court's language in Smith about selecting sentencing under the guidelines, and apply that language to selections made after the guidelines were no longer in effect. The conclusion that a selection under Smith permits use of a sentencing scheme, the Code, not in effect when this Court wrote Smith, is implied or reached in those decisions without consideration of what the applicable guidelines are under the applicable statutes. Without such a statutory analysis, these cases do not address the issue presently before this Court, but merely seek to follow the language of the Smith precedent in a perfunctory and misguided fashion. Smith never required that a guidelines selection would

mean an affirmative choice to be sentenced under whatever sentencing laws were in effect at the time of the selection. Even if Smith were read to so hold, the legislature, in its numerous reenactments of the guidelines and the Code since Smith, has plainly stated what sentencing statutes apply to which offense dates.

An analysis of the applicable statutes shows that the legislature clearly expressed that the Code applies to certain cases, while the guidelines applies to a distinctly separate body of cases. The Criminal Punishment Code states that it applies only to crimes committed after October 1, 1998, §921.002, Fla. Stat. (2001), and contains no language about electing to be sentenced under its provisions.

The sentencing guidelines are the sentencing laws that apply to all crimes committed before October 1, 1998. Section 1, Ch. 97-194 ("[s]ections 921.001. 921.001, 921.0011, 921.0012, 921.0013, 921.0014, 921.0015, 921.0016, and 921.005, Florida Statutes, as amended by this act, are repealed effective October 1, 1998, except that those sections shall remain in effect with respect to any crime committed before October 1, 1998.") The sentencing guidelines provide that "The guidelines enacted effective October 1, 1983, apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994; and to all felonies, except capital felonies and life felonies, committed before October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions." '921.001(4)(b)1., Fla. Stat. (2001). The sentencing guidelines provide that the 1994 revisions apply only to crimes occurring after January 1, 1994. '921.001(4)(b)2., Fla. Stat. (2001). Since the statutes state that the current sentencing scheme, the Criminal Punishment Code, applies only to crimes occurring after October 1, 1998, that sentencing statute cannot apply here. Moreover, the sentencing guidelines state that the 1994 revisions apply only to crimes committed after January 1, 1994. The current sentencing guidelines statute further provides that the guidelines "enacted effective October 1, 1983, apply to all felonies, except

capital felonies, committed on or after October 1, 1983, and before January 1, 1994. . ." '921.001(4)(b)1., Fla. Stat. (2001). Under these circumstances, the sentencing guidelines "enacted effective October 1, 1983" should logically apply in this case, because the offense date for the charged crimes is March 17, 1984. As the state and the defense and the trial court below all agreed, Mr. Logan originally was wrongly sentenced back in 1984 under the sentencing guidelines, because he was not given the choice between the sentencing guidelines and the parole system. Mr. Logan's sentencing in December, 1984, occurred when the sentencing guidelines, determined to be constitutionally enacted in July 1, 1984, were in effect and could have been selected. Since no one knew that selection was required for Mr. Logan's offenses until Smith was handed down in 1989, Mr. Logan did not make his selection between the sentencing schemes at the original sentencing hearing. When Mr. Logan then elected to be sentenced under the sentencing guidelines in May, 2001, Mr. Logan was properly subject to being sentenced under the sentencing guidelines as provided in the then current laws of '921.001(4)(b)1., Fla. Stat. (2001). This law states that the guidelines effective for crimes committed at the time of these March 1984 offenses, are the guidelines originally enacted October 1, 1983, as set forth in In re Rules of Criminal Procedure, 439 So.2d 848 (Fla. 1983).

To apply the sentencing guidelines enacted after January 1, 1994 to this case would be a violation of the ex post facto clauses of the state and federal constitutions, since the Florida statutes in effect at the time of resentencing in 2001 clearly provide that the guidelines "enacted effective October 1, 1983" apply to crimes committed after October 1, 1983 and before January 1, 1994. ''921.001(4)(b)1., Fla. Stat. (2001); Miller v. Florida, 482 U.S. 423 (1987); Smith v. State, 537 So.2d 982 (Fla. 1989)(sentencing guidelines are substantive, not procedural).

This Court in Dillard v. State, 728 So.2d 725 (Fla. 1999), found that §921.001(4), Fla. Stat.(Supp. 1994) created a guidelines sentencing scheme completely different from the 1983 guidelines. In so ruling this Court stated, “the 1983 and 1994 versions of the guidelines constitute two separate and distinct forms of sentencing and the respective scoresheets cannot be intermingled — the scoresheets from one version cannot be used for pending offenses committed under the other.” This Court so concluded by referring to a plain reading of the statute, which specifies “[t]he guidelines enacted effective October 1, 1983, apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994; and to all felonies, except capital felonies and life felonies, committed before October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions. 2. The 1994 guidelines apply to

sentencing for all felonies, except capital felonies, committed on or after January 1, 1994." §921.001(4), Fla. Stat.(Supp. 1994). Similarly, in this situation, the statutes plainly specify that the sentencing guidelines and the Code are "separate and distinct forms of sentencing" like the two forms of the sentencing guidelines in Dillard. The separate and distinct differences between the Code and the guidelines are more apparent than the differences between the pre-1994 and the 1994 sentencing guidelines, because the Code repealed the sentencing guidelines statutes, except for offenses occurring prior to the effective date of the Code. Dillard also plainly states that the guidelines applicable to a given offense must be determined by reading the guidelines statute.

The state's argument is illogical. On one hand the state argues that the Code applies to Mr. Logan's guidelines selection. On the other hand, the state argues that the selection provision of the sentencing guidelines is law for the Code, because under Ch. 97-194, the sentencing guidelines remain in effect regarding any crimes committed prior to October 1, 1998. Brief of Respondent on Jurisdiction at 7. Either the sentencing guidelines apply to Mr. Logan's selection or the sentencing guidelines do not apply at all to that selection. If Mr. Logan made a selection, it was under the sentencing guidelines, because there is no selection provision in the Code, only in the sentencing guidelines. There can be no

plain reading of these sentencing statutes, the guidelines and the Code, that supports the state's position that the Code is the applicable sentencing law, but the sentencing guidelines are the applicable selection law. If Mr. Logan selected sentencing under the sentencing guidelines, he cannot be punished under the Code. The legislature, in enacting the Code, did not provide for the Kafkaesque result urged by the state here. Nowhere in these statutes did the legislature provide for a selection under the sentencing guidelines to mean a selection of sentencing under the Code. The legislature provided for selection of a guidelines sentence and did not include that same provision in the Code. A plain reading of the sentencing guidelines and the Code then shows that the selection provision applies only to sentencing guidelines sentences, and not to Criminal Punishment Code sentences. Had the legislature intended to do as the state suggests, the selection provision of the sentencing guidelines reenacted in Ch. 97-194 would have been rewritten to provide that selections under the sentencing guidelines after the repeal of the sentencing guidelines would mean a selection under the Code.

The ex post facto clause of the federal and state constitutions are aimed at ensuring "that legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.'" Miller v. Florida, 482 U.S. 423, 430 (1987), quoting Weaver v. Graham, 450 U.S. 24, 28-29

(1981); Britt v. Chiles, 704 So.2d 1046 (Fla. 1997). A law is therefore considered ex post facto if it applies to events occurring prior to its enactment and if it disadvantages the offender affected by it. Id. Lynce v. Mathis, 519 U.S. 433 (1997).

Applying these principles to Mr. Logan's case shows that he is entitled to be sentenced under the 1983 sentencing guidelines. The offense date of his offenses is March 17, 1984 and his original sentencing date was December 11, 1984. (R38-39, 42-47). At the time of sentencing, he was entitled to elect sentencing under the sentencing guidelines, but, believing the guidelines applied to his case under the law then applicable, no affirmative selection was made. The law in effect at the time of Mr. Logan's offenses was later deemed by this Court's ruling in Smith to be the parole system. Since Mr. Logan was sentenced after the sentencing guidelines were officially enacted, the law applicable to his sentence provided for the selection between the parole system and the sentencing guidelines. When Mr. Logan was first able to make his selection between the parole system and the guidelines, in 2001, the guidelines were no longer the statute applicable to offenses committed at that time. The guidelines were still the applicable law, however, for offenses committed before 1994, but sentenced in 2001. The selection provision applicable to Mr. Logan's offenses provides for selection between guidelines

sentences and parole for offenses committed before the effective date of the sentencing guidelines but sentenced after that date.

This selection provision cannot be changed retroactively to require selection between the Code and guidelines. This reading of the selection provision would change the selection from its former state of being a selection between the parole system and guidelines, to one of choosing between the parole system and the Code. This interpretation of the selection provision causes the Code to apply to crimes committed before its enactment and this reading would disadvantage the accused. This ex post facto reading of the selection provision renders the statute unconstitutional and such a statutory interpretation should be rejected.

The legislature could not retroactively change that selection provision in the guidelines; nor can the courts of this state constitutionally construe the guidelines selection provision to provide for retroactive application. This construction is prohibited because the sentencing guidelines selection provision cannot be changed retroactively without violating the state and federal constitutional ex post facto clauses. The same selection provision that makes the selection lawful also requires that the parole system and the guidelines are the available choices.

The state's construction applies the Code to events occurring prior to its enactment. This statutory construction retroactively

changes the selection provision and this retroactive change disadvantanges Mr. Logan, who is subject to a maximum life sentence, instead of a maximum 17 year prison sentence. The state's position then requests an unconstitutional result that violates the ex post facto clauses of the state and federal constitutions.

That Mr. Logan selected sentencing under the guidelines after the enactment of the Code does not require that he did so only by forfeiting his constitutional right to not be subjected to ex post facto sentencing laws. At the time Mr. Logan selected guidelines sentencing, May 8, 2001, the applicable legislation read, "The guidelines enacted effective October 1, 1983, apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994; and to all felonies, except capital felonies and life felonies, committed before October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions." §921.001(b)1., Fla. Stat. (2001). Smith became law in 1989, yet the legislature still continued to reenact this provision repeatedly to provide that selection under the guidelines requires application of the October 1, 1983 sentencing guidelines. This legislative pronouncement determines what laws apply to Mr. Logan's 2001 selection.

To apply the sentencing guidelines enacted after January 1, 1994 to this case would be a violation of the ex post facto clauses of

the state and federal constitutions, since the Florida statutes in effect at the time of resentencing in 2001 clearly provide that the guidelines "enacted effective October 1, 1983" apply to crimes committed after October 1, 1983 and before January 1, 1994. '921.001(4)(b)1., Fla. Stat. (2001); Miller v. Florida, 482 U.S. 423 (1987); Smith v. State, 537 So.2d 982 (Fla. 1989)(sentencing guidelines are substantive, not procedural). The applicable sentencing laws under the 2001 statute are the 1983 original sentencing guidelines.

Since the 1983 sentencing guidelines required the trial court to file contemporaneous written reasons for any departure sentence imposed, this court must consider how that requirement is to be applied to this case presently. The Florida Supreme Court has held that the policy reasons for requiring the correction of a departure sentence imposed without written reasons still apply after the Criminal Appeal Reform Act of 1996, '924.051, Fla. Stat. (Supp. 1996). Maddox v. State, 760 So.2d 89, 106-108 (Fla. 2000). In this case the trial court's error of failing to file written reasons for the departure sentence was preserved through the filing of a motion to correct sentence under Rule 3.800(b). (A1-2). The trial court denied the motion without filing written reasons. (A3). Mr. Logan is thereby precluded from effectively appealing the grounds for the departure sentence, because the written reasons for the sentence were not filed or rendered.

Since written reasons were not filed or rendered, Mr. Logan is left with challenging the orally given departure reasons he can glean from the sentencing transcript that might be grounds for the departure sentence.

This Court has found that effective appellate review of a departure sentence can only be accomplished when written reasons for the departure sentence are filed. State v. Jackson, 478 So.2d 1054, 1056 (Fla. 1985). In Butler v. State, 765 So.2d 274 (Fla. 1st DCA 2000), the First District Court of Appeal determined that it was required to reverse the departure sentence entered and to remand the case to the trial court for imposition of a guidelines sentence when the trial court had failed to file written reasons for the departure sentence, but had orally stated the grounds for the departure sentence in the transcript. The appeals court did so in order to comply with this Court's decisions in Maddox and Butler v. State, 761 So.2d 319 (Fla. 2000), finding that the failure to file written reasons for a departure sentence was a fundamental sentencing error which has "a qualitative effect on the integrity of the sentencing process." Maddox v. State, 760 So.2d at 108. This case involves a preserved sentencing error which the trial court failed to correct after being apprised of the error in a motion to correct sentence. (A1-3). While the tardy filing of departure grounds may lead to a different result, See Mandri v. State, 813 So.2d 65 (Fla. 2002), the failure to file

any written reasons at all for a departure sentences requires reversal and resentencing within the guidelines. Maddox v. State, 760 So.2d at 107-108.

The trial court, in denying the motion to correct sentence, relied solely on Davis v. State, 661 So.2d 1193 (Fla. 1995), which the trial court believed held that the issue of the failure to file written reasons for a departure sentence cannot be raised in a post conviction motion. Davis involved a motion for post conviction relief in which the failure to file written reasons for the departure sentence was raised for the first time in such a post conviction motion. The trial court apparently did not understand that raising an issue in a motion to correct sentence and on direct appeal is not the same as raising an issue for the first time in a post conviction motion. Mr. Logan had no prior opportunity to raise the issue of the failure to file written reasons for the departure sentences other than in the motion to correct sentence and to this Court on direct appeal. To preclude Mr. Logan from raising the issue of the lack of written reasons now would preclude him from ever raising this legal issue in any court and would amount to a denial of due process. Clearly the trial court erred in relying on Davis in this case and in denying the motion to correct sentence.

The trial court and all the parties below properly relied on the applicable 1983 sentencing guidelines in determining the

applicable guidelines sentencing range. The guidelines sentence in this case was determined at resentencing to be 12 to 17 years, with the next range being 17-22 years. (R48-49, T36). Because the original sentencing guidelines did not permit sentencing within the guidelines to include the next highest cell upon a violation of probation, the only applicable sentencing range in this case is the 12 to 17 year range. In re Rules of Criminal Procedure, 439 So.2d 848 (Fla. 1983).

Since the trial court failed to file written reasons, this case should be remanded for resentencing within the 12 to 17 year range. Ree v. State, 565 So.2d 1329 (Fla. 1990); State v. Colbert, 660 So.2d 701, 702 (Fla. 1995); Culver v. State, 727 So.2d 278, 279 (Fla. 2d DCA 1999); State v. Campbell, 673 So.2d 925, 925 (Fla. 2d DCA 1996).

ISSUE II.

2Shull v. Dugger, 515 So.2d 748 (Fla. 1987)Blackwelder v. State, 570 So.2d 1027, 1029 (Fla. 2d DCA 1990).

Only the original written grounds can be considered as valid for any departure sentence on resentencing. Beal v. State, 478 So.2d 401 (Fla. 1985). The incorporation of the orally stated grounds into the written sentencing order does not make those orally stated grounds valid. Id. The orally stated grounds cannot be considered.

ISSUE III.

2State v. Mischler, 488 So.2d 523 (Fla. 1986).

This burden of proof requires that the actual facts of a given case must "be credible and proven beyond a reasonable doubt." Keys v. State, 500 So.2d 134, 135 (Fla. 1986). The oral grounds that the trial court seemed to be making for imposing the departure sentence include the ground that an escalating pattern of criminal conduct was evidenced by Mr. Logan's criminal record. Since this departure ground did not exist for the 1983 sentencing guidelines, it could not be used as a departure ground against Mr. Logan in this case.

Since '921.001(4)(b)1. of the Florida Statutes requires that "[t]he guidelines enacted effective October 1, 1983 apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994," the departure ground of an escalating pattern of criminality must be determined in light of the statutes and laws enacted on October 1, 1983. Section 921.001(4)(b)1., as repeatedly reenacted by the legislature through today, clearly states that sentencing guidelines cases with offense dates from October 1, 1983 to January 1, 1994 shall use the sentencing guidelines enacted October 1, 1983. Since the legislature had changed the sentencing guidelines several times from October 1, 1983 until 1994, it could have added language to '921.001(4)(b)1. which refers to those amendments to the October 1, 1983 laws. The legislature chose not to do so. Instead the legislature decided to use the law enacted on October 1, 1983 as applying to any offenses occurring between October 1, 1983 and January 1, 1994, despite the finding in 1989 by the state supreme court that the October 1, 1983 sentencing guidelines were not constitutionally enacted until July 1, 1984. Smith v. State, 537 So.2d 982 (Fla. 1989)(sentencing guidelines were unconstitutional prior to July 1, 1984). Since the 1983 sentencing guidelines were deemed unconstitutional in the manner of enactment, not in the substance of the laws written, the 1983 sentencing guidelines law are the chosen body of law for sentencing guidelines cases with offense dates ranging from October 1, 1983 to January 1, 1994. The statutes and laws enacted October 1, 1983 did not then include a specific statutory ground for departure based on an escalating pattern of criminality, although this statutory ground was subsequently added in Chapter 87-110, effective July 1, 1987. The trial court could only rely on this ground for departure if it was articulated originally at sentencing and if it was a legal ground for departure under the 1983 sentencing guidelines. See Miller v.

Florida, 482 U.S. 423 (1987); Booker v. State, 514 So.2d 1079, 1083-1085 (Fla. 1987); Blackwelder v. State, 570 So.2d 1027, 1029 (Fla. 1990). The trial court then erred in relying on this ground, which was not a legal basis for a departure sentence under the 1983 sentencing guidelines.

Appellant has already argued that this ground for departure is invalid because not articulated originally at sentencing. Additionally, this departure ground is not valid because 1) this departure ground as articulated here did not exist under 1983 guidelines; and 2) this departure ground was not supported by clear and convincing evidence in this record.

Prior to 1987 the departure grounds based on a prior criminal record were held to be invalid. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). A blanket recitation of the prior record cannot be grounds for a departure sentence. Id.; White v. State, 579 So.2d 377 (Fla. 2d 1991); Fabelo v. State, 488 So.2d 915 (Fla. 2d DCA 1986). Moreover, the prior criminal activity included on the defendant's scoresheet may not be considered a second time as grounds for a departure sentence. Cooper v. State, 764 So.2d 934 (Fla. 4th DCA 2000).

This court has found that a pattern of escalating criminal conduct occurring over a period of years can constitute a sufficient reason for a departure. Keys v. State, 500 So.2d 134, 135-136 (Fla. 1986). The escalating pattern ground for departure articulated in Keys, was codified in 1987 to mean “a progression from nonviolent to violent crimes or a progression of increasingly violent crimes.” §921.991(8), Fla. Stat. (1987). An escalating pattern of criminality has been interpreted to not include a prior criminal record of burglary, aggravated assault, robbery, and soliciting prostitution, as the history considered in sentencing for convictions for aggravated assault with a firearm and shooting into an occupied dwelling. Johnson v. State, 558 So.2d 1051 (Fla. 2d 1990). This is so because a escalating pattern must be shown through an increase in the seriousness of the crimes. Id.

The trial court at resentencing did not make an oral or written fact finding about what Mr. Logan's criminal record consisted of, so there is not clear and convincing evidence in this record to support this departure ground. The prosecutor at sentencing mentioned that Mr. Logan was convicted previously of attempted armed robbery and armed robbery. (T20). The prosecutor, however, did not produce any record proof of these charges, such as an information and a conviction and sentence, and did not produce any evidence of when the charges occurred, what age Mr. Logan was at

the time of those offenses, or about the factual basis for those charges. Since the prior record for "armed robbery" and "attempted armed robbery," includes crimes similar in nature to the crimes involved in this case, it is unlikely that the pattern of criminal conduct was escalating and increasing in severity. Not only is the record not supported by clear and convincing evidence of an escalating pattern of criminality, the record as constituted shows no escalating pattern, but instead a second commission of the same kind of crime. Compare Keys v. State, 500 So.2d 134 (Fla. 1986)(escalating pattern of criminality found where prior offenses for burglary and petit theft were followed by two sexual battery convictions) with Lowe v. State, 641 So.2d 937 (Fla. 4th DCA 1994)(commission of robberies following previous robberies of same nature not escalating pattern of criminality); Bourgault v. State, 515 So.2d 1286 (Fla. 4th DCA 1987)(prior attempted sexual battery and charged completed sexual battery not escalating pattering of criminality but difference in attempt and fruition) .

Without more information about those prior charges, there are not sufficient facts upon which the trial court could determine by clear and convincing evidence that an escalating pattern of criminality existed back in 1984. Additionally, Mr. Logan was eighteen at the time of the commission of the charged crimes in this case. (R48). Juvenile prior convictions cannot be used as a basis for finding an escalating pattern of criminality, although such convictions might be used to justify a pattern of increasing violence. Cooper v. State, 764 So.2d 934, 935 (Fla. 2d DCA 2000). The barren record in this case does not give the factual support for any of the legal grounds for finding an escalating pattern of criminality and must therefore be reversed. Reversal and resentencing within the recommended guidelines range is required.

ISSUE IV.2' 775.0845, Fla. Stat. (1984)Fla. Stat. (1984). See Fletcher v. State, 472 So.2d 537 (Fla. 5th DCA 1985)Barr v. State, 674 so.2d 628 (Fla. 1996)Strawn v. State, 576 So.2d 877 (Fla. 5th DCA 1991)Mash v. State, 499 So.2d 35 (Fla. 1st DCA 1986)Mr. Logan. Wright v. State, 810 So.2d 873 (Fla. 2002). Reversal and resentencing within the sentencing guidelines range of 12 to 17 years is required.

ISSUE V.2. "Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief and conviction, without hesitancy, as to the truth of the allegation sought to be established." Id. at 525.

This burden of proof requires that the actual facts of a given case must "be credible and proven beyond a reasonable doubt." Keys v. State, 500 So.2d 134, 135 (Fla. 1986). The oral grounds that the trial court seemed to be making for imposing the departure sentence appear to include the ground that a firearm was placed by someone against the body of some victim. There is no evidence in this record that Mr. Logan placed a gun against the body of any of the victims. There is evidence, however, that Mr. Gilmore did so. Mr. Broughton testified that the robber who wore the ski mask came up to the table and pointed a big gun right against Mr. Broughton's chest. (SuppI:T155, 171). Mr. Frank identified Mr. Gilmore as the robber who carried a big gun and wore a mask. (SuppI:T104-105). Mr. Logan cannot receive a departure sentence based on facts proved only against the codefendant. Wright v. State, 810 So.2d 873 (Fla. 2002); State v. Rodriguez, 602 So.2d 1270 (Fla. 1992); Blount v. State, 581 So.2d 604 (Fla. 1991); Waychoff v. State, 624 So.2d 392 (Fla. 2d DCA 1993); Dumas v. State, 592 So.2d 383 (Fla. 2d DCA 1992).

Robbery with a firearm requires proof of the taking of property by "force, violence, assault, or putting in fear." '812.13(1), Fla. Stat. (1984). Placing a weapon against a person would appear to be an inherent part of the act of using "force, violence, assault or putting in fear" and would thus be an inherent part of the charged crime of robbery with a firearm. McPhaul v. State, 496 So.2d 1009 (Fla. 2d DCA 1986)(unnecessary use of firearm during robbery not valid departure ground); Roberts v. State, 500 So.2d 338 (Fla. 4th DCA 1986)(sticking firearm in stomach of victim was not valid departure ground in robbery with firearm). Factors already part of the charged crime are calculated into the guidelines score and cannot be used as a ground for a departure sentence. Michler; McPhaul; Roberts. Accordingly the fact that someone put a gun to one of the victims during the offense is not a valid departure ground and cannot justify the departure life sentences imposed. Reversal and resentencing within the 1983 sentencing guidelines is required.

ISSUE VI.

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT WITHOUT PREPARING A SENTENCING GUIDELINES SCORESHEET?

Rule 3.701(1) of the Florida Rules of Criminal Procedure requires that a guidelines scoresheet be prepared for sentencing. The failure to prepare a scoresheet, requires resentencing. Holton v. State, 573 So.2d 284 (Fla. 1990); Jones v. State, 602 So.2d 604 (Fla. 2d DCA 1992); Barr v. State, 474 So.2d 417 (Fla. 2d DCA 1985). In this case no guidelines scoresheet was prepared at resentencing or after this error was brought to the attention of the trial court in a motion to correct sentence. (A1-2). Accordingly resentencing with the preparation of a 1984 guidelines scoresheet is required.

CONCLUSION

Based on the arguments and authorities presented herein, Appellant respectfully requests that this Court reverse the sentences of the trial court and remand this case for resentencing.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Dale E. Tarpley, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of , .

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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APPENDIX

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