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KEYWORDS: issues, sentencing, Florida

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Few recent developments in the laws of Florida have resulted in so much litigation, particularly at the appellate level, as did the adoption of sentencing guidelines in 1983.[1] With published decisions now numbering in the hundreds,[2] appellate judges have begun to wince at "yet another" guidelines case.[3] Regardless whether the practitioner or criminal court judge personally believes sentencing guidelines are a panacea or merely "an interesting but failed social experiment,"[4] the legislature has not yet shown any sign that it intends to abandon sentencing guidelines and so an understanding of the mechanics of this innovative system is essential to effective advocacy and to the administration of justice.

This article is concerned not as much with what trial judges can and cannot do under the guidelines as the proper procedure for review of guideline errors, with special emphasis on post-conviction remedies. The vast majority of published opinions have arisen on direct appeal from judgment and sentence. Although nothing short of a hornbook or CLE manual can hope to include all of the numerous issues that have arisen in connection with guideline sentencing,[5] it is important to un-

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1. Originally adopted by the legislature as Chapters 82-145 and 83-87, Laws of Florida (codified at FLA. STAT. § 921.001 (1987)), and approved by the Florida Supreme Court September 8, 1983. IN RE RULES OF CRIMINAL PROCEDURE (SENTENCING GUIDELINES), 439 So. 2d 848 (Fla. 1983).

2. *See, e.g.*, the caseload statistics presented to the Sentencing Guidelines Commission at their February 28, 1986, meeting by Judge John M. Scheb of the Second District Court of Appeal. The official minutes of this meeting reflect that 58 of that court's last 318 decisions dealt at least in part with guidelines issues. Of these, 31 were remanded to the trial court. Notably, Judge Scheb's statistics were for January and February of 1986, prior to several significant and precedent-shattering Florida Supreme Court decisions.

3. *See, e.g.*, Johnson v. State, 503 So. 2d 955 (Fla. 2d Dist. Ct. App. 1987).

4. Hendrix v. State, 455 So. 2d 449, 451 (Fla. 5th Dist. Ct. App. 1984) (Sharp, J., dissenting), *quashed*, 475 So. 2d 1218 (Fla. 1985).

5. Extremely valuable in this regard is a booklet entitled "Pearls of Great Price"

derstand when an issue can, must, cannot, and need not be argued on direct appeal, as well as what steps (if any) need to be taken to preserve issues for appellate review.

I. Special Problems With Sentencing Guidelines Appeals

Probably the most significant entanglements that have arisen during the brief history of guideline appeals are the contemporaneous objection rule and the debate over whether changes in the sentencing guidelines are substantive or merely procedural.

A. The Contemporaneous Objection Rule

The necessity for objections to perceived sentencing errors has in the last few years been a subject of debate.[6] Unquestionably, if a judge has a *statutory* duty to follow a certain procedure at the time of sentencing, his failure or refusal to do so is not excused by the lack of an objection. There are certain guideline-related errors that clearly fall into this "mandatory" category, among them the requirements that the court have before it a scoresheet[7] and that any reasons for departure be reduced to writing.[8]

On the other hand, the nature of the reasons given for departure necessarily varies from case to case, imbuing the sentencing guidelines with a residual degree of judicial discretion. Arguably, one might acquiesce by silence in the court's performance of such a discretionary act. Even so, the supreme court has not required a contemporaneous objection before a departure order may be reviewed on appeal.[9] At this

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prepared by Judge Charles E. Miner, Jr. (Second Judicial Circuit, Tallahassee), and Sentencing Guidelines Commission director Leonard Holton.

6. *See, e.g.*, State v. Walcott, 472 So. 2d 741 (Fla. 1985); State v. Brumley, 471 So. 2d 1282 (Fla. 1985); State v. Snow, 462 So. 2d 455 (Fla. 1985); Walker v. State, 462 So. 2d 452 (Fla. 1985); State v. Rhoden, 448 So. 2d 1013 (Fla. 1984); Cofield v. State, 453 So. 2d 409 (Fla. 1st Dist. Ct. App. 1984).

7. *See, e.g.*, Myrick v. State, 461 So. 2d 1359 (Fla. 2d Dist. Ct. App. 1984). Note, however, that the absence of a scoresheet may be harmless error if it is apparent from the record that all parties were aware of the guideline recommendation. *See, e.g.*, Davis v. State, 461 So. 2d 1361 (Fla. 2d Dist. Ct. App.), *petition for review denied*, 471 So. 2d 43 (Fla. 1985). In such cases, the only party truly "harmed" by the omission is the Sentencing Guidelines Commission, part of whose function is the keeping of statistics on guidelines departures.

8. State v. Jackson, 478 So. 2d 1054, 1055 (Fla. 1985).

9. State v. Whitfield, 487 So. 2d 1045 (Fla. 1986). The actual omission in *Whit-*

juncture it seems clear that no objection is required to preserve any *legal* error occurring at a guideline sentencing. The opportunity to be heard should, of course, be encouraged.[10] As is discussed in more detail below, errors of *fact* may be deemed waived unless a timely objection is lodged. Undeniably a defendant may *affirmatively* waive any objection to a departure (such as a plea bargain to a sentence in excess of the guidelines), estopping him from "sandbagging" the state on appeal.[11]

B. Retroactive Application of Changes in the Sentencing Guidelines

Most attempts by the legislature to toughen the sentencing guidelines have dealt with the scoring of offenses rather than with such matters as permissible criteria for departure or the scope of appellate review.[12] Initially, any such modifications were regarded as substantive in

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field was the failure to state in writing the reasons for departure, which State v. Jackson earlier had stated is mandatory no less than the procedures involved in *Rhoden*, 448 So. 2d at 1013. However, *Whitfield* goes on to state that the defendant "in any event . . . is entitled to appellate review of [those] mandatory findings," 487 So. 2d at 1047, appealability being an integral part of the guidelines. *Whitfield* was later narrowed, though only to a minor extent, by Dailey v. State, 488 So. 2d 532 (Fla. 1986).

10. *See, e.g.*, Scruggs v. State, 463 So. 2d 487 (Fla. 2d Dist. Ct. App. 1985).

11. *See, e.g.*, Rowe v. State, 496 So. 2d 857 (Fla. 2d Dist. Ct. App. 1986); Key v. State, 452 So. 2d 1147 (Fla. 5th Dist. Ct. App. 1984), *petition for review denied*, 459 So. 2d 1041 (Fla. 1984). Note, however, that a defendant's mere assertion that he recognizes the maximum penalty for his offense does not in and of itself constitute any sort of agreement to that sentence. Coates v. State, 458 So. 2d 1219, 1221 (Fla. 1st Dist. Ct. App. 1984).

12. For one example of the latter, see the legislative attempt to overrule Albritton v. State, 476 So. 2d 158 (Fla. 1985), by precluding appellate review of the extent to which a trial court departs from the recommended guideline sentence. Ch. 86-273, § 1, LAWS OF FLA.. The question of the constitutionality of this enactment at first was ducked. *See, e.g.*, Ochoa v. State, 509 So. 2d 1115, 1116 (Fla. 1987) (constitutional review unnecessary because *no* reasons for departure were found valid); Fryson v. State, 506 So. 2d 1117 (Fla. 1st Dist. Ct. App. 1987) (issue of *ex post facto* application of new law not raised in trial court). However, once the issue finally had been presented squarely the supreme court concluded that this "legislative restriction on the scope of rights to appeal" did not infringe upon any sort of "inherent judicial power" such as would violate constitutional provisions regarding separation of powers. Booker v. State, 514 So. 2d 1079, 1082 (Fla. 1987). The court did find that application of the new statute to crimes committed before its effective date would constitute an ex post facto violation.

In Chapter 86-273, Laws of Florida, effective July 1, 1987, the legislature attempted to further truncate *Albritton* by permitting affirmance if only one of several

nature, and thus not subject to *ex post facto* application.[13] However, in its landmark decision *State v. Jackson*, the supreme court concluded that a revision of the guidelines that allowed enhanced penalties for violations of probation was "merely a procedural change not requiring application of the *ex post facto* doctrine."[14] This rationale thereafter was universally applied to any change in scoring methods.[15] As a result, sentences that may have been excessive according to the law in effect at the time of the offense nevertheless could be sustained on appeal if the law had changed in the interim between the offense and sentencing, or

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departure criteria is valid (the so-called "laundry list" approach). In *Ochoa*, and Griffis v. State, 509 So. 2d 1104 (Fla. 1987), the supreme court found it unnecessary to address the constitutionality of this enactment, and thereafter continued to apply the *Albritton* standard. *See, e.g.*, Reichman v. State, 511 So. 2d 995 (Fla. 1987). The First District Court of Appeal has held that the legislation neither transgresses the doctrine of separation of powers nor represents an ex post facto violation, but is merely a clarification of the original legislative intent behind FLA. STAT., § 921.001(5) (1987), Felts v. State, No. BJ-413 (Fla. 1st Dist. Ct. App. January 14, 1988) [13 F.L.W. 205]. Thus the court affirmed a sentence where only one of four reasons given in support of the departure was valid, and thereby served notice that *Albritton* would no longer be followed in that district. Judge Zehmer, while crediting the majority for their attempt to "bring order out of chaos [and] make the guidelines approach to sentencing a workable process," dissented, finding the enactment "significantly alter[s] the defendant's right to receive the guidelines' presumptive sentence," and the panel certified to the supreme court the issue of retroactive application of the amended section 921.001(5).

Suggestions that appellate review of guideline sentences should be abolished altogether have been nipped in the bud by the supreme court. *See* FLORIDA RULES OF CRIMINAL PROCEDURE RE SENTENCING GUIDELINES (rules 3.701 and 3.988), 509 So. 2d 1088 (Fla. 1987).

13. *See, e.g.*, Miller v. State, 468 So. 2d 1018 (Fla. 4th Dist. Ct. App. 1985), *quashed*, 488 So. 2d 820 (Fla. 1986), *rev'd*, 107 S.Ct. 2446, 96 L.Ed.2d 351, 55 U.S.L.W. 4814 (1987), *after remand*, 512 So. 2d 198 (Fla. 1987).

14. 478 So. 2d 1054, 1056 (Fla. 1985). The court in *Jackson* also rejected the notion, formerly held by some of the District Courts of Appeal, that a transcript of the trial judge's oral pronouncement at time of sentencing was a sufficient substitute for a written order delineating his reasons for departing from the guidelines.

15. If confined to the precise question before the court, it might be argued that State v. Jackson actually was beneficial to criminal defendants. Prior to *Jackson*, the mere fact that a defendant was being sentenced for violation of probation was considered to be a legitimate criterion for exceeding the guidelines, thus permitting any sentence up to the statutory maximum. *See, e.g.*, Carter v. State, 452 So. 2d 953 (Fla. 5th Dist. Ct. App. 1984). The rule change for which retroactive application was approved in *Jackson* authorized enhancement of sentence by only one cell for probation violators. FLA. R. CRIM. P. 3.701(d)(14). *But see* Pentaude v. State, 500 So. 2d 526 (Fla. 1986) (circumstances surrounding probation violation may support departure in excess of one cell).

even between sentencing and the decision of the appellate court (because reversal for resentencing would be a useless act). An *impending* rule change, even after *Jackson*, still would not justify a departure from the guidelines in existence at the time of sentencing.[16]

The United States Supreme Court then agreed to hear a *Jackson*-related case, *Miller v. Florida*, signifying that the procedural-*versus*-substantive debate was not yet quite ready to be put to rest.[17] Sure enough the high court revivified the issue. Justice O'Connor, writing for a unanimous court, stated that retroactive application of revised guidelines that call for a more excessive sentence violates the ex post facto clause of Article I, Section 10 of the Constitution.[18] In so holding, the court rejected the state's argument that Florida's sentencing guidelines were little more than "guideposts" for a sentencing judge, and cited case authority from the very court that had decided *Jackson* to the effect a presumptive guideline sentence pretty much is just that, requiring "strict standards" before it can be enhanced or reduced.[19] The end result of *Miller* very well could be hundreds, if not thousands, of resentencings and post-conviction proceedings.[20] *Miller*-based reversals already have begun to appear in the advance sheets.[21]

C. Other Questions of Appellate Procedure

Like any other legal issue, a sentencing guidelines question can be appealed only if a timely notice is filed. The question has arisen when the time for filing the notice of appeal begins to run. In *State v. Williams*,[22] one of its earliest guideline-related opinions, the Third District Court of Appeal held that the state's time to appeal a downward departure does not begin until the court has rendered a written departure order, stating that "the propriety *vel non* of a sentence imposed outside of the recommended guideline range cannot be said to be known until

16. Hopper v. State, 465 So. 2d 1269 (Fla. 2d Dist. Ct. App. 1985), *petition for review denied*, 475 So. 2d 696 (Fla. 1985).

17. 107 S.Ct. 455, 93 L.Ed. 401 (1986).

18. Miller v. Florida, 107 S.Ct. 2446, 96 L.Ed.2d 351, 55 U.S.L.W. 4814 (1987).

19. State v. Mischler, 488 So. 2d 523, 525 (Fla. 1986).

20. *See* the discussion of *Miller* as it relates to FLA. R. CRIM. P. 3.800(a) and State v. Whitfield, 487 So. 2d 1045 (Fla. 1986).

21. *See, e.g.*, Gallo v. State, 510 So. 2d 372 (Fla. 2d Dist. Ct. App. 1987); Gollwitzer v. State, 509 So. 2d 1373 (Fla. 5th Dist. Ct. App. 1987).

22. 463 So. 2d 525 (Fla. 3d Dist. Ct. App. 1985).

the written reasons . . . are given."[23] Unfortunately, such a policy may operate to a defendant's prejudice if the trial court delays the filing of such an order[24] or refuses to file one altogether. Insofar as the failure to prepare a written order is appealable in and of itself, according to *State v. Jackson*, a better practice might be to require the state to appeal directly from the pronouncement and rendition of the judgment and sentence.[25] It is at this point that the parties know a departure has taken place, and generally they have some idea of the reasons even if these are not fully explicated in writing. This author knows of no case law similarly permitting the defendant to wait until the written departure order has been entered, and suggests such an appeal would be stricken as untimely if filed more than thirty days after judgment and sentence. *State v. Williams* predates *Jackson*, and thus may constitute an anomaly, but there do not appear to exist any decisions holding the other way.[26]

II. Postconviction Relief And The Sentencing Guidelines

The huge number of guideline appeals demonstrates not only that there is no shortage of defendants (along with the occasional prosecutor) wanting to challenge their sentences but also that the appellate courts have provided relatively free access to those litigants. By far a more troublesome subject is the utilization of postconviction relief to address alleged guideline errors. The extent of interdependency between the sentencing guidelines and the procedures authorized by Florida Rules of Criminal Procedure 3.800 and 3.850 has not yet crystal-

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23. *Id.*

24. In Ree v. State, 512 So. 2d 1085 (Fla. 4th Dist. Ct. App. 1987), the trial court waited only five days before reducing its oral pronouncement of sentence to writing. Nevertheless the District Court found reversible error, citing State v. Oden, 478 So. 2d 51 (Fla. 1985), to the effect a written statement of reasons for departure must be provided contemporaneously with sentencing. The court went on to review the reasons eventually stated in the order, finding several of them invalid, and certified to the Supreme Court the question of the absolute necessity of furnishing written reasons at the same time sentence is pronounced.

25. The recent case of State v. Echemeque, 503 So. 2d 996 (Fla. 3d Dist. Ct. App. 1987), appears to have proceeded in such a fashion.

26. As this article was going to press, the Second District Court of Appeal expressed disagreement with *Williams*. State v. Ealy, No. 87-3017 (Fla. 2d Dist. Ct. App. September 2, 1988) [13 Fla. L. Weekly 2061]. *See also* State v. Cajunste, No. 87-3409 (Fla. 2d Dist. Ct. App. August 24, 1988) [13 Fla. L. Weekly 2003].

lized.[27] However, as the first wave of guideline-sentenced prisoners has passed the initial, essential hurdle of direct appellate review, many of those not successful on appeal have fallen back upon traditional post-conviction remedies.

Although the supreme court has afforded at least one new avenue of relief by an amendment to rule 3.800(a),[28] it is becoming apparent that rules 3.800 and 3.850 are not permitted to serve as a substitute for appeal in the guideline context any more than in any other sort of criminal proceeding.[29] For purposes of this discussion we can distinguish at least five qualitatively different types of guideline issues.

A. Ineffective Assistance of Counsel

Historically the claim of ineffective assistance is probably the most common ground alleged as a basis for relief under rule 3.850. As a general rule this issue may *only* be raised in proceedings under rule 3.850, and not on direct appeal.[30] Among the earliest guideline decisions one finds a recognition that ineffective assistance could occur if an attorney rendered bad advice concerning guideline sentencing.[31] The courts have since found possible ineffective assistance in the guideline

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27. In fact, it is not entirely certain which of these two rules is the more appropriate for addressing guideline errors. To the extent rule 3.800(a) permits a court to correct an unlawful sentence "at any time," defendants should find it preferable to rule 3.850, with its limitations on time of filing and successive motions. However, when the defendant's complaint is properly directed elsewhere than the facial validity of the sentence (such as the adequacy of representation at sentencing), he should not be permitted to duck the more restrictive provisions of rule 3.850 by attempting to characterize his sentence as "unlawful." The fact that a defendant may have invoked the wrong rule should be considered immaterial, and a court may treat an improper 3.850 motion as it had been filed pursuant to rule 3.800(a), if the circumstances permit. *See, e.g.*, Trimble v. State, 511 So. 2d 403 (Fla. 2d Dist. Ct. App. 1987).

28. "A court may at any time correct an illegal sentence imposed by it *or an incorrect calculation made by it in a sentencing guidelines scoresheet*" (emphasis added).

29. *See, e.g.*, Wahl v. State, 460 So. 2d 579 (Fla. 2d Dist. Ct. App. 1984). As will be seen, however, a handful of decisions have muddied the water by applying the Whitfield amendment to rule 3.800(a) in a manner more broadly than this author believes the supreme court intended.

30. State v. Barber, 301 So. 2d 7 (Fla. 1974).

31. Lucas v. State, 461 So. 2d 260 (Fla. 1st Dist. Ct. App. 1984). Here counsel allegedly misinformed the defendant that he was not eligible to elect the more lenient guideline sentencing procedure. *See also* Brown v. State, 480 So. 2d 119 (Fla. 3d Dist. Ct. App. 1985).

context where an attorney is aware of scoresheet inaccuracies not readily apparent from the face of the record but does not bring the matter to the attention of the trial court[32] and where an attorney fails to advise his client adequately of the consequences of choosing between a guideline and a non-guideline sentence.[33]

Perhaps not surprisingly, there are very few published decisions wherein an attorney actually was found to have rendered ineffective assistance of counsel in a guidelines context. Given the whirlwind of confusion surrounding this area of the law, a definition of what is "outside the wide range of professionally competent assistance"[34] would not be easy to attempt. That an attorney might simply have guessed wrong about what a trial or appellate court would do hardly seems surprising.[35] The author predicts that relief generally will not be had except when an outright blunder by counsel is the only thing standing between the defendant and a more favorable sentence.[36]

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32. Lanier v. State, 478 So. 2d 1184 (Fla. 2d Dist. Ct. App. 1985). *See also* Pettway v. State, 502 So. 2d 1353 (Fla. 2d Dist. Ct. App. 1987), wherein defense counsel allegedly failed to object to scoring of uncounseled misdemeanor convictions, barred by Pilla v. State, 477 So. 2d 1088 (Fla. 4th Dist. Ct. App. 1985).

33. Highsmith v. State, 493 So. 2d 533 (Fla. 2d Dist. Ct. App. 1986); Toler v. State, 493 So. 2d 489 (Fla. 1st Dist. Ct. App. 1986).

34. Strickland v. Washington, 466 U.S. 668, 690 (1984).

35. For example, prior to the supreme court's opinion in Albritton v. State, 476 So. 2d 158 (Fla. 1985), a departure might be sustained on appeal if only one of several reasons given were valid. No doubt this doctrine dissuaded a good many appeals, and counsel should not be faulted for failing to anticipate that the supreme court would reverse the generally accepted trend.

36. In Johnson v. State. 523 So. 2d 755 (Fla. 2d Dist. Ct. App. 1988), the defendant alleged that he plea bargained for what was represented to him as a downward departure, only to discover (apparently after his transfer to prison) that the scoresheet had been erroneously calculated and should have recommended a lower sentence than it actually did. The trial court denied Johnson's 3.850 motion, finding that he had received the amount of time for which he had negotiated, but the district court reversed. They held that Johnson had plainly alleged that his plea was grounded in a desire to avoid an even longer sentence and, in view of Williams v. State, 500 So. 2d 501 (Fla. 1986), concluded that whichever sentence the scoresheet recommended would have been "highly likely." Thus Johnson's sentence was "not quite the windfall . . . he was led to expect," thereby affecting the voluntariness of his plea. *Johnson*, 523 So. 2d at 756.

Most of the examples located by this author involve ineffective assistance on the part of *appellate* counsel. In McCullum v. State, 498 So. 2d 1374 (Fla. 3d Dist. Ct. App. 1986), a departure sentence was not contested on appeal, presumably because there was no contemporaneous objection. The *Whitfield* decision, stating that no such objection was required, issued before the opinion on direct appeal in *McCullum*, yet

Any efforts at postconviction relief based on ineffective assistance of counsel or other recognized grounds should be held to the same strict standards applicable in nonguideline cases. For example, in *Morris v. State*[37] the defendant claimed counsel gave bad advice when he recommended defendant not elect a guideline sentence. The appellate court affirmed the denial of Morris's motion because he had failed to allege what sentence he would have received had he not listened to his attorney.[38]

Along these lines, consider the prisoner who, second-guessing his attorney's advice about the guidelines, calculates a lenient presumptive sentence without taking into account charges that might have been dropped in exchange for a plea or other criteria that could have supported a departure. To what extent that prisoner should have to demonstrate that he *would have gotten* the lighter sentence is not clear in light of *Morris*; given the measure of unpredictability that still inheres in the sentencing process, such an allegation may not even be possible. It is probably enough for the prisoner to show that a more favorable sentence arguably should have been imposed, with any reasons why it should not be determined from record exhibits overlooked by the movant or at an evidentiary hearing.[39]

B. Invalid Reasons for Departure

Most of the appellate decisions written in the wake of the guide-

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there was no attempt to supplement the appeal to include the guideline question. The court found that the departure was based on invalid criteria and that resentencing was required. In Hernandez v. State, 501 So. 2d 163 (Fla. 3d Dist. Ct. App. 1987), counsel failed to appeal a departure sentence although the trial court had given no reasons for departing. Both these omissions seem fairly clear-cut. Where the efforts of appellate counsel would require more originality or outright clairvoyance, ineffectiveness is less likely to be found.

37. 493 So. 2d 19 (Fla. 5th Dist. Ct. App. 1986).

38. The result in *Morris* appears to hold the movant to a stricter burden than suggested by the opinions in *Lucas v. State*, 461 So. 2d at 260, and *Brown v. State*, 480 So. 2d at 119, *see supra* note 31. However, neither *Lucas* nor *Brown* found that ineffective assistance actually had occurred, only that the movants each had made a facially valid claim. The extent of the allegations made by the movants is not readily discernible from either opinion.

39. For an example of what does *not* suffice to refute a claim for postconviction relief, see Henderson v. State, 504 So. 2d 54 (Fla. 5th Dist. Ct. App. 1987), wherein the court disapproved of the trial judge's attempt at an "end run" around allegations of ineffective counsel by stating he would have departed in any event.

lines have been concerned with the sorts of factors that may and may not be cited as grounds to depart from a presumptive guideline sentence. However, the appellate courts generally have maintained that a departure does not constitute fundamental error or an illegal sentence per se.[40] As the court stated in *Chaplin v. State*,[41] "[w]hether or not to

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40. There is some troublesome language in Justice Barkett's opinion in Williams v. State, 500 So. 2d 501, 503 (Fla. 1986), to the effect a trial court "cannot impose an illegal sentence pursuant to a plea bargain." Because *Williams* was a guideline departure case, this statement has been cited in support of the thesis that all guideline departures equate to illegal sentences. The passage in question continues, "*Similarly*, a trial court cannot make the failure to appear a proper basis for departure by simply conditioning acceptance of a guilty plea upon the defendant's agreement to accept a departure sentence if he fails to appear" (emphasis supplied). This might suggest that the court intended reference to *per se* illegal sentences only by analogy. However, Justice Barkett then reiterates that one "cannot by agreement confer on the court the authority to impose an illegal sentence. If a departure is not supported by clear and convincing reasons, the mere fact a defendant agrees to it does not make it a legal sentence."

The issue in *Williams* was whether a sentence may be enhanced because of a failure to appear. The appeal did not stem from an unsuccessful motion to correct sentence, but directly from the final judgment of guilt. The reason for departure invalidated by the Supreme Court was the sole reason cited by the trial judge; the same result had been reached previously, *e.g.*, Monti v. State, 480 So. 2d 223 (Fla. 5th Dist. Ct. App. 1985), but without the "Kafkaesque" twist of *Williams* wherein the defendant agreed to the possibility of departure in advance. The rather different question whether Williams still could have "acquiesced" in this departure by failing to appeal was not before the Supreme Court and thus was not addressed.

This author suggests the "illegal sentence" language remains, for the time being, dicta, and not binding upon courts considering the validity of departure criteria in the course of postconviction review. In fact, the significance of *Williams* may have been undercut by the court's later decision in Quarterman v. State, 13 Fla. L. Weekly 431 (Fla. July 14, 1988) (No. 70,567). Alternatively, *Williams* may be interpreted as recognizing that reasons for departure either are valid or they are not, regardless of how the parties may view them at the time of plea bargaining or sentencing. This would simply be a reaffirmation that no objection is required to preserve this sort of issue for appeal.

The Supreme Court may have given tacit approval to attacking guideline departures via rule 3.800(a) in the unusual case Shull v. Dugger, 515 So. 2d 748 (Fla. 1987), which arose as a petition for habeas corpus filed after the expiration of the presumptive sentence. The sole reason for departure in the case, petitioner's status as a habitual offender, had been rejected by the District Court of Appeal after Shull appealed an unsuccessful attempt at collateral attack. Shull v. State, 512 So. 2d 1021 (Fla. 1st Dist. Ct. App. 1987). The state originally persuaded the appellate court to certify the question whether a defendant may collaterally attack a sentence on the basis of an invalid departure criterion, but later announced its intention not to pursue further appeal and, in fact, conceded Shull's entitlement to resettlement. Nevertheless, they disputed Shull's use of habeas corpus, arguing that the trial court should develop new

depart is a matter of discretion subject only to certain requirements contained within Rule 3.701, Florida Rules of Criminal Procedure."[42] Accordingly, the greater weight of authority has held that such errors are not cognizable by 3.850 motion, but should be raised, if at all, on direct appeal from the judgment and sentence.[43] At least one of the District Courts of Appeal appears to permit defendants to question guideline departures via 3.850 motions,[44] and so this question appears

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justifications for departure. The Supreme Court held that "the better policy requires the trial court to articulate all of the reasons for departure in the original order." *Id.* at 750. The Supreme Court's decision to allow only one bite at the apple was unanimous, and affirms a position already taken by some of the intermediate appellate courts. *See, e.g.*, Wade v. State, 513 So. 2d 1358 (Fla. 2d Dist. Ct. App. 1987). Whether all members of the court would have gone beyond the narrow issue presented by Shull's case to embrace the broader implications of Justice Barkett's opinion is another question.

Upon remand for resentencing, because none of the reasons cited for departure were valid, the trial court may recalculate the scoresheet based on new convictions and impose a harsher sentence without violating the principles espoused in North Carolina v. Pearce, 395 U.S. 711 (1969). Smith v. State, 518 So. 2d 1336 (Fla. 5th Dist. Ct. App. 1987).

41. 473 So. 2d 842 (Fla. 1st Dist. Ct. App. 1985), *aff'd*, 490 So. 2d 52 (Fla. 1986).

42. 473 So. 2d at 843.

43. *See, e.g.*, Kiser v. State, 505 So. 2d 9 (Fla. 1st Dist. Ct. App. 1987); Rowe v. State, 496 So. 2d 857 (Fla. 2d Dist. Ct. App. 1986); Bailey v. State, 475 So. 2d 296 (Fla. 2d Dist. Ct. App. 1985); Wahl v. State, 460 So. 2d 579 (Fla. 2d Dist. Ct. App. 1984).

44. Watkins v. State, 498 So. 2d 576 (Fla. 3d Dist. Ct. App. 1986).

In Little v. State, 512 So. 2d 231 (Fla. 1st Dist. Ct. App. 1987) ("Little II"), the trial court rejected the defendant's attempt to challenge via rule 3.850 the reasons given for departing from his presumptive guideline sentence, but stopped short of holding that such matters should be raised on direct appeal only. The legality of Little's sentence had been affirmed on appeal, Little v. State, 474 So. 2d 331 (Fla. 1st Dist. Ct. App. 1985), *petition for review denied*, 484 So. 2d 9 (Fla. 1986), but according to Little's motion, the supreme court subsequently invalidated some of the reasons cited by the trial judge in departing from the guidelines. Despite the fact none of the major Supreme Court guideline decisions explicitly provides for retroactive application, the district court concluded that "the stated basis for the trial court's ruling is probably no longer sound." In so holding, the court cited its recent opinion in Hall v. State, 511 So. 2d 1038 (Fla. 1st Dist. Ct. App. 1987), which is discussed in greater detail in this article under Habitual Offender Sentences. Nevertheless, the appellate court declined to reverse the denial of Little's motion because the defendant did not identify the specific reasons for departure that he believed to be invalid, thus his motion was legally insufficient.

The district court appears to have overlooked a significant distinction between *Hall* and *Little II*, in that the former turns upon a question of statutory interpretation.

ripe for resolution by the Florida Supreme Court.[45]

One exception to this general rule recently has arisen. Prior to *Miller v. Florida*, when changes in the sentencing guidelines were considered procedural rather than substantive, whenever a guideline sentence was reversed the resentencing was required to comply with the guidelines in effect at that time.[46] At least one case has extended this rationale to a defendant who filed a 3.850 motion sufficient to warrant review of his sentence on grounds other than erroneous departure criteria.[47] Having determined that the error properly before the trial court via rule 3.850 should be corrected, the appellate court next determined whether the same sentence likely would have been imposed notwithstanding the error. Because the departure from the guidelines was based on a single factor, which was invalidated subsequent to the defendant's original appeal, the appellate court cautioned that the trial court could no longer simply rely on its original reasons for departure and instead directed that the defendant be resentenced within the guidelines.

The basic thrust of this decision, and its prospective application, should not be affected by the holding in *Miller*. The substantive right recognized in *Miller* concerns only the method of calculating (or recalculating) a guideline sentence. When the appellate courts attempt to decide what are and are not "clear and convincing reasons for departure" they are merely expanding their interpretation of rule language that itself has not been altered, and their pronouncements become the law from that point onward (unless overturned by a higher court). Any resentencings required by *Miller* should not be expected to reverse history and treat this body of interpretive case law as if it did not exist.

The refusal to address departure reasons *via* rule 3.850, while honestly and adequately reasoned, should prove rather nettlesome to those prisoners who basically represent the guinea pigs upon whom today's system was tested. Initially the appellate courts willingly afforded considerable discretion to trial judges who wished to depart.[48] As a result,

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As a result, the dicta in *Little II*, which undoubtedly will invite much future 3.850 litigation, may be overbroad.

45. The Second District Court of Appeal has acknowledged conflict with *Watkins* in Bailey v. State, 504 So. 2d 429 (Fla. 2d Dist. Ct. App. 1987). However, no effort was made to seek discretionary review in either of these two cases.

46. Boston v. State, 481 So. 2d 550 (Fla. 2d Dist. Ct. App. 1986).

47. Parker v. State, 506 So. 2d 86 (Fla. 2d Dist. Ct. App. 1987).

48. "The purpose of sentencing guidelines is to promote more uniformity in sentencing without impairing judicial discretion." Weems v. State, 451 So. 2d 1027 (Fla.

error, the scoring of "assault with intent to commit robbery" as a "prior Category 3 [robbery] offense." Implicit in the *Whitfield* decision is a consideration of the relative ease of determining and correcting such errors, thereby justifying a right to address them via rule 3.850.

Whitfield errors still may be raised on direct appeal from the judgment and sentence.[55] Even prior to *Whitfield* there was some suggestion that certain scoresheet errors might not be waived just because no appeal was taken. For example, in *Brosz v. State*,[56] the guidelines were erroneously applied to a capital felony, with the result a life sentence without parole in violation of the legislative intent. Though *Brosz* was a direct appeal, the court's use of the terminology "fundamental error" suggests that the court would have been equally receptive to an attempt to correct the error via rule 3.800 or 3.850.

Whitfield may provide one possible exception to the rule stated above that a guideline error, once considered on direct appeal, will not be revisited. In *State v. Viamari*[57] the court authorized inclusion of misdemeanor offenses in the guideline category 6 "multiplier", which operates as a sort of "surcharge" whenever the offender's prior record includes offenses of the same type for which he is presently being sentenced.[58] In so doing, the court declined to rely upon a contrary "comment" to rule 3.701(d)(5), which, unlike the official committee notes, was not originally adopted as part of the rule. However, that comment eventually was sanctioned by the supreme court[59] and rule 3.701(d)(15) currently limits the "multiplier" to felonies only.[60] Although changes in guideline case law generally are not regarded as retroactive,[61] this "multiplier" controversy deals purely with calculations, and an argument might be made that the supreme court, amending

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55. *See, e.g.*, Peterson v. State, 506 So. 2d 94 (Fla. 2d Dist. Ct. App. 1987). The court in *Peterson* did chide the defendant that it was not necessary for him to have appealed this particular error.

56. 466 So. 2d 256 (Fla. 5th Dist. Ct. App. 1985).

57. 462 So. 2d 1154 (Fla. 2d Dist. Ct. App. 1984).

58. FLA. R. CRIM. P. 3.988(f)(III)(B).

59. THE FLORIDA BAR: AMENDMENT TO RULES OF CRIMINAL PROCEDURE (3.701, 3.988 - Sentencing Guidelines, 468 So. 2d 220 (Fla. 1985).

60. In Bordeaux v. State, 471 So. 2d 1353 (Fla. 1st Dist. Ct. App. 1985), the court disagreed with the analysis in *Viamari* and found the comment "indicative of the Commission's original intent". 471 So. 2d at 1355. The court also noted the pending change in the rule, though it did not reverse on this basis.

61. Ardley v. State, 491 So. 2d 1259 (Fla. 1st Dist. Ct. App. 1986).

rule 3.800(a) in *Whitfield*, implicitly authorized retroactive usage of the new rule.[62]

Parker v. State,[63] discussed in greater detail in the section on habitual offender sentences, may be the first case to extend the protection of *Whitfield* to departure sentences. A different result was reached in *Rowe v. State*,[64] where the defendant's postconviction grievances included an alleged scoresheet miscalculation. In *Rowe*, the length of sentence was specifically agreed to as part of a plea bargain, a well-recognized exception to the guidelines.[65] Implicit in *Rowe* and explicit in the later decision of *Brown v. State*[66] is a requirement that a defendant sentenced in accordance with a plea bargain demonstrate that a miscalculation in his scoresheet somehow contributed to or affected the sentence eventually imposed.

In an unrelated *Brown* decision[67] the court applied *Whitfield* to a departure sentence that was not the result of a plea bargain. The court first recognized that the error complained of by Brown, if raised on direct appeal, would have required reversal unless it could be shown conclusively that the court would have imposed the same departure

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62. The inclusion of misdemeanors in the "multiplier" was successfully contested via postconviction relief in Wilson v. State, 514 So. 2d 1127 (Fla. 1st Dist. Ct. App. 1987), but there is no suggestion from the opinion that the erroneous guideline calculation was imposed prior to the adoption of rule 3.800 (d)(15).

63. 506 So. 2d 86 (Fla. 2d Dist. Ct. App. 1987).

64. 496 So. 2d 857 (Fla. 2d Dist. Ct. App. 1986).

65. *See, e.g.*, Bell v. State, 453 So. 2d 478 (Fla. 2d Dist. Ct. App. 1984).

In Quarterman v. State, 506 So. 2d 50, 52 (Fla. 2d Dist. Ct. App. 1987), the court expressed some concern whether the holding in *Bell* could be sustained in light of Williams v. State, 500 So. 2d 501 (Fla. 1986). However, the supreme court more recently cited *Bell* with approval. Holland v. State, 508 So. 2d 5 (Fla. 1987). The difference between the plea bargain in cases such as *Rowe* and that in *Williams* is rather fundamental. The former contemplates a give-and-take between the defendant and the state, whereby charges which otherwise might have skewed the maximum possible sentence may be reduced or dropped. For example, a defendant who pleads to a lesser charge of second degree murder in order to avoid the electric chair would not come into court armed with many equities should he turn around and expect further leniency based on his quick jailhouse guideline computations. In *Williams*, on the other hand, the defendant was promised no more than that to which he was presumptively entitled, a guideline sentence, in return for which he was asked, in essence, to waive a valid lawful objection. Thus, there is nothing in the *Williams* opinion to suggest the peculiar "plea bargain", even if carried through, would have afforded any additional benefit to the defendant.

66. 507 So. 2d 764 (Fla. 1st Dist. Ct. App. 1987).

67. 508 So. 2d 522 (Fla. 2d Dist. Ct. App. 1987).

sentence notwithstanding the error.[68] Then, because the error (assuming the petitioner's facts were true) was "plain," the court concluded that it fell within the ambit of *Whitfield* and could be addressed at any time via rule 3.800(a).[69] The trial court was directed to grant the relief sought by Brown, unless its files and records demonstrated that the same sentence would have been imposed in any event. This could be done by showing that the scoresheet actually was correctly calculated or that the error did not affect the presumptive guideline sentence, or by attaching other evidence that would substantiate that the original sentence should stand. The appellate court did not speculate as to how this last alternative might be accomplished.[70]

As suggested previously, though the decision in *Miller v. Florida* does not specifically provide for retroactive application, nevertheless it may unleash a floodgate of motions filed pursuant to rule 3.800(a) as amended by *State v. Whitfield*. The decision regarding which edition of the guidelines to apply to a given conviction — the crux of *Miller* — is so intertwined with the selection of the chronologically correct scoresheet form (provided by rule 3.988) as to suggest any error would constitute a "scoresheet miscalculation".[71] The court called upon to review an alleged *Miller* violation pursuant to 3.800(a) generally should be able to resolve the issue from the face of the record, which should reflect the date of the offense (from the charging instrument or the bill of particulars) and whether the offender's scoresheet comports with the appropriate version of the rule.

D. Habitual Felony Offenders

Perhaps the broadest and most extreme guideline departures have

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68. *See, e.g.*, Scott v. State, 469 So. 2d 865 (Fla. 1st Dist. Ct. App. 1985).

69. Brown's motion actually was filed pursuant to FLA. R. CRIM. P. 3.850, but the court found authority to correct the sentence under 3.800(a), even though, technically, the wrong rule was invoked. DeSantis v. State, 400 So. 2d 525 (Fla. 5th Dist. Ct. App. 1981).

70. In Orsi v. State, 515 So. 2d 268 (Fla. 2d Dist. Ct. App. 1987), the appellate court was satisfied that the departure sentence would stand despite a scoresheet error, because Orsi's twenty-year sentence for attempted sexual battery was specifically agreed to in exchange for a reduction in the charge against him.

71. So held the Second District Court of Appeal in Dupont v. State, 514 So. 2d 1159 (Fla. 2d Dist. Ct. App. 1987). In a related vein the same court, in Schneider v. State, 512 So. 2d 308 (Fla. 2d Dist. Ct. App. 1987), recently held that *no* scoresheet may be a "scoresheet error."

taken place after a defendant was first declared a habitual felony offender.[72] Prior to 1986, habitual offender status was recognized as a legitimate ground for departing from the guidelines,[73] although the continuing validity of this recidivism statute was occasionally called into question.[74] In the final analysis habitual offender sentences were predicated for the most part upon the offender's prior record, a matter already factored into the guidelines.[75] Then, in *Whitehead v. State*,[76] the supreme court found that the objectives of the habitual offender statute were adequately accommodated by the sentencing guidelines and so disapproved departures based on this criterion. Later, the court rejected an attempt by the Sentencing Guidelines Commission to amend rule 3.701(d)(11) and thereby effectively overrule *Whitehead*.[77]

To what extent *Whitehead* operates to the benefit of anyone whose sentence became final before this decision was released is unclear. Until very recently, the few published decisions addressing this precise question held that a habitual offender sentence imposed under the guidelines does not rise to the level of an illegal sentence *per se*.[78] However,

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72. FLA. STAT. § 775.084 (1985).

73. *See, e.g.*, Brady v. State, 457 So. 2d 544 (Fla. 2d Dist. Ct. App. 1984). Originally the appellate courts planned to classify habitual offender sentences as an alternative to the guidelines, but they quickly receded from that position. Thus the opinion in Gann v. State, 459 So. 2d 1175 (Fla. 5th Dist. Ct. App. 1984), is an anomaly.

74. One writer conceded the situation posed "an interesting problem" but opted to preserve the fragile harmony between the statute and the guidelines. Dominguez v. State, 461 So. 2d 277, 278 n.6 (Fla. 5th Dist. Ct. App. 1985).

75. It has long been established that a departure may not be based solely upon prior record because this has already been factored into the guideline score. Hendrix, 475 So. 2d 1218. Thus, although the appellate courts initially approved departures for habitual offenders, they declined to do so in those instances where prior record was the chief or sole basis for habitual offender classification. *See, e.g.*, Vicknair v. State, 483 So. 2d 896 (Fla. 5th Dist. Ct. App. 1986), *approved* 498 So. 2d 416 (Fla. 1986). As had been the case before the inception of the guidelines, the sufficiency of the trial court's findings justifying habitual offender enhancement remained a proper subject for appellate review. Borrell v. State, 478 So. 2d 1185 (Fla. 4th Dist. Ct. App. 1985). Additionally, the rule that a court must first be aware of the guideline range before it may consider departing was applied where the court had sentenced the defendant as a habitual offender. Rasul v. State, 465 So. 2d 535 (Fla. 2d Dist. Ct. App. 1985).

76. 498 So. 2d 863 (Fla. 1986).

77. FLORIDA RULES OF CRIMINAL PROCEDURE RE SENTENCING GUIDELINES (Rules 3.701 and 3.988), 509 So. 2d 1088 (Fla. 1987).

78. *See, e.g.*, McCuiston v. State, 507 So. 2d 1185 (Fla. 2d Dist. Ct. App. 1987). The departure, based on the habitual offender statute, was upheld on direct appeal.

this issue is presently before the supreme court, in that the First District Court of Appeal, in *Hall v. State*,[79] not only determined that a *Whitehead* violation is an illegal sentence but also certified the question as one of great public importance. The *Hall* panel based its conclusions primarily upon *Bass v. State*,[80] which dealt not with the sentencing guidelines but with the three-year mandatory sentence for firearm crimes.[81] Having previously held in *Palmer v. State*[82] that "stacking" of such mandatory sentences is improper where the offenses occurred during a single episode, the court in *Bass* held that since *Palmer* merely interpreted an existing statute and "corrected mistakes in its application,"[83] it did not change the law of sentencing in any substantive way. Prisoners whose sentences were illegal in light of *Palmer*, but whose appeals became final before *Palmer* was decided, should not be without "a mechanism to attack that sentence, simply because courts were unaware of its illegality at the time of imposition of the sentence."[84]

The *Hall* court, though confessing "some difficulty discerning the precise effect of the holding in *Bass* on the issue before us,"[85] found that in *Whitehead* the supreme court had performed an analogous construction of Florida Statutes sections 775.084 and 921.001 and so concluded that the ultimate conclusion of *Whitehead* is that "the sentencing guidelines . . . effectively superseded the habitual offender statute, so that at no time from the inception of sentencing guidelines could a valid departure sentence be based upon a defendant's adjudication as an habitual offender."[86] Though determining that Hall's sentence was illegal, thus reachable by 3.850 motion, the court expressed the hope that the supreme court, by answering questions certified in several ear-

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McCuiston v. State, 462 So. 2d 830 (Fla. 2d Dist. Ct. App. 1985). In the second appeal, from the denial of McCuiston's 3.850 motion, the court held "that the invalidation of habitual offender status as a reason for departure from the sentencing guidelines is "not such a fundamental or constitutional law change as will cast serious doubt on the veracity or integrity of an original trial proceeding" and thus that *Whitehead* cannot be applied retroactively. 507 So. 2d 1185.

79. 511 So. 2d 1038 (Fla. 1st Dist. Ct. App. 1987).
80. 12 Fla. L. Weekly 289 (Fla. June 11, 1987) (No. 68,230).
81. FLA. STAT. § 775.087. (1985).
82. 438 So. 2d 1 (Fla. 1983).
83. 12 Fla. L.Weekly at 289.
84. *Id.* At least one appellate court had previously permitted retroactive application of *Palmer*. Cisnero v. State, 458 So. 2d 377 (Fla. 2d Dist. Ct. App. 1984).
85. 511 So. 2d at 1042.
86. 511 So. 2d at 1043.

lier cases, would "provide further guidance as to the extent to which, if any, section 775.084 continues to have viability."[87]

The Fifth District Court of Appeal has opted for the same interpretation of the relationship between *Whitehead* and *Bass*.[88] The Second District, on the other hand, specifically declined to reject its prior opinion in *McCuiston* in order to avoid conflict with *Hall*.[89]

This position was reaffirmed when the supreme court, in *Winters v. State*,[90] concluded that the habitual offender statute remained viable in those instances where, due to an offender's serious prior record, the presumptive guideline sentence actually exceeded the ordinary statutory maximum. In an effort to harmonize the recommended and actual sentences, the trial court had adjudged Winters a habitual offender, and the supreme court affirmed notwithstanding any language in *Whitehead* about "repeal by implication."[91] The court of appeal, in *Rowe v. State*,[92] construed *Winters* as supportive of its own longstanding position that habitual offender sentences are not *per se* unlawful. *Rowe* now appears to be pending in the supreme court. It remains to be seen whether they will approve the restrained "one review only" approach of the district court, or whether they will conclude that the habitual offender statute was *amended* (rather than repealed) by implication when guidelines were adopted, thereby restricting its lawful application to only the most extreme recidivists.

Even more tenuous than the holding in *Hall*, in the opinion of this

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87. 511 So. 2d at 1044.

88. Frierson v. State, 511 So. 2d 1016 (Fla. 5th Dist. Ct. App. 1987).

89. Cusic v. State, 512 So. 2d 309 (Fla. 2d Dist. Ct. App. 1987).

90. 522 So. 2d 816 (Fla. 1988).

91. Noting that *Whitehead* concerned reasons for departing from a recommended sentence, rather than calculation of that sentence, two district courts had suggested at least a limited survivability of the habitual offender statute. Myers v. State, 499 So. 2d 895 (Fla. 1st Dist. Ct. App. 1986); *Winters*, 500 So. 2d at 303; Hoefert v. State, 509 So. 2d 1090 (Fla. 2d Dist. Ct. App. 1987). A similar position had been made moot in Rasul v. State, 506 So. 2d 1075 (Fla. 2d Dist. Ct. App. 1987), where the scoresheet, when certain other errors therein were corrected, no longer called for a sentence in excess of the statutory maximum. The Second District was not "faced squarely with the issue" until *Hoefert*, whereupon that court retreated from Rasul and followed the lead of *Winters*. In so doing the court emphasized the committee note to rule 3.701(d)(10) to the effect "the maximum allowable sentence is increased" by the operation of the habitual offender statute. Neither *Whitehead* nor *Hall* had specifically repudiated this language.

92. 523 So. 2d 620 (Fla. 2d Dist. Ct. App. 1987).

writer, is the First District's later opinion in *Taylor v. State*.[93] Here the defendant had, prior to *Whitehead*, been convicted by a jury of armed burglary. The state threatened to invoke the Habitual Offender act, whereupon the defendant agreed to accept a fifteen-year sentence in lieu of the recommended guideline maximum of twelve years. Even though the end result was *not* a habitual offender sentence the District Court reversed, citing the *Williams* case to the effect one cannot bargain to an "illegal sentence" and finding that "the sole inducement for appellant's agreement to the departure sentence" was the state's threat to seek an enhanced penalty[94] — a threat which, under the law in existence at the time, the state was entitled to make!

In such cases as *Cuthbert v. State*,[95] habitual offender departure sentences have been reversed because the trial court erroneously believed that a habitual offender finding enhanced the *degree* of the underlying felony, thereby affecting the guideline score. Although *Cuthbert* was a direct appeal, this would appear to be the sort of purely legal question appropriate for postconviction relief pursuant to *Whitfield*. Furthermore, in view of *Parker v. State*,[96] a motion authorized by *Whitfield* might also open the door to vacation of a habitual offender enhancement.

In *Parker*, the original guideline sentence was in the five-year range but the defendant received ten years as a habitual offender. On direct appeal, the case was remanded for a new trial on some but not all of the offenses of conviction,[97] and the state declined to retry the defendant. Because the nolle prossed felonies had been considered in both the scoresheet and the habitual offender determination, Parker moved to set aside the original sentence on the remaining charges. The court found that Parker was nonetheless eligible for habitual offender status and denied the motion. On appeal from the denial of the 3.850 motion the court reaffirmed that ordinarily postconviction proceedings may not be used to raise appellate issues, but that a computation error in a scoresheet may be raised at any time. Further, the court must have before it a correct scoresheet even when a departure sentence is im-

93. 512 So. 2d 304 (Fla. 1st Dist. Ct. App. 1987).
94. *Id.* at 305.
95. 459 So. 2d 1098 (Fla. 1st Dist. Ct. App. 1984), *petition for review denied*, 467 So. 2d 1000 (Fla. 1985).
96. 506 So. 2d 86 (Fla. 2d Dist. Ct. App. 1987).
97. Parker v. State, 471 So. 2d 1352 (Fla. 2d Dist. Ct. App. 1985).

posed.[98] Parker's scoresheet technically had been correct at the original sentencing, giving him no reason to complain at that time, but became incorrect in light of the reversal on appeal. The trial court therefore was obligated to resentence Parker. It could not make the simple determination that the same sentence would have been imposed notwithstanding the error, because the sole remaining felony conviction carried a statutory maximum sentence of five years and the only justification for a ten-year sentence was enhancement through the habitual offender statute. Because of *Whitehead* Parker's sentence had to be reduced to no more than five years regardless of whether the trial court again determined that the presumptive sentence was insufficient.

E. Factual Inaccuracies and Other Misunderstandings

The recent case of *Lomont v. State*[99] is distinguishable from the technical, purely legal question posed by *Whitfield* in that the error complained of was not readily apparent from the face of the record and so would require further evidentiary determination. In *Lomont*, the appellant claimed that his guide-line scoresheet reflected three prior felonies when, in fact he had but one felony conviction. However, Lomont failed to object to this alleged inaccuracy at the time of sentencing; had he done so, any failure to substantiate the additional convictions could have been cited on appeal.[100] Further, in his 3.850 motion Lomont did not claim that counsel knew of the inaccuracy, such that he might have rendered ineffective assistance. In sustaining the trial judge's conclusion that Lomont was required to object at the time of sentencing, the court of appeal has placed great emphasis on the Supreme Court's use of the word "calculation" in *Whitfield*. The error complained of by Lomont required more than a mere recalculation of points in accordance with applicable legal principles. When the state produces at sentencing a facially valid scoresheet and prior record calculation (usually within a presentence investigation), the defendant should have some burden to object if he disagrees with it. If he fails to do so, he may have waived any right to resurrect the matter at a later date.[101]

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98. Bass v. State, 496 So. 2d 880 (Fla. 2d Dist. Ct. App. 1986).

99. 506 So. 2d 1141 (Fla. 2d Dist. Ct. App. 1987).

100. Delaine v. State, 486 So. 2d 39 (Fla. 2d Dist. Ct. App. 1986).

101. The holding in *Lomont* should not be confused with the situation in Roberts v. State, 507 So. 2d 761 (Fla. 1st Dist. Ct. App. 1987), where the extent of the defendant's prior record (specifically, the proper classification of one prior felony conviction) as reflected in the presentence investigation was ambiguous. Because FLA. R. CRIM. P.

The holding in *Lomont* is consistent with the supreme court's opinion in *Dailey v. State*,[102] which preserved some vestige of the contemporaneous objection rule in the guideline context.[103] On the other hand, there may be instances where initially the defendant has no basis to object, but where subsequent events reveal the nature of the error. Here the *Lomont* "procedural default" argument may not always bar the defendant from seeking relief.

For example, in *Highsmith v. State*[104] the defendant complained he had received a guideline sentence without having affirmatively requested it, a common appellate issue for those prisoners whose offenses occurred prior to the effective date of the guidelines but who were sentenced afterward.[105] Highsmith actually couched his argument in the context of ineffective counsel, alleging that his attorney had never advised him of the guideline option. Because Highsmith claimed he was unaware of his nonparolable sentence until the Parole Commission rejected a hearing examiner's recommended release date, and because Highsmith may not otherwise have felt any need for an appeal,[106] one can see how this type of error could go undiscovered until well after the appeal time has expired. Accordingly, the court of appeal ruled that Highsmith had made a prima facie showing of good cause why the issue had not been raised prior to the 3.850 motion and remanded the case for further proceedings. The habitual offender case *Parker v. State*,[107] involves a similarly justifiable delay in attacking what ordinarily would constitute an appellate issue only. Factual errors that might otherwise be deemed waived also may be addressed if a case is remanded on other, properly preserved grounds.[108] Nevertheless, it is important to bear in mind that such cases are uncommon and the courts

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3.701(d)(5) requires that any uncertainty with regard to prior record should be resolved in the defendant's favor, the prior conviction should *as a matter of law* have been scored as leniently as possible and the error was appropriate for attack via post-conviction relief.

102. 488 So. 2d 532 (Fla. 1986).

103. Outside the Second District, *Lomont* has been cited with approval in Stewart v. State, 511 So. 2d 375 (Fla. 1st Dist. Ct. App. 1987). The same reasoning process followed in *Lomont* appears to have been utilized in Senior v. State, 502 So. 2d 1360 (Fla. 5th Dist. Ct. App.), *petition for review denied*, 511 So. 2d 299 (Fla. 1987).

104. 493 So. 2d 533 (Fla. 2d Dist. Ct. App. 1986).

105. *See, e.g.*, Rodriguez v. State, 458 So. 2d 899 (Fla. 2d Dist. Ct. App. 1984).

106. This sort of error ordinarily should be raised, if at all, on direct appeal. Chippas v. State, 482 So. 2d 528 (Fla. 5th Dist. Ct. App. 1986).

107. 506 S0. 2d 86 (Fla. 2d Dist. Ct. App. 1987).

108. *See, e.g.*, Johnson v. State, 506 So. 2d 1086 (Fla. 1st Dist. Ct. App. 1987).

are quick to disdain any "retrospective selection of options."[109]

In sum, there are at least some guideline errors for which an attempt at correction must be made at the time of sentencing. If a sufficient objection is lodged to these mistakes of *fact*, an unfavorable ruling may be appealed along with a panoply of mistakes of *law* that currently require no objection. Beyond the appeal state there is little that can be corrected apart from the true "technicality" or the mishap that can honestly be blamed on counsel. However, if resentencing is ordered on one ground, the proceeding occurs *de novo* and the parties may pose any lawful objection to a departure regardless whether that issue was or should have been considered at an earlier date. Aside from relaxing the contemporaneous objection rule (and a corresponding expansion in workload), the guidelines have wrought no substantial changes on appellate practice and procedure or upon the traditional restraints of the postconviction relief process. Finally, when considering any guideline-related issue, one should always bear in mind that the precise status of the law may still be in a state of flux. Though as time passes these uncertainties gradually are being ironed out, a few significant questions remain to be answered.

109. Johnson v. State, 453 So. 2d 411, 412 (Fla. 1st Dist. Ct. App. 1984).

EDITOR'S NOTE

Since the writing of the following article, the Florida Legislature enacted a law enabling a child to recover for loss of parental consortium. The statute provides that an unmarried, dependent child of either a natural or adoptive parent may recover loss of consortium damages from a person whose negligent acts caused the parent significant permanent injury. 1988 Fla. Sess. Law Serv. 88-173 (effective Oct. 1, 1988).

The new statute rejects previous case law which denied a child's cause of action for loss of parental consortium when a negligent act caused the injury, as opposed to the death, of the parent. In *Zorzos v. Rosen By and Through Rosen*, 467 So. 2d 305 (Fla. 1985) the Florida Supreme Court couched its denial of a child's loss of parental consortium damages on the reasoning that since the Legislature had expressly provided for a child's loss of consortium damages on the death of a parent, the Legislature had not intended to allow a child's action when a parent was injured. By authorizing a child's cause of action for loss of parental consortium when the parent is injured by the tortious acts of another, the Legislature has responded to the judicial presumption that the lack of an express law was indicative of the Legislative intention not to act in this area of tort law.