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An Examination of Issues in the Florida Sentencing Guidelines

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Abstract

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KEYWORDS: examination, issues, guidelines

An Examination of Issues in the Florida Sentencing Guidelines

I. Introduction

Reformers have reshaped the theory of sentencing in the United States during the last decade,[1] responding to the realization that rehabilitation as a primary goal of sentencing is not realistic.[2] Prior to the 1970s, rehabilitation was seen as the ultimate aim of the penal system. Rehabilitation involves the use of sentencing to isolate and reform offenders, thereby reducing crime.[3] But "correctional institutions" did not rehabilitate,[4] and the rehabilitation goal began to lose favor among commentators around 1970.[5] Extremely overcrowded surroundings, brutality, intra-inmate violence, filthy conditions, lack of medical attention, and negative psychological effects from long term incarceration are among the reasons for prisons' failure to rehabilitate.[6]

1. A. SUNDBERG, A REPORT TO THE LEGISLATURE. STATEWIDE SENTENCING GUIDELINES IMPLEMENTATION AND REVIEW (1982); *See generally* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); W. RICH, C. SUTTON, T. CLEAR, M. SAKS, SENTENCING BY MATHEMATICS: AN EVALUATION OF THE EARLY ATTEMPTS TO DEVELOP AND IMPLEMENT SENTENCING GUIDELINES xvii (1982); C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 502-74 (1978); R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979); A. VON HIRSCH, DOING JUSTICE (1976); G. CAVENDER, *The Philosophical Justifications of Deteriminate Sentencing,* 26 AM J. JURIS. 157 (1981); and Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle,* DUKE L. J. 1103 (1980).
2. N. KITTRIE and E. ZENOFF, SANCTIONS, SENTENCING AND CORRECTIONS 49-54 (1981); Greenberg and Humphries, *The Cooptation of Fixed Sentencing Reform,* CRIME & DELING., April 1980, at 206 [hereinafter cited as Greenberg].
3. Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle,* DUKE L. J. 1103, 1199(1980).
4. C. SILBERMAN, *supra* note 1, at 504. Silberman quotes the 1967 Crime Commission: "Indeed, experts are increasingly coming to feel that the conditions under which many offenders are handled, particularly in institutions, are often a positive detriment to rehabilitation." *Id.*
5. See Gardner, *supra* note 3, at 1103, Greenberg, *supra* note 2, at 207 and R. SINGER, *supra* note 1, at 1-10.
6. Crump, *Determinate Sentencing: The Promises and Perils of Sentence Guidelines,* 68 KY. L.J. 1, 28-33 (1977-80). C. SILBERMAN, *supra* note 1, at 502-74.

Prisoner unrest caused by blatant disparity in sentencing additionally contributed to the need for reform. Criminals with similar records who commited the same crime received greatly varied sentences.[7] Moreover, uncertain sanctions created a sense of anxiety in the prisoners. "[I]t becomes increasingly apparent that the very indeterminacy of indeterminate sentences is a form of psychological torture."[8] The rehabilitative model utilized an indeterminate sentencing system in sentencing the offender, where the parole board controlled an inmate's future by determining his release date based on his behavior. Under this system, the sentences necessarily covered a broad period of time. For example, a typical indeterminate sentence would be five to twenty years. Given this latitude, the parole board could select the "'magic moment' when a criminal [was] rehabilitated."[9] However, the task of ascertaining that moment, if that moment ever occured at all, was almost impossible.[10] The Federal Parole Commission frankly admits that accurately selecting the critical moment when a prisoner is ready for release is beyond their capabilities.[11]

The rehabilitative system somehow allowed the "inequalities of wealth and power"[12] to determine sentences more than the defendant's blameworthiness or the moral turpitude of the crime itself.[13] The criminal justice system's over-optimistic rehabilitative ambitions resulted from and was perpetuated, in part, by sentencing uncertainty and disparity. Since there are financial obstacles and practical complications inherent in revising the penal system toward effective rehabilitation, legislators and judicial officials opted to alleviate one aspect of the problem by restructuring sentencing procedures and policies. A shift from a rehabilitative philosophy to one of "just deserts"[14] resulted. Just

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7. A. VON HIRSCH, *supra* note 1. at 72-74; Greenberg, *supra* note 2, at 208.

8. Alshuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126* UL. PA. L. REV. 550, 553 (1978). *See also* Alschuler, *Sentencing Reform and Parole Release Guidelines, 51 U.* COLO. L. REV. 237,237 (1980); GARDNER, *supra* note 3, at 1109; and von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Guidelines Commission,* 5 HAMLINE L. REV. 164. 176-77 (1982).

9. Alschuler, *supra* note 8, at U. COLO. L. REV. at 238.

10. *Id.*

11. *Id.*

12. Greenberg, *supra* note 2, at 208.

13. *Id.*

14. Wilkins, *Sentence Guidelines to Reduce Disparity*?, CRIM.L. REV. 201, 205 (1980).

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deserts, or retribution, as a purpose for sentencing entails the theory that the offender has violated "societal rules and must be 'punished" in order that he or she receives just deserts."[15]

The Florida Sentencing Guidelines are based on this philosophy.[16] The guidelines[17] took effect on October 1, 1983. The greatest change from the old system of sentencing was the seemingly shorter sentence lengths. This reduction resulted from the abolition of parole release, and the imposition of sentences decreased only by gain time.[18] Rather than lengthy sentences determined by a judge and subject later to the Parole Commission's discretion, a felon's "composite score"[19] is calculated, based on the offenses at conviction, prior record, legal status at the time of the offense and extent of victim injury, where pertinent.[20] This score determines a narrow range of "presumptive sentences"[21] which are "assumed appropriate"[22] for the offender. Provision is made for departure from the guidelines at the judge's discretion, but such departures require written explanation.[23] The guideline sentences apply to all felonies, excluding capital offenses and those with mandatory sentences, committed after October 1, 1983.[24] Felons sentenced after that date whose crimes were committed prior to it, may affirmatively choose to have the guideline sentence imposed.[25]

This note summarizes and critiques the philosophy and formulation of the Florida Sentencing Guidelines, their strengths and some potential problems. It analyzes circumstances under which departures from the presumptive sentences are allowed. It addresses the question of the Guidelines' constitutionality, raising and predicting the probable outcome of various challenges. The Minnesota Sentencing Guidelines served in part as a prototype for Florida's Guidelines.[26] Because of the

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15. N. Kittrie and E. Zenoff, Sanctions, Sentencing and Corrections - Law, Policy and Practice 14 (1980).
16. In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So. 2d 848 (Fla. 1983).
17. Fla. R. Crim. P.. 3.701 and form 3.988.
18. Fla. R. Crim. P. 3.701(b)(5).
19. Fla. R. Crim. P. 3.701(d)(8).
20. Fla. R. Crim. P. 3.988(a)(i).
21. Fla. R. Crim. P. 3.701(d)(8).
22. *Id.*
23. Fla. R. Crim. P. 370.1(b)(6) and (d)(11).
24. *Sentencing Guidelines*, 439 So. 2d 848.
25. *Id.*
26. The motivation for the final stages of the construction of the Florida Sentencing Guidelines was described by Robert Wesley, Staff Counsel for the Florida Sentenc-

similarities between the two, this note will present a survey of the cases interpreting that state's guidelines, so as to aid in understanding the effects these new Florida guidelines will have.

II. Development of the Guidelines

A. Early Interest

Florida's sentencing reform began in January of 1978 when the Chief Justice of the Florida Supreme Court appointed a committee "to examine the extent and causes of sentence disparity and to explore the variety of sentence alternatives available—judicial, legislative, and administrative—to reduce unreasonable sentence variation."[27] This sentencing committee consisted of judges, professors and legislators, to ensure a thorough examination of the repercussions of change in the criminal justice system.[28]

The primary goal of the committee was "to devise a system where individuals of similar backgrounds would receive roughly equivalent sentences when they commit similar crimes, regardless of the different penal philosophies of legislators, correctional authorities, parole authorities, or judges."[29] The committee examined the various reforms emerging in the country and the felony sentencing practices in use in the state.[30] In its Interim Report,[31] the committee recommended,

> in principle, the exercise of judicial discretion in the sentencing process. However, in order to achieve a greater degree of consis-

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ing Guidelines Commission, as coming from the Minnesota Sentencing Guidelines. These guidelines bear many similarities to the completed Florida guidelines. See generally von Hirsch, *supra* note 8, for a complete description and analysis of the Minnesota Guidelines.

27. Sundberg, Plante and Palmer, *A Proposal for Sentence Reform in Florida,* 8 FLA. ST. U. L. REV. 1, 1-2 (1980). This reform was spurred by the current reform in the United States in general and by several sources specifically. Among these specific influences was L WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN and A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, REPORT TO THE FEASIBILITY STUDY (1976) cited in A. SUNDBERG, *supra* note 1, at 42 n.1.

28. Sundberg, Plante & Palmer, *supra* note 27, at 2, 3.

29. *Id.* at 3.

30. A. SUNDBERG, *supra* note 1, at 3.

31. *Id.* at 4, 44 & n.12, citing *Interim Report of the Sentencing Study Committee to the Florida Supreme Court* (1978)(available from the Office of the State Courts Administrator at the Florida Supreme Court).

tency and fairness in the sentencing process throughout the state, the committee recomend[ed] the development of structured sentencing guidelines in combination with a sentencing review panel that would operate within the sentence parameters prescribed by the Legislature.[32]

B. Multijurisdictional Sentencing Guidelines Project

In 1974, the National Institute of Law Enforcement and Criminal Justice[33] (NIJ) and the Law Enforcement Asistance Administration (LEAA) funded a study to determine the feasibility of drafting and utilizing sentencing guidelines.[34] The resulting study encouraged an extension of the project on a multijurisdictional level. Four years later, Florida became part of the project.[35] Four Florida judicial circuits were specifically selected as sites for the pilot program. The specific circuits were chosen for several reasons, including: 1) the availability and com-

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32. *Id.* Sentencing guidelines are inherently different from other forms of sentencing reform. States such as California, Maine, Illinois, and Indiana now use "determinate sentencing" schemes, which involve little or no judicial discretion. There are three basic types of determinate sentencing schemes: mandatory or minimum-mandatory sentencing, flat time sentencing, and presumptive sentencing. Guidelines are most similar to the presumptive model (though often the distinctions between all categories are blurred), in that the trial judge has a limited range of sentences from which to select, and aggravating or mitigating factors can vary the range. The difference between the to lies in the greater amount of discretion the judge has under sentencing guidelines. Whereas a presumptive system merely provides a judge with a new presumption in the presence of an aggravating or mitigating circumstance, the guidelines allow a judge total freedom in administering the sentence, once he determines that such a circumstance exists. The judge using guidelines may also deviate for reasons relating to the defendant, rather than only to the offense itself, as he would be restricted under most presumptive systems. This greater amount of discretion can be viewed as either good or bad, depending upon one's confidence or skepticism in judges' ability to judge fairly. *Id.* at 2, 3 and accompanying notes.

33. Now the National Institute of Justice, A. SUNDBERG, *supra* note 1, at 44, n.13.

34. Plante, Abernathy, Salokar and Kern, *Judicial Sentencing - Help is on the Way,* FLA. BAR. J. 536, 537 (1981).

35. Together the NIJ and LEAA awarded $270,000 to the Office of the State Court's Administrator for testing the Guidelines in four of Florida's twenty Circuits. The circuits tested were the 4th (consisting of Clay, Duval, and Nassau Counties) the 10th (Hardee, Highland, and Polk Counties) the 14th (Bay, Calhoun, Gulf, Holmes, Jackson and Washington Counties) and the 15th (Palm Beach County). *Id.* at 536, 537.

pleteness of sentencing records, 2) the relationship between presentence investigation reports and sentencing decisions, 3) the mixture of rural and urban areas, 4) the variety of political and social values reflective of the state as a whole and 5) the judges' agreement to cooperate with and participate in the one-year implementation period.[36] An advisory board from each circuit oversaw the progress of the project. The boards consisted of the chief judge (or his representative) and eight other members from each of the four jurisdictions, reflecting a desire for a diverse group of experts.[37]

C. The Historical Model

In the initial formulation of the guidelines, the past sentencing practices of Florida judges served as a basis for determining sentence ranges for various crimes. This historical approach resulted in a model which represented what sentencing *had been*, rather than what it *ought* to be. Advisory boards were provided with a sampling of felony cases concluded during the three previous years, thus insuring a variety of judges' decisions, and encompassing a broad range of cases.[38] In all, 15,613 cases were sampled, consisting of 194 different criminal offenses. Some offenses occurred far more frequently than others with sixty-five statutes making up eighty-five percent of the felony caseload. These sixty-five statutory offenses were categorized into six groups, by similarities among "offense and offender characteristics."[39] Statutory violations not occurring within this eighty-five percent portion were not analyzed further.[40]

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36. A. SUNDBERG, *supra* note 1,at 5.

37. OFFICE OF THE STATE COURTS ADMINISTRATOR, MULTIJURISDICTIONAL SENTENCING GUIDELINES PROJECT, FINAL REPORT 3 (1982) [hereinafter cites as FINAL REPORT].

38. *Id.* at 4.

39. A. SUNDBERG, *supra* note 1, at 6, 7.

40. *Id.* at 7. One hundred twenty nine statutes comprised the remaining 15% of the felony cases. The advisory board felt the infrequency of these occurences demanded the individualized attention of the trial judge and chose to leave it entirely to his discretion. *Id.* at 7 & n.18. The offense categories were: Category 1: Murder, Manslaughter, Kidnapping, Lewd and Lascivious Assault; Category 2: Aggravated Assault, Aggravated Battery, Battery of Law Enforcement Officer; Category 3: Burglary with Assault, Burglary of an Occupied Dwelling, Structure or Conveyence, Robbery; Category 4: Armed Robbery, Burglary of an Unoccupied Dwelling, Structure or Conveyence; Category 5: Grand Larceny or Theft, Dealing in and Receiving Stolen Property, Forgery, Worthless Checks; Category 6: Possession, Sale, Delivery, Importation of a Controlled

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From the eighty-five percent group, a random sample of 6,826 cases was taken, of which 5,100 were coded and analyzed.[41] Information variables were compiled and statistically analyzed to identify decision making factors historically used by judges.[42] The advisory boards then qualitatively analyzed these factors, to prevent the continued use of undesirable and inappropriate variables from being factored into the guidelines.[43] The remaining sentencing factors were used to develop a mathematical model for explaining the sentencing practices historically used in the four jurisdictions.[44]

This process of eliminating inappropriate or undesirable factors constitutes something of a compromise in the underlying rationale or policy of the guidelines. The Florida Sentencing Guidelines, though similar in many ways to the Minnesota guidelines,[45] do not adhere to

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Substance. *Id.* at 8.

41. *Id.* at 9. Problems in locating files and the files' incompleteness precluded using the other 1726 cases.

42. *Id.* at 10. The records used for this information included pre and post sentence investigation reports, prison admission documentations and criminal history records, or "rap sheets."

43. *Id.* at 11. Among the factors eliminated were: "Lack of Remorse" and "Extent of Victim Scarring or Disfigurement". These factors were deemed highly subjective and too difficult to quantify in a general fashion. They may properly influence a judge, but must do so on a case by case basis. "Victim's sex" should not make any difference in sentencing, but the relative sizes and physical appearances may be considered. *See Id.* at 12-14. "Number of Dependants" was characterized as "having no place in the sentencing process", and the "Type of Victim", whether an individual, business, or government. . .should not make a difference." *Id.* at 16, 17.

44. *Id.* at 19. For a description of the model see *id.* at 19, 20. *Cf.* W. RICH, C. SUTTON, T. CLEAR, M. SAKS, *supra* note 1, at 33-89.

45. Both Minnesota and Florida have provisions prohibiting the use of factors related to offenses for which convictions have not been obtained. Both delete first degree murder from the guidelines because of a statutorily mandatory sentence. The statements of purpose of each run along similar principles: the first in each requires that "[s]entencing should be neutral with respect to. . .race, gender. . .social. . .economic status", Florida's 3rd and 4th principles and Minnesoata's 2nd provide that punishment should increase with the severity of the offenses and the offender's criminal record. Florida's 6th principle and Minnesota's 4th provide that the guidelines prescribed sentence should be imposed unless exceptional ("clear and convincing" in Florida, and "substantial and compelling" in Minnesota) circumstances exist. Florida's 7th and Minnesota's 3rd principles provide, "[b]ecause the capacities of state and local correctional facilities are finte, use of incarcerative sanctions should be limited to those convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purpose of the

Minnesota's ultimate decision to completely reject the historicist approach.[46] There, the Sentencing Commission considered analyzing past practices of judges to develop the guidelines, but they determined that the mere elimination of inappropriate factors would distort the relative weights to be assigned to the more appropriate relevant factors.[47] Moreover, the strictly historical approach was seen as evading such important issues as why certain crimes are punished more severely than others, and whether more severe punishment is warranted. Minnesota therefore adopted the policy of taking an active role in deciding which sentencing considerations should be taken into account, how much weight to assign to each consideration, which sentencing aims should be targeted[48] and, perhaps most importantly, the seriousness of different offenses.[49]

This last task of evaluating offenses reflects a major difference between Florida's original guidlelines, as used in the pilot program, and Minnesota's guidelines. Minnesota's Commission utilized rating technique based on its own personal and collective judgments, to determine the seriousness of various crimes. The Minnesota Commission thereby reevaluated crime categories and rated them accordingly. Such rating reflects an important step toward making a reasoned judgment about the relative moral turpitude of various classifications of crimes. To historically analyze legislative or judicial decisions would sacrifice a consistent and express rationale. Similarly, reliance upon a public poll would risk maintenance of a haphazardly and ill-founded tradition which lacks a reasoned coherence.[50]

In the Florida pilot program guidelines, this sacrifice was indeed made. Thus, the severe sentences of notoriously controversial crimes, such as possession or sale of small amounts of marijuana or cocaine, remained virtually untouched by the guidelines. Reliance upon purely historical data, and only deleting "variables deemed inappropriate for use in sentencing"[51] maintained the underlying qualitative evaluation of offenses for which the defendant was charged. Therefore, although the guidelines "represent[ed] a prescriptive model of what factors

sentence." FLA. R. CRIM. P. 3.701 and MINN. STAT. app. § 244 (1983).

46. von Hirsch, *supra* note 8, at 175.

47. *Id.* at 174.

48. *Id.* at 174, 75

49. *Id.* at 175, 197, 198,

50. *Id.* at 197, 198.

51. S. SUNDBERG, *supra* note 1, at 11.

'should' be considered in the sentencing process,"[52] the benefit of critically reevaluating those sentencing practices as they relate to the distinct substantive areas of crime was forfeited.

With the aid of the historical data, a mathematical model was used to construct six separate guidelines, one for each offense category. After training seminars were held for members of the bar and bench, clerks and probation personnel,[53] these guidelines were used in the pilot program in the four jurisdictions.[54] Florida Supreme Court Chief Justice Sundberg and the staff[55] visited the participating jurisdictions during the pilot program.[56] The committee made revisions accordingly[57] and analyzed the guidelines "scoresheets."[58]

The committee then recommended the creation of a "sentence review panel"[59] to review sentences outside the guidelines. Nonetheless, during the pilot program, the sentences imposed were not subject to any formal review.[60] Direct review of sentences was not part of Florida's appellate system and appeals could not be allowed in only four jurisdictions.[61] However, the committee felt sentence review was a "key

52. *Id.* at 20.

53. FINAL REPORT, *supra* note 37. at 23-25.

54. In addition to the concerns mentioned above, other criticisms included: 1) the sentences were either too harsh or too lenient, 2) the decrease in disparity was undesirable in that the variation is merely an expression of local mores, 3) the judges may not be able to use enough discretion, 4) the defendant's prior record was not given enough attention, 5) mitigating factors needed to be identified and 6) the guidelines were too "negative[ly]" oriented. *Id.* at 25, 26.

55. The guideline staff consisted of Donna L. Braziel and Kenneth J. Plante, Project Directors, Susan K. Wilson, Data Entry Supervisor, and Doris Puffer, Secretary. *Id.* at second unnumbered page.

56. *Id.* at 25.

57. *Id.* at 23-25. The "scoresheets" are used to determine the presumptive sentence range. "Points are assigned for various offense and offender related characteristics and total score calculated. This score is then used to enter a one-dimensional matrix with score ranges correlated to sentences. The median sentence figure is recommended, accompanied by a minimum and maximium range which may be imposed at the discretion of the Court." *Id.* at 21.

58. *Id.* at 22. For a complete description of this process, including project data, graphs and charts, see Sundberg, Plante, and Braziel, *Florida's Initial Experience with Sentencing Guidelines*, 11 FLA. ST. L. REV. 125 (1983) and FINAL REPORT, *supra* note 37.

59. A. SUNDBERG, *supra* note 1, at 31-36.

60. FINAL REPORT, *supra* note 37, at 21. *But see,* Layton v. State, 432 So. 2d 195 (Fla. 1st Dist. Ct. App. 1983).

61. FINAL REPORT, *supra* note 37, at 21

element in the entire concept of sentencing guidelines."[62] Therefore, the finalized guidelines recognize departures from the guidelines as a ground for appeal by either the state or defendant.[63]

D. Florida Sentencing Guidelines Commission

Chief Justice Sundberg recommended creation of a sentencing commission to develop and periodically revise statewide guidelines.[64] Accordingly, the legislature enacted section 921.001 of the Florida Statutes on April 7, 1982 approving his recommendation.[65]

The Commission created by this statute was not required to report on the "exact mechanism/methodology used to develop and implement the guidelines,"[66] so that most of the changes from the original guidelines used in the pilot program are left unexplained. For example, the finalized guidelines have nine offense categories, as opposed to six in the pilot program.[67] Apparently the Committee saw the need to redefine these categories more specifically to correct overbroad classifications of offenses.[68] Although the minutes of the Commission meetings reflect these changes, no particular reasons are cited to explain the alterations. In the finalized guidelines, many of the same procedures for determining sentences were used as in the original guidelines. As in the originals, statistical analysis was employed to develop a mathematical model for the guidelines.[69] The Commission then developed the guidelines by utilizing the statistical data provided by the project as to past sentencing practices.

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62. *Id.*

63. FLA. STAT. § 921.001(2) and (3) (1983) (amending FLA. STAT. § § 924.06 and 924.07 (1983).

64. A. SUNDBERG, *supra* note 1, at 36-41.

65. FINAL REPORT, *supra* note 37 at 34 and text of bill at Appendices a, A-1 - A-3.

66. A. SUNDBERG, *supra* note 1, at 39.

67. *Cf. supra* note 40 and FLA. R. CRIM. P. 3.988(a)-(i).

68. The compliance rate for certain categories was much lower than others. *See* A. SUNDBERG, *supra* note 1, at Appendix C.

69. The Commission randomly selected 3,977 felony cases from 58,000 convictions filed in 1981. Criminal history records, or "rap sheets," pre- and post- sentence investigation reports an admission summaries were used to code 233 variables. The staff then analyzed these variables to determine which ones accounted for the length and type of sentence. Introduction to FLORIDA SENTENCING GUIDELINES COMMISSION, GUIDELINES MANUAL (1983) [hereinafter cites as MANUAL].

III. The Florida Sentencing Guidelines

A. Philosophy

In July 1983, the Sentencing Guidelines Commission released drafts of the finalized guidelines, including a statement of purpose, committee notes, and comments.[70] A draft was published in the Florida Bar News,[71] and was later approved by the Florida Supreme Court[72] after final modifications. The Commission adopted a retributive philosophy in fashioning the guidelines: "[t]he primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals. . . but must assume a subordinate role."[73] Additionally, the guidelines provide for harsher punishments for recidivists than for first offenders. The more numerous and severe in nature the past convictions, the more severe incarcerative sanctions will be.[74] Practical considerations were also woven into the guidelines, by making an *a priori* decision to extend the scope of the guidelines to "serve as a mechanism for dealing with prison overcrowding. . . ."[75] The commission recognized that "[b]ecause the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive possible."[76]

The policy of including prison capacity as a consideration for designing the guidelines is another point where the Florida Commission followed the lead of the Minnesota guidelines.[77] Although some authorities contend that this policy is an ethical consideration, since it is "simply wrong to sentence people to overcrowded prisons,"[78] the ethical problem results from an economic dilemma. The problem of overcrowded prisons can be solved in several ways, including building more

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70. *Id.*

71. 10 FLA. B. NEWS 14, 5-7. *See also* accompanying article Orrick, *Court Receives Sentencing Guidelines, Id.* at 1, 7-9.

72. *Sentencing Guidelines*, 439 So. 2d 848.

73. MANUAL, *supra* note 69, at 3.

74. FLA. R. CRIM. P. 3.701(b)(4).

75. MANUAL, *supra* note 69, at Introduction.

76. FLA. R. CRIM. P. 3.701(b)(7).

77. *See* von Hirsch, *supra* note 8 at 176-80.

78. *Id.* at 176.

prisons, incarcerating fewer people, or releasing more prisoners by parole. However, authorities meet with difficulties regarding the first option; they are faced with political factions unwilling or unable to convince the public that more funding needs to be appropriated for more prisons.[79] Once this alternative has been eliminated because of monetary concerns, it becomes a matter of ethics to decide who is most in need of incarceration, and who society should continue to have in its midst. Ethical considerations necessarily involve reevaluating the blameworthiness of various classifications of substantive crimes. The Commission therefore incorporated ethical and practical concerns into the finalized guidelines.[80] Controversial crimes such as prostitution, drug offenses, and other victimless crimes, were deliberated at length and reappraised on a normative level. Hence, the decision to base sentences on the "length and nature of the offender's criminal history,"[81] the "severity of the convicted offense,"[82] as well as the capacity of prisons[83] manifest moral and economical considerations. A brief in opposition to the guidelines filed with the Florida Supreme Court before their final approval criticized the Commission for considering prison capacity in sentencing. "We maintain that the safety, and emotional and physical well being of our society must be paramount to concerns about jail overcrowding."[84]

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79. More importantly, even if funding were appropriated, it is doubtful whether this would solve the problem. Florida is already the "most incarcerative state in the nation, imprisoning a greater percentage of its population than any other state." Lohman, *Florida's Overcrowded Prisons, too little space or too many people?*, FLA. B. J., April 1983, at 199. Twelve major prisons have been built since 1974. *Id.* Nonetheless, this high rate of incarceration apparently has no deterrent effect on the commission of crime. *Id.* at 201.

80. von Hirsch, *supra* note 8, at 179.

> The Minnesota Commission made the existing prison capacities decisive of the aggregate use of imprisonment under the Guidelines. The normative questions, for the Commission, were those of allocation: with classes of convicted prisoners, for how long, and for what reasons, should be allocated to this prison bedspace? The aggregate use of imprisonment was thus decided on the basis of what facilities were in fact available. The Commission did not make a normative judgment about how much, apart from the availability of resources, the state *ought* to rely upon the prison sanction.

Id. (Emphasis in original.)

81. FLA. R. CRIM. P. 3.701(b)(4).

82. *Id.* at (b)(3).

83. *Id.* at (b)(7).

84. M. Satz, R. Stone, E. Whitworth, K. Zuelch, J. Appleman, R. Eagan, J.

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The guidelines are intended to serve as a standard to aid the sentencing judge in the decision-making process.[85] "However, while structuring judicial discretion, the guidelines are sufficiently flexible to permit the judge to tailor the sentence to the individual offender."[86] This standard should then "eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense- and offender-related criteria and in defining their relative importance in the sentencing decision."[87] The sentencing judge is thus provided with a narrow range of recommended sentences from which to choose.

B. Judicial Discretion to Depart from the Guidelines

To depart from a guideline-imposed sentence, the circumstances of a case must *clearly and convincingly* warrant aggravating or mitigating the sentence.[88] There is no defined list of appropriate aggravating or mitigating factors;[89] consequently, judges are free to read the entire record and develop their own reasons to shorten or lengthen the sentence beyond the guidelines' range. The Committee comment states that each criminal case is unique, so that a comprehensive list of aggravating and mitigating circumstances is not given.[90] However, by excluding specific factors, the Commission risks allowing judges to stray from the policy of the guidelines and create a judicial doctrine different from the guidelines' underlying purpose.[91] A judge need only make a written statement explaining why he departed from the guidelines.[92] Such a statement becomes part of the record, and should be specific enough to inform all parties and the public why departure was necessary.[93] This written statement need not be a lengthy discussion—often two or three words will suffice to explain. Allowing the procedure to be simple, however, increases the opportunity for discretion. The sentencing study committee commented:

Gardner, D. Modesitt and C. Golden, Petitioners Brief in Opposition, Rules of Criminal Procedure (Rule 3.701) Sentencing Guidelines, Case No. 63,962, at 5 (1983).

85. FLA. R. CRIM. P. 3.701(b).
86. MANUAL *supra* note 69, at Introduction 2.
87. FLA. R. CRIM. P. 3.701(b).
88. *Id.* at (b)(6) and (d)(11).
89. MANUAL, *supra* note 69, at 10, comment to 11.
90. *Id.*
91. *See* von Hirsch, *supra* note 8, at 205.
92. FLA. R. CRIM. P. 3.701, Committee Note (d)(11).
93. *Id.*

> Although the purpose of sentencing guidelines is the reduction of unwarranted sentence variation, the need for some variation is recognized and is indeed promoted. It is anticipated that that from 15-20% of the sentencing decisions will routinely fall outside of the recommended range. At no time should sentencing guidelines be viewed as the final word in the sentencing process. . . . The specific circumstances of the offense may be used to either aggravate or mitigate the sentence within the guideline range or, if the offense and offender characteristics are sufficiently compelling, used as a basis for imposing a sentence outside of the guidelines.[94]

Predictions have proved to be correct; 81.1% of the cases in the pilot program were in fact within the sentence range recommended by the guidelines.[95] There is no evidence of how representative this compliance rate will be because of changes in the guidelines and implementation throughout the entire state. Factors such as the willingness and commitment of the judges in the pilot program to cooperate with the guidelines project, the knowledge that appeals were not possible in the pilot program, and restructuring of the new guidelines themselves[96] may affect compliance on a statewide level.[97]

The fear that the just-deserts policy of the guidelines woud be contravened by not supplying aggravating and mitigating factors to judges was recognized and acted upon by Minnesota.[98] There, the guidelines include a non-exclusive list of reasons appropriate for departure,[99] as well a a list of factors inappropriate to justify departure.[100] Appropriate reasons for departure go to the nature of the offense itself, rather than to the offender; inappropriate reasons for departure relate specifically to the offender's personal and social status.[101]

Minnesota's reasoning seems consistent with its choice to advocate

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94. A. SUNDBERG, *supra* note 1, at 22.

95. FINAL REPORT, *supra* note 37, at 30.

96. For changes from the pilot program to the final guidelines, *see supra* notes 64-69 and accompanying text.

97. See FINAL REPORT, *supra* note 37, at 30 and Appendix F for compliance rate information.

98. von Hirsch, *supra* note 8, at 205-07.

99. MINN. STAT. ANN. § 244 II. D. 2(a) and (b) (West Supp. 1982), reprinted in 5 HAMLINE L. REV. 395 (1982) [hereinafter cited as GUIDELINES, HAMLINE].

100. MINN. STAT. ANN. § 244 II D. 1(a)-(e) (West Supp. 1982). *See also* GUIDELINES, HAMLINE, *supra* note 99.

101. *See supra* notes 99-100 and accompanying text; von Hirsch, *supra* note 8, at 206, 207.

a "modified just-desert"[102] rationale as opposed to one of rehabilitation.[103] Given the just-desert/incapacitative philosophy, factors such as employment history, the impact of the sentence on occupation or profession, and marital status are deemed irrelevant to the retribution that should be made for a particular offense.[104] This policy offends many peoples' sense of compassion and mercy. A hard-working person with a family to support, who will lose his job because of a jail sentence, seems less culpable than one who has no family or community ties, drifts in and out of jobs and burdens society for his support. While some of these factors may be "manipulable" by offenders who would marry, take a job, or become a parent as a ploy,[105] it seems unwise to abandon centuries of almost universally accepted values because of this possibility. Surely judges are aware of the potential for abuse, and factor it into their sentencing decisions.

Although rehabilitation is no longer a primary goal for the criminal process generally, factors predicting the potential for rehabilitation continue to be proper sentencing considerations. A sentencing philosophy which treats all crimes alike, without regard to differences between those who commit them, "is dehumanizing and has grave and dehumanizing implications for all of society."[106] It is important for reformers to look beyond the theoretical differences in philosophies and retain basic humanitarian concerns.

Florida reformers appear to have done this. By not prescribing a list of factors which must be referred to for justifying departure, the Commission seems to have endorsed use of the defendant's personal characteristics in sentencing. Apparently, the fear of allowing too much discretion to the judges was outweighed by the realization that more than a mathematical formula is needed when dealing with individuals' lives.

To limit discretion, albeit with use of some provisions already

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102. von Hirsch, *supra* note 8, at 182. The term "modified" indicates the fact that the just desert philosophy is blended with an incapacitive one as well. *Id.*

103. *Id.* at 206, citing a letter from Andrew von Hirsch to Dale G. Parent (Oct. 8, 1979).

104. GUIDELINES, HAMLINE, *supra* note 99, at 411.

105. "Manipulability" is the reason the Minnesota Guidelines Commission excluded employment as a sentencing consideration. *Id.* at 412, Comment II. D. 101.

106. D. POINTER, C. ROSENSTEIN, and M. KRAVITZ, PERSPECTIVES ON DETERMINATE SENTENCING: A SELECTED BIBLIOGRAPHY, 3 (1982) (summarizing B. Alper and J. Weis, MANDATORY SENTENCE - RECIPE FOR RETRIBUTION, V 41, N. 4 FED. PROBATION, 15-20 (December 1977)).

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mandated by the Constitution, the Commission provided direction by noting that "[s]entencing should be neutral with respect to race, gender, and social and economic status."[107] These factors are precisely the kinds of considerations which unfairly bias judges and result in unwarranted disparity in sentencing.

C. The Standard for Departure

1. *A Last Minute Change*

The July 1983 draft of the Florida Sentencing Guidelines provided that "substantial and compelling"[108] circumstances were needed to justify departures from the guidelines. The "substantial and compelling" standard was derived from the Minnesota Sentencing Guidelines.[109] In Minnesota, where the "substantial and compelling" test controls departures, it proved to command a fairly strict adherence to the presumptive sentences of the guidelines.[110] However, the final guidelines which were adopted by the Florida Supreme Court in September, 1983, provide that "clear and convincing reasons"[111] are necessary for the trial court to deviate from the presumptive guideline range.[112]

The reasons for the Commission's decision to change the standard for departure are not explicit. The switch occured on August 26, 1983, at the Commission's final meeting, following the receipt of suggestions and comments spurred by the proposed rule's publication in the Florida Bar News earlier that summer. After the Commission considered these suggestions and comments several changes were made, one of which was the test for departure. The reason for favoring the "clear and convincing" standard may be that it does appear in several other areas of Florida law,[113] whereas the "substantial and compelling" test is only

107. FLA. R. CRIM. P. 3.701(b)(1).

108. MANUAL, *supra* note 70, at 3, Principles 6 and 10, comment 11.

109. GUIDELINES, HAMLINE, *supra* note 99, at 395.

110. Note, *Minnesota Supreme Court Cases*, 5 HAMLINE L. REV. 319, 332 (1982). "[T]he Minnesota Supreme Court has consistently upheld the basic tenets of the Sentencing Guidelines and has demonstrated that it will require the trial judge to subordinate their own view about the sentencing process, and act according to the stipulations of the Guidelines." *Id.* at 332.

111. FLA. R. CRIM. P. 3.701(b)(6) and (d)(11).

112. *Id.*

113. See *infra* notes 147-56 for the areas of Florida law utilizing the "clear and convincing" test.

used in the context of constitutional challenges based on fundamental rights. In these cases, the state must prove it has a "substantial and compelling" interest to justify the challenged classification, and that the means used to achieve the legislative end are "necessarily and precisely drawn."[114]

The Florida Supreme Court has characterized that test as "almost always fatal in its application, imposing a heavy burden of justification upon the state. . . ."[115] Therefore, it appears that the greater familiarity with the "clear and convincing" standard alone may not entirely account for the Commission's decision to adopt it. The real reason for the change may have been pressure from prosecutors who felt that judges would need a more lenient standard to depart from the guidelines. State attorneys have criticized the guidelines' sentences for being too short. Broward County State Attorney Michael Satz is typical of the prosecutors who say that the new sentences are too short, and that criminals will not be getting what they truly deserve.[116] In response to that criticism, however, Senator Crawford, drafter of the original Senate Bill, counters that the old sentencing system was a "fraud" against the media and the public.[117] "The judges' sentences are often ignored" and have "become meaningless."[118] The fraud Crawford refers to existed because the actual term served as determined by the Probation and Parole Commission, which often resulted in sentences being reduced by over one half.[119] Because the guidelines effectively eliminate the early release of prisoners by parole,[120] the sentences are much shorter than the ones Florida has imposed in the past. Nevertheless, state attorneys from at least ten Florida circuits oppose the guidelines because "the sentences listed are entirely too lenient, and. . .the ranges allowed for deviation are entirely too small."[121] Other criticisms of the

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114. In Re Estate of Greenberg, 390 So. 2d 40, 42 (Fla.), *dismissed* 67 L.Ed.2d 610, 101 S. Ct. 1475 (1980).

115. *Id.* at 43.

116. Pellegrino, *New Sentencing Plan Finds Few Allies,* Fort Lauderdale News/ Sun Sentinel, June 12, 1983, at A 12 col. 5 [hereinafter cited as Allies].

117. Hillstom, *New 'Truth in Sentencing' Rules begin Oct. 1*, Miami Herald, Sept. 11, 1983, at D 1, col. 2, 3. The term used in the title here is not to be confused with "real offense sentencing" discussed *infra*, text accompanying notes 163-171.

118. *Id.* at D 2, col. 1.

119. See Chart at Allies, *supra* note 116, at A 12.

120. FLA. STAT. § 921.001(8) (1983).

121. M. Satz, R. Stone, E. Whitworth, K. Zuelch, J. Appleman, R. Eagan, J. Gardner, D. Modesitt and C. Golden, Petitioners Brief in Opposition, Rules of Crimi-

test attack its potential for creating an unconstitutional assumption by the court "through its rule making power of legislative authority to enact substantive law."[122]

With such vocal opposition to the "substantial and compelling" requirement, it is not surprising that the Commission struck it from the guidelines and replaced it with the less stringent "clear and convincing" standard. It is questionable, however, how much of a concession this actually is. The new test may act as a two-edged sword, because defense attorneys can also request downward departures from the guidelines for defendants, judged by the same test. Whatever the reasons for the change, the fact remains that "clear and convincing," not "substantial and compelling" reasons are necessary.

The change may be merely rhetorical and not lower the standard for departure whatsoever. In Minnesota, where the language for departure remains "substantial and compelling," it has arguably been equated with "clear and convincing." In *State v. Olson*,[123] the Minnesota Supreme Court stated: "[s]ubstantial and compelling evidence at the Sentencing Hearing with respect to the overall excellent background and character of the defendant had been received, and [was] "clear and convincing."[124] The two tests stand side by side in this case, apparently without conflict. If this language does not make the tests synonomous, it at least raises considerable doubt as to which is more stringent.

The terms of the tests themselves seem to be somewhat correlative. A "substantial" reason is likely to be a "clear" reason, and vice versa, and a "compelling" reason is likely to be a "convincing" reason. However, the terms do not seem to be identical: it is possible to have a convincing reason which is not compelling. In that regard, perhaps the "substantial and compelling" test is more rigid. Whatever the relationship of the tests, a review of the cases in Minnesota may provide a sense of the kinds of issues that may be raised on appeal in Florida. If "substantial and compelling" is indeed a more rigid test, the reasons which have withstood appellate review there will certainly pass muster under Florida's test.

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nal Procedure (Rule 3.701) Sentencing Guidelines, Case No. 63,962, at 10 (1983).

122. J. Reno, Comments Regarding Porposed Sentence Guidelines, In re Rules of Criminal Procedure, Proposed Rule 3.710, [sic] Regarding Sentencing Guidelines, Case No. 63,962 at 2 (1983).

123. 325 N.W.2d 13 (Minn. 1982).

124. *Id.* at 15.

2. *Minnesota Cases*

The first Minnesota Supreme Court case interpreting that state's guidelines manifested a strong support of them. In *State v. Garcia,*[125] the parties had negotiated a plea in an attempt to shorten the guideline-prescribed sentence. This plea was rejected by the trial court, and the Supreme Court upheld that decision. The Court reproved, "[o]nly the court, acting in accordance with the Guidelines, and not the parties, has the authority to determine the appropriate sentence."[126] Under the Florida Sentencing Guidelines, plea bargaining will still exist, but it will take on a new character. Much of the negotiation will be over the charge at conviction itself, and the points assigned for variables such as "victim injury" rather than on the length of the sentence.

The Minnesota cases that followed *Garcia* continued to scrutinize the trial courts' decisions very closely, and to insist upon a careful reading of and compliance with the guidelines. Among the factors which were rejected by the Supreme Court of Minnesota as *not* being "substantial and compelling" so as to warrant an upward departure from the guidelines were: the trial court's belief that the defendant was dangerous and that he had taken drugs during the offense,[127] the trial court's speculation that the morphine stolen in an aggravated robbery of a pharmancy would be distributed in the future,[128] the fact that the defendant was driving without a license during the offense, his "lack of candor," the inadequacy of facilities available in the community to rehabilitate him, and his alleged continued prostitution.[129] Generally, the court flatly refused to uphold departures based on factors which were already figured into the offense's guideline prescribed sentence, such as criminal history record whether good or bad.[130] In a few cases, reversal of the trial court's departure rested on the simple grounds that no valid arguments for departure were given.[131]

Factors which were found to warrant an aggravated departure

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125. 302 N.W.2d 643 (Minn. 1981).
126. *Id.* at 647.
127. State v. Magnan, 328 N.W.2d 147, 150 (Minn. 1983).
128. State v. Schantzen, 308 N.W.2d 484, 487 (Minn. 1981).
129. State v. Barnes, 313 N.W.2d 1, 2 (Minn. 1981).
130. *Magnan,* 328 N.W.2d at 149 (an upward departure), and State v. Cizl, 304 N.W.2d 632, 634 (Minn. 1981) (a downward departure).
131. State v. Nelson, 326 N.W.2d 917 (Minn. 1982), State v. Johnson 314 N.W.2d 229 (Minn. 1982); State v. Leibfried, 309 N.W.2d 36 (Minn. 1981); and State v. Bellanger, 304 N.W.2d 282 (Minn. 1981).

were generally those which are specifically listed in the Minnesota guidelines.[132] For instance, "victim vulnerability,"[133] due to infancy or old age, was frequently upheld as a reason for an upward departure from the guidelines. "[P]articular cruelty" to the victim, that is, cruelty "of a kind not usually associated with commission of the offense in question,"[134] was also cited often as an appropriate aggravating factor.[135] Other proper reasons for an upward diviation include: infliction of an injury,[136] intruding upon a victim's zone of privacy by assailing the victim in his/her own home,[137] and neglecting the medical needs of the victim after the infliction of injury.[138]

In addition to deciding whether a departure was warranted, the court also ruled as to whether departures were excessive. A basic principle was set down in *State v. Evans*.[139] There the court ruled that, "*generally*, in a case in which an upper departure in sentence length is justified, the upper limit will be double the presumptive sentence length."[140] This tenet sets only the upper limit, however, and was not intended to be the rule for all departures, nor is it an iron-clad rule that sentences cannot exceed the doubled limitation. "[T]here may be rare cases in which the facts are so unusually compelling that an even greater degree of departure will be justified."[141]

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132. See *supra* notes 90-94, and accompanying text.

133. State v. Givens, 332 N.W.2d 187 (Minn. 1983); State v. Jones, 328 N.W.2d 736 (Minn. 1983); State v. Norton, 328 N.W.2d 142 (Minn. 1983); State v. Van Gorden, 326 N.W.2d 633 (Minn. 1982); State v. Partlow, 321 N.W.2d 886 (Minn. 1982); State v. Stumm, 312 N.W.2d 248 (Minn. 1981).

134. *Schantzen,* 308 N.W.2d at 487.

135. *Givens,* 332 N.W.2d at 187; *Jones* 328 N.W.2d at 736; *Norton* 328 N.W.2d at 142; *Van Gorden,* 326 N.W.2d at 633; *Partlow,* 321 N.W.2d at 886; State v. Martinez, 319 N.W.2d 699 (Minn. 1982); *Stumm,* 312 N.W.2d at 248; State v. Evans, 311 N.W.2d 481 (Minn. 1981); State v. Fairbanks, 308 N.W.2d 805 (Minn. 1981).

136. *Van Gorden,* 326 N.W.2d at 634.

137. *Id.* at 635; *Jones* 328 N.W.2d at 738.

138. *Stumm,* 312 N.W.2d at 249.

139. 311 N.W.2d at 481.

140. *Id.* at 483.

141. *Id.* In *Stumm,* 312 N.W.2d at 248, and *Van Gorden,* 326 N.W.2d at 633, the court upheld sentences exceeding the doubled presumptive sentences. The *Stumm* court held that the "absolute vulnerability of the helpless victim," who was a two year old child, justified an extreme departure, *Stumm,* 312 N.W.2d at 249. In *Van Gorden,* the combination of the 66 year old victim's age, the aggravated nature of the misconduct, permanent injury to the eyes resulting in vision loss, three distinct sexual penetrations invading the privacy zone of the victim's home, and dragging the victim outside her home, thereby increasing her fright, warranted the departure, *Van Gorden,* 326

A case which presented a blatant disregard of the guidelines by the sentencing judge was *State v. Bellanger.*[142] The Minnesota Supreme Court quoted the trial court as stating, "there is a great deal too much made of regularity and conformity in sentencing."[143] The supreme court flatly reversed the upward departure, admonishing, "[g]eneral disagreement with the Guidelines or the legislative policy on which the Guidelines are based does not justify departure."[144]

This survey of the Minnesota cases concerning the guidelines demonstrates the effect of the "substantial and compelling" standard. Adherence to the presumptive sentence is the rule, and departure clearly the exception. How close to this result the Florida cases will be is a matter of speculation at this point, because of inherent differences between the two sets of guidelines, the standard for departures, and the two states' laws in general. However, because of the great similarities in the two Sentencing Guidelines Commissions' intents and goals, and because of the absence of case law directly on point in Florida, these cases may provide some direction for the courts here.

3. *"Clear and Convincing" in Florida*

The "clear and convincing" standard has been used in Florida in a variety of legal settings. It is the proper standard of proof for the establishment of entitlement to a trust,[145] the introduction of hypnotically refreshed testimony,[146] civil commitment,[147] disbarment,[148] actual malice in defamation cases,[149] permanent commitment of an adopted child to the new parents,[150] establishing that *Miranda* warnings were

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N.W.2d at 634, 635.

142. 304 N.W.2d 282 (1981).

143. *Id.* at 283.

144. *Id.*

145. Hiestand v. Geier, 396 So. 2d 744, 745 (Fla. 3d Dist. Ct. App.), *rev. denied,* 407 So. 2d 1103 (1981).

146. Brown v. State, 426 So. 2d 76, 91 (Fla. 1st Dist Ct. App. 1983).

147. In Re Preer Beverly, 342 So. 2d 481, 488 (Fla. 1977); Gorchov v. State, 354 So. 2d 116, 117 (Fla. 3d Dist. Ct. App. 1978).

148. The Florida Bar v. Rayman, 238 So. 2d 594, 598 (Fla. 1970); Abstract and Title Corp. of Florida v. Cochran, 414 So. 2d 284, 285 (Fla. 4th Dist. Ct. App. 1982).

149. Lampkin-Asam v. Miami Daily News, Inc. 408 So. 2d 666, 669 (Fla. 3d Dist. Ct. App. 1982), *reh. denied,* 103 S. Ct. 838, *dismissed* 74 L. Ed. 2d 44, 103 S. Ct. 29. Gibson v. Maloney, 263 So. 2d 632, 637 (Fla. 1st Dist. Ct. App. 1972), *cert. denied,* 410 U.S. 984.

150. In Re the Adoption of J.G.R., 432 So. 2d 735, 735 (Fla. 4th Dist. Ct. App.

given,[151] the voluntariness of a confession to criminal charges,[152] the reformation of a contract,[153] and the impeachment of service of process.[154] A thread of similarity runs through all of these situations. There is no perceived need for the criminal standard of "beyond a reasonable doubt," yet each controversy seems to demand more than a mere preponderance. This need stems from either the seriousness or the finality of the disputed matter's impending judgment. Prior to sentencing proceedings, a criminal defendant's guilt will have been proved "beyond a reasonable doubt." The sentence imposed under Florida's sentencing guidelines has been approved through the appropriate channels. The "clear and convincing" standard only applies to decisions to deviate from the prescribed sentence. The imposition of a criminal sentence being quite a serious matter, however, a standard more strict than "a preponderance" was deemed appropriate.

It may seem surprising that, even though applied in a number of areas, the term "clear and convincing" had not been satisfactorily defined by Florida courts until recently.[155] In *State v. Graham*,[156] the problem of defining the standard was described as follows:

> Wigmore went to the heart of the matter: 'The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief.' We communicate with words rather than numbers in the legal profession, and this forces us to verbalize standards for the subjective feeling of probability engendered by evidence. Broadly, we say that the measure of persuasion in criminal cases is proof beyond a reasonable doubt, while civil cases require the lesser measure of proof by a preponderance of the evidence. Wigmore, however, recognizes that a 'stricter standard,' in some such phrase as 'clear and convincing proof' is commonly used to measure the necessary persuasion in certain matters.[157]

In April of 1983, the Fourth District Court of Appeal of Florida

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1983); In the Interest of T.C., a child, 417 So. 2d 775, 776 (Fla. 3d Dist. Ct. App. 1982).

151. State v. Graham, 240 So. 2d 486, 490 (Fla. 2d Dist. Ct. App. 1970).
152. *Id.*
153. Allstate Insurance Co. v. Vanater, 297 So. 2d 293, 298 (Fla. 1974).
154. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th Dist. Ct. App. 1983).
155. *Id.* at 799.
156. *Graham*, 240 So. 2d at 486.
157. *Id.* at 490.

went to great lengths to define the standard in *Slomowitz v. Walker*:[158]

> [C]lear 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 directly remembered; the testimony must be precise and explicit and the witness must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.[159]

This definition is presumably as good as any, given the nature of the concept. What is important to realize is that "clear and convincing" is a phrase which is normally used to determine the quantum of evidence or proof necessary to establish the truth of a disputed matter for the finder of fact. In the sentencing guidelines, however, "clear and convincing" is a descriptive phrase modifying the rationale accompanying a departure from the prescribed sentence. It is not the quantum of evidence necessary to prove that the reasons exist. Therefore, the meaning of the term becomes even more elusive. Hopefully, any reason a judge would have for sentencing a convicted felon to one term rather than another would be a valid one and therefore "clear." And presumably, any reason for imposing a sentence outside the guidelines would be "convincing" to the judge that it is a valid reason to depart. The questions that remain to be answered are how the interpretation of the "clear and convincing" standard will affect departures from the guidelines, and the direction that the new body of case law will take.

D. The End of "Real Offense Sentencing"[160]

"Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained."[161] "This state-

158. *Slomowitz,* 429 So. 2d 797.

159 *Id.* at 800.

160. This term was used in NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT (Approved Draft 1978), *located in* 10 UNIFORM LAWS ANN., (master ed. West 1974) (Supp. 1980) [hereinafter cited as MODEL ACT].

161. FLA. R. CRIM. P. 3.701(d)(11). The Sentencing Guidelines Commission presented recommendations for changes to the Florida Supreme Court which included

ment in the Florida's guidelines represents an attempt by the Commission to end the practice of "real offense sentencing,"[162] sanctioned by the Model Sentencing and Corrections Act. Real offense sentencing requires the court to ignore the charge at conviction and to base the sanction on the defendant's "actual offense behavior."[163] Criticisms of the practice in general and the Model Act's advocacy of it "range from the constitutional to the principled to the practical."[164]

The primary objection, however, is that real offense sentencing simply does not seem fair.[165] A defendant should be sentenced for the charge at conviction, and not for prior dismissed charges or acquittals. Moreover, where plea bargaining is utilized in fixing the offense, defendants must be sentenced according to their negotiated pleas. In return for the guilty plea and the waiver of the right to a jury trial, the prosecutor promises immunity from the imposition of the more serious charge and its sentence. The judge can not ethically consider his own conclusions as to the "real offense" when sentencing.[166] Despite the objection that real offense sentencing is not equitable, there is evidence that this injustice arises all too frequently. The practice has been described as "antithetical to our basic notions of individual worth and fair play."[167] The real concern is that "[m]ost courts now operate on a real offense system; they simply don't admit to it."[168]

The provision in the Florida Sentencing Guidelines should put an end to this unfair practice. The judge is now forced to articulate and record the reasons for departure so that reasonable review of the case is possible. This ensures that the offense at conviction is the one by which defendants are sentenced, and promotes certainty in sentencing.

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this new language. The court approved the changes and commented as to this revision that it was "revamped to replace the cumbersome language in the [original] rule." 9 FLA. L.W. 169 (May 11, 1984) (No. 19).

162. See *supra*, note 160.

163. M. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM L. CRIMINOLOGY 1550, 1550 (1981).

164. *Id.* at 1556.

165. *Id.* at 1568. Tonry suggests that the practice of "real offense sentencing" is "institutionalized deceit." *Id.*

166. *Id.* at 1568-71.

167. *Id.* at 1564. "Real offense sentencing undermines the importance of the substantive criminal law, nullifies the law of evidence, and is irreconcilable with the notion that punishment can be imposed only in respect to offenses admitted or proven."

168. *Id.* at 1586.

III. Constitutionality

It should be noted that Minnesota's guidelines have withstood all constitutional attacks.[169] Because of the similarities between Minnesota's and Florida's guidelines, the Minnesota decisions may serve as persuasive authority in the initial challenges in Florida. Possible attacks in Florida may rest on various grounds, including the prohibition of cruel and unusual punishment, due process vagueness, equal protection, or separation of powers. Though it is impossible to foresee the precise circumstances of a constitutional attack, relevant case law will be examined in order to predict the outcome of such a challenge.

A. Cruel and Unusual Punishment

In a challenge based on the prohibition of cruel and unusual punishment under the state[170] and federal[171] constitutions, the guidelines would be sustained, as will be illustrated. First, it is essential to note that the guidelines do not control capital offenses;[172] therefore, the constitutionality of the death penalty, as addressed in *Gregg v. Georgia*,[173] will not be an issue. This is evidenced in *Rummel v. Estelle*,[174] where the petitioner received a mandatory life sentence pursuant to a Texas statute requiring such a penalty for all third time felony convictions. All three convictions were minor property offenses with an aggregate value of approximately $230. Despite the penalty's apparent harshness, the statute was upheld. The United States Supreme Court noted that

> [b]ecause a sentence of death differs in kind from any sentence of imprisonement, no matter how long, our decsions applying the prohibition of cruel and unusual punishments to capital cases are of

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169. State v. Givens, 332 N.W.2d 187 (Minn. 1983); State v. Olson, 325 N.W.2d 13 (Minn. 1982); State v. Fields, 311 N.W.2d 486 (Minn. 1981).

170. FLA. CONST. art. I, § 17 provides: "[e]xcessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden."

171. U.S. CONST amend. VIII provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

172. FLA STAT. § 921.144 (1982) provides for sentencing proceedings for capital felonies "to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082." This procedure remains unaffected by the guidelines.

173. 428 U.S. 238 (1976).

174. 445 U.S. 263 (1980).

limited assistance in deciding the Constitutionality of the punishment meted out to Rummel.

Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare. . . .[175]

Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.[176]

Gregg also adds weight to the high degree of deference the Court affords state legislatures in determining sentences. The Florida Supreme Court, in *Hamilton v. State*,[177] relied in part on *Gregg* in upholding a sentence imposed for sale and possession of cannabis mandated by section 893.13 of the Florida Statutes.

[I]n assessing a punishment selected by a democratically elected legislature against the Constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the Constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.[178]

In applying this principle to an attack on a sentence imposed pursuant to the Florida guidelines, it is apparent that as long as the actual sentence received falls within the statutory mandate, it will be upheld. Indeed, the guidelines are designed to avoid precisely the disproportionate sentences that the cruel and unusual clause proscribes. In *Banks v. State*,[179] the Florida Supreme Court held that a life sentence with a

175. *Id.* at 272.
176. *Id.* at 285.
177. 366 So. 2d 8 (Fla. 1979).
178. *Id.* at 11 (citing *Gregg*, 428 U.S. at 174-75).
179. 342 So. 2d 469 (Fla. 1977) (affirming a conviction for involuntary sexual

minimum of twenty-five years imprisonment prior to parole eligibility did not amount to cruel and unusual punishment. It stated that it had "no jurisdiction to interfere"[180] because the sentence was within the limits set by the legislature.[181]

The guidelines' purpose is to limit judicial discretion by "establish[ing] a uniform set of standards to guide the sentencing judge,"[182] thus minimizing unwarranted disparity in sentences. As long as the sentences are within the guidelines, a cruel and unusual punishment challenge will undoubtedly fail. However, sentences which are harsher than the guideline's presumptive range because of "clear and convincing"[183] reasons, may pose a separate issue of whether the degree of departure from the guidelines is warranted by the circumstances of the crime.[184] If not, the constitutional question of whether the deviation violates the cruel and unusual punishment clause may be presented, with less clear-cut results than where the sentence is within the guidelines. The outcomes of challenges presenting these questions will depend on individualized analyses of the facts of each case. Because it is conceivable that a court of appeals could find an abuse of discretion in the judge's sentence, an extreme departure from the guidelines could constitute cruel and unusual punishment. However, this finding would only affect that particular sentence, and not the constitutionality of the guidelines as a whole.

The weakness of a cruel and unusual punishment attack is further evidenced by the guidelines' subordination to mandatory sentences. The guidelines provide that "[f]or those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recomended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed."[185]

Mandatory minimum sentences were upheld in *McArthur v.*

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battery).

180. *Id.* at 470.

181. FLA. STAT. § 775.082(1).

182. FLA. R. CRIM. P. 3.701(b).

183. FLA. R. CRIM. P. 3.701(b)(6) and (d)(11).

184. See *supra* nn.139-41 and accompanying text for a discussion of the permissible extent of departure from guideline sentences in Minnesota. The standard for departure in Florida is discussed *supra*, notes 145-59 and accompanying text.

185. FLA. R. CRIM. P. 3.701(d)(9).

State[186] and *State v. Benitez*.[187] In *McArthur*, the petitioner argued that the statute, which mandated a twenty-five year sentence before parole eligibility for first-degree murder constituted cruel and unusual punishment. He asserted that "it operate[d]without regard to the circumstances of individual defendants or the crimes for which the defendants have been convicted."[188] Regarding the federal Constitution, the Florida Supreme Court distinguished this case from ones involving the death sentence,[189] relying on *Woodson v. North Carolina*:[190] "the penalty of death is qualitatively different from a sentence of imprisonment, however long."[191] In *Woodson*, the court noted that "the prevailing practice of individualized sentencing determinations generally reflects simply enlightened policy *rather than a constitutional imperative*.[192] Thus, the penalty passed muster under the federal Constitution.

As to the Florida Constitution, the *McArthur* court relied on *O'Donnell v. State*[193] which upheld a thirty year mandatory sentence for kidnapping.[194] That case reiterated the principle espoused above; that any sentence within the statutory scheme's limits was not violative of the Florida Constitution.[195] In *State v. Benitez*,[196] the Florida Supreme Court again rejected the argument that the elimination of judicial discretion in mandatory minimums violates the cruel and unusual clauses.[197] Relying on *McArthur*, the court upheld the mandatory sentences for drug trafficking.[198]

Since the mandatory minimum sentences are constitutional, the guidelines' sentences would only be suspect in instances where they exceed the mandatory minimum and are imposed pursuant to the guidelines.[199] However, the guidelines allow for more individualized sentencing than the mandatory minimum sentences. For instance, a

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186. 351 So. 2d 972 (Fla. 1977).
187. 395 So. 2d 514 (Fla. 1981).
188. *McArthur*, 351 So. 2d 972, 975.
189. *Id.*
190. 428 U.S. 280 (1976).
191. *Id.* at 305 (as cited in *McArthur*, 351 So. 2d at 975).
192. *Id.* (Emphasis in original).
193. 326 So. 2d 4 (Fla. 1975)
194. FLA. STAT. § 775.082(4)(a) (1973).
195. *McArthur*, 351 So. 2d at 975-76.
196. 395 So. 2d 514 (Fla. 1981).
197. *Id.* at 518.
198. *Id.*
199. FLA. R. CRIM. P. 3.701(d)(9).

defendant's record, victim injury, and the defendant's legal status at time of conviction are all factored into the guideline sentence. Thus, the guidelines are more proportionate to the seriousness of the crime and therefore less likely than mandatory sentencing schemes to constitute cruel and unusual punishment. Furthermore, guideline sentences exceeding statutory maximums may not be imposed. In the case of such a conflict the statutory maximum sentence takes precedence. This further illustrates the intent of the legislature to generally reduce severity of sentences thus contradicting any cruel and unusual punishment argument.

B. Due Process Considerations

Perhaps the most likely due process argument would be a vagueness challenge. In *Benitez*, petitioners argued that the definition of a defendant who is eligible for lenient treatment under Florida Statutes section 893.135 was impermissibly vague and thus violated the due process clauses of the Florida[200] and federal[201] Constitutions.[202] In statutes proscribing certain activity as criminal, the test for vagueness is "language that is definite enough to provide notice of what conduct will constitute a violation."[203] However, the statute challenged in *Benitez* and the guidelines do not prohibit behavior as criminal; rather, they determine penalties for existing substantive crimes. In *Benitez*, the court stated that, "[b]eing a description of *post-conviction*. . .form of plea bargaining rather than a definition of the crime itself, the phrase 'substantial assistance' can tolerate subjectivity to an extent which normally would be impermissible for penal statutes."[204] The court held that the contested phrase was "susceptible of common understanding in the context of the whole statute,"[205] and therefore did not violate due process.[206]

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200. FLA. CONST. art. I § 9.
201. U.S. CONST. amend. V and XIV.
202. 395 So. 2d at 518.
203. State v. Ashcraft, 378 So. 2d 284, 285 (Fla. 1979). The text continues: "[i]f the language is definite enough, when measured by common understanding and practice, to apprise ordinary persons [of common intelligence] of what conduct is proscribed, the statute is not vague." Cline v. Frink Dairy Co., 274 U.S. 445, 448 (1927); Connally v. General Construction Co., 269 U.S. 385, 391 (1926).
204. *Benitez*, 395 So. 2d at 518 (emphasis in original).
205. *Id.* at 519.
206. *Id.*

It is difficult to predict which, if any, language in the guidelines may be subject to a vagueness attack. In a Minnesota case, *State v. Givens*,[207] the defendant attacked the constitutionality of that state's standards for departure from the guidelines. The Minnesota Supreme Court upheld the guidelines concluding that the vagueness challenge was "misplaced in this context."[208] Relying on reasoning similar to that enunciated in the cruel and unusual punishment arguments, the court distinguished the application of a vagueness challenge in death penalty cases from sentences controlled by the guidelines. Relying on *Godfrey v. Georgia*[209] and *Gregg*, the court noted that crimes punishable by death must be defined in a way that "obviates standardless sentencing discretion."[210] Since Givens was not sentenced to death or subjected to cruel and unusual punishment, the court refused to extend the doctrine to his situation: "[t]he application of vagueness argument to more routine sentencing decisions - those not including the death sentence, is not contemplated by the *Gregg* and *Godfrey* decisions."[211] Before concluding that the vagueness argument was "misplaced,"[212] however, the court expressed its support for the guidelines, apparently rejecting the defendant's challenge on the merits despite its inappropriateness.

> Three points must be made before analyzing the constitutional merit of defendant's claim: (1) the guidelines not only list aggravating factors - such as race, sex, employment - which may not be used as a basis for a sentencing departure:..(2) the trial court applied only specified aggravating factors, and (3) this court is in the process of fleshing out the guidelines in an ongoing series of judicial decisions. Counsel for defendant and the state acknowledged at oral argument that the guidelines represent a salutory step forward in controlling sentencing discretion, with an ultimate objective of achieving greater uniformity in sentencing statewide, consistent with fitting punishment to the particular nature of the crime committed.[213]

This defense of the guidelines seems to anticipate the possible ex-

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207. 332 N.W.2d 187 (Minn. 1983).

208. *Id.* at 190.

209. 446 U.S. 420 (1980), *cert. denied*, 456 U.S. 919, *reh'g denied* 456 U.S. 1001 (1982).

210. *Givens*, 332 N.W.2d at 190, (citing *Godfrey*, 446 U.S. at 428).

211. *Givens*, 332 N.W.2d at 190.

212. *Id.*

213. *Id.* at 189.

pansion of the *Godfrey* and *Gregg* decisions. It anticipates an approval of the degree of definiteness the guidelines possess in case of the need for such justification in the future. The Florida guidelines may not be able to meet this type of challenge so ably. They specify no aggravating or mitigating factors for use in departing from the guidelines. However, they do prohibit the consideration of race, gender, social and economic status,[214] or "factors relating to prior arrests without conviction" or "factors relating to the instant offense for which convictions have not been obtained."[215] General goals in the Statement of Purpose will also provide guidance to the sentencing judge.[216] Whether these provisions will be sufficient to save the guidelines from a vagueness attack is uncertain, but seems probable. As the Minnesota Supreme Court noted in *Givens*, the guidelines represent a "salutory step forward in controlling judical discretion,"[217] and at least assure more definiteness in sentencing than was guaranteed before the rules' inception. Thus, inasmuch as the broad discretion allowed in indeterminate sentencing practices of the past were never held unconstitutionally vague, it is doubtful that the Florida guidelines will fall to a vagueness challenge.

C. Equal Protection

Another potential ground for attack is the denial of equal protection of the law in violation of the fourteenth amendment of the United States Constitution and article I section 2 and section 9 of the Florida Constitution. Because of the high degree of discretion given a state legislature[218] in devising statutory categories, this challenge will place a heavy burden on the petitioner.[219]

It is difficult to foresee the delineations of the challenged classification, but several possibilities exist. A broad classification could simply include all convicted felons subject to sentencing under the guidelines. A more narrow class might include all felons convicted and sentenced pursuant to one of the nine offense categories in the guidelines. Whatever the demarcation of the class the test of constitutionality will be whether there exists a "[r]ational basis for the classifica-

214. FLA. R. CRIM. P. 3.701(b)(1).

215. *Id.* at (d)(11). As discussed *supra* notes 160-68 and accompanying text, this provision should end the practice of "real offense sentencing". *Supra* note 160.

216. FLA. R. CRIM. P. 3.701(b).

217. *Givens*, 332 N.W.2d at 187.

218. Hamilton v. State, 366 So. 2d 8, 10 (Fla. 1979).

219. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1910).

tion. . .or whether this classification is arbitrary and, therefore, unconstitutional."[220]

In ordinary equal protection challenges where no suspect class or fundamental right is involved, there is no constitutional mandate that the law operate without any inequality. "A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."[221] Therefore, it would not be enough to show that some offenders are treated somewhat differently than others who, though apparently similarly situated, somehow were not included in the class. Furthermore, "[w]hen the classification in such a law is called in question, if any set of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted, must be assumed."[222] Given this test, which is highly deferential to the legislature, a challenger should be skeptical of the possibility of success. Surely the state could conceive of some reasonable justification for the delineation of the challenged class. Basis for such justification could be found in the legislative history of the bill, or in the statistical data gathered by the Sentencing Commission. Unless the challenger can show that the guidelines classification "does not rest upon any reasonable basis, but is essentially arbitrary,"[223] the challenge will fail.

In Minnesota, an equal protection challenge of the guidelines failed even when the defense attempted to bolster its chances of success by claiming that the guidelines, as applied, were racially discriminatory.[224] The defense premised this claim on statistical data showing that blacks received disparate sentences for the same crimes as whites.[225] If the finding of intentional racial discrimination had been made, the standard of review would have been elevated from mere rationality to strict scrutiny.[226] The court rejected the contention that racial discrimination was the reason for defendant's sentence departing upwardly from the guideline range.

> Disparity of sentencing based upon race has no place in our justice

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220. *Hamilton,* 366 So. 2d 8, 10.
221. *Lindsley,* 220 U.S. at 78-79.
222. *Id.*
223. *Id.*
224. *Givens,* 332 N.W.2d at 191.
225. *Id.*
226. Korematsu v. U.S., 323 U.S. 214, 216 (1944).

> system. The guidelines specifically reject race as a sentencing factor in sentencing decisions. Whatever disparity exists, discrimination was not the fact [sic] in this case. The absence of bias by the jury is demonstrated by the verdict acquitting defendant of the first-degree murder and criminal sexual conduct charges. And more importantly with regard to sentencing bias, counsel for defense explicitly acknowledged that the trial court was in no way motivated by racial bias.[227]

The Florida guidelines also specifically mandate that "[s]entincing should be neutral with respect to race."[228] Therefore, unless it could be proved that a particular sentence was imposed solely as a result of racial discrimination, an attack like the one in *Givens* would also fail in Florida.

D. Separation of Powers

Another potential Constitutional argument rests on the Separation of Powers doctrine. Article II § 3 of the Florida Constitution sets forth the principles in the following language: "[t]he powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless provided herein." Article V section 2 provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts. . . ." An attack might be formulated charging that the legislature, in passing section 921.001 of the Florida Statutes, which proposed the rule implementing the guidelines, encroached upon the rule-making authority of the supreme court. However, the supreme court's adoption of the rules in September, 1983 renders this argument moot.

E. Double Jeopardy

Finally, a challenge based on double jeopardy grounds may be posed. The state is authorized to appeal from "[a] sentence imposed outside the guidelines."[229] This provision may be grounds for a broad attack on the constitutionality of this power in that it subjects the defendant twice to jeopardy of life or limb.

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227. *Givens*, 332 N.W.2d at 191.
228. FLA. R. CRIM. P. 3.701(b)(1).
229. FLA. STAT. § 924.07 (1983).

However, this issue was already resolved in *United States v. DiFransesco.*[230] where the United States Supreme Court upheld the government's right to appeal a sentence. DiFransesco was convicted in federal district court of racketeering offenses. He appealed his conviction to the Court of Appeals for the Second Circuit, and the government appealed the sentence received under a particular charge.[231] The court of appeals affirmed the defendant's convictions but dismissed the government's appeal to increase his sentence.[232] The court held that "to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the government is to place him a second time 'in jeopardy of life or limb.' "[233] The United States Supreme Court, upon a grant of petition of certiorari, reversed, explaining that the "Double Jeopardy Clause is *not* a complete barrier to an appeal by the prosecution in a criminal case."[234] Because the appeal did not pose the risk of a successive prosecution, but merely made possible a greater sentence, it did not offend double jeopardy principles.[235] "The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be."[236]

In dicta relevant to the guidelines, the Court noted that "sentencing is one of the areas of the criminal justice system most in need of reform"[237] The Court acknowledged that the "basic problem" in the criminal system is "the unbridled power of sentences to be arbitrary and discriminatory."[238] The Court then concluded that "[a]ppellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing."[239] This language implicitly lends support to the principles and purposes of the guidelines, and indicates approval of the type of reform the guidelines attempt to

230. 449 U.S. 117 (1980).

231. U.S. v. DiFrancesco, 604 F.2d 769 (1979), *cert. granted*, 444 U.S. 1070, *rev'd*, 449 U.S. 117 (1980).

232. *Id.* at 783.

233. *Id.*

234. *DiFrancesco*, 449 U.S. at 122 (emphasis in original).

235. *Id.*

236. *Id.* at 137.

237. *Id.* at 142. The Court cites M. FRANKEL, CRIMINAL SENTENCES, LAW WITHOUT ORDER (1973) and P. O'DONNELL, M. CHURGIN and D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977).

238. M. FRANKEL, *supra* note 237, at 49. cited at *DiFrancesco*, 449 U.S. at 143.

239. *DiFrancesco*, 449 U.S. at 143.

implement.

The Minnesota Guidelines also allow the state to appeal from a sentence. In *State v. Cizl*,[240] the defendant challenged the constitutionality of this power, and the court relied on *DiFrancesco* with virtually no discussion.[241] In Florida, a similar double jeopardy attack will likely be dismissed on the same grounds.

It is clear that the guidelines will be challenged in various areas of constitutionality; however, based on this survey of the case law, it may be concluded that no strong arguments exist. In any event, the perimeters of the attacks must be confined to precedent, thus it appears unlikely for a successfull challenge to be posed.

IV. Conclusion

The guidelines have already caused great controversy in Florida's judicial and political forums. No one can predict the aggregate impact of their implementation with great accuracy. The consequences of abolishing early release through parole, the effects on plea negotiation, and changes the newly proclaimed philosophy of just-deserts will produce are issues which only time will clarify. The judiciary's implementation and the Commission's monitoring of the guidelines will determine the direction of sentencing for the future. The guidelines are not the panacea of the criminal justice system, but merely a modification which may provide the needed structure to accommodate future improvements.

Rebecca Jean Spitzmiller

240. 304 N.W.2d 632 (Minn. 1981).
241. *Id.*