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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
vs.))
))
JEFFREY JEROME MILTON,)
)
 Respondent.)
_____)

CASE NO. 66,393

RESPONDENT'S BRIEF ON THE MERITS

SUMMARY OF ARGUMENT

Sentencing in this case did not occur when the defendant was originally placed on probation, since a probation order is not a sentence. Therefore, sentencing following a probation revocation is not a "resentencing". The sentencing in the instant case took place after the effective date of the sentencing guidelines, although the crime occurred prior thereto. The defendant elected the sentencing guidelines. The guidelines apply.

ARGUMENT

THE SENTENCING GUIDELINES
ARE APPLICABLE, IF AFFIRMA-
TIVELY ELECTED BY THE DEFEN-
DANT, TO PROBATION REVOCATIONS
WHERE THE SENTENCING OCCURS
AFTER OCTOBER 1, 1983, EVEN
THOUGH THE ORIGINAL ORDER
PLACING THE DEFENDANT ON
PROBATION WAS PRIOR TO THE
EFFECTIVE DATE OF THE
GUIDELINES.

The legislature specifically mandated that the sentencing guidelines are applicable if affirmatively elected by the defendant to sentences imposed after October 1, 1983, for crimes occurring prior thereto. § 921.001(4)(a), Fla.Stat. (1983). See also In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 849 (Fla. 1983).

The state, however, asserts that the defendant is not entitled to be sentenced under the guidelines since he was "sentenced" when he was originally placed on probation and is therefor not entitled to the election provided by the rule since the new proceeding is merely a "resentencing". The district courts have rejected this assertion. Milton v. State, 9 FLW 2333 (Fla. 5th DCA November 8, 1984); Rutlin v. State, 455 So.2d 1347 (Fla. 5th DCA 1984); Boyett v. State, 452 So.2d 958 (Fla. 2d DCA 1984); Duggar v. State, 446 So.2d 222 (Fla. 1st DCA 1984).

Placing the defendant on probation is not a sentence. Section 948.01(3), Florida Statutes (1983), provides that in placing a defendant on probation the court shall "withhold the imposition of sentence." Therefore, a defendant who is placed on probation has not been sentenced and is not sentenced until such time as he may violate probation and have it revoked. Boyett v. State, supra at 959; Duggar v. State, supra at 223. See also Villery v. Florida Parole and Probation Commission, 396 So.2d 1107, 1110 (Fla. 1981); and Bracey v. State, 356 So.2d 72 (Fla. 1st DCA 1978), holding that an order of probation is not a sentence.

Although Section 948.06(1), Florida Statutes (1983), provides that upon revocation of probation the court may "impose any sentence which it might have originally imposed before placing the probationer or offender on probation," this statute has been limited by the legislature in enacting the guidelines. The legislative intent was clearly expressed in Section 921.001(4)(a), providing for sentencing pursuant to the guidelines for all felonies, except capital and life felonies, where sentencing is after the effective date and the defendant has elected to be sentenced thereunder. The sentencing of persons on probation was not excluded from the ambit of the statute. Boyett, supra at 959. See also Committee Note (c) to Florida Rules of Criminal Procedure 3.701, which explicitly requires that sentences imposed in probation revocations be in accordance with the guidelines.

In rejecting the state's argument concerning Section 948.01(3), the Second District held:

There had to be a cutoff date after which the guidelines would be applied. This comprehensive legislation [§ 921.001, Fla.Stat.] which so drastically affects sentencing in Florida necessarily overrides any inconsistency which may remain in section 948.06(1). Since appellant was sentenced after October 1, 1983, he was entitled to be sentenced under the guidelines.

Boyett v. State, supra at 960.

The defendant here was sentenced after October 1, 1983. He elected to be sentenced pursuant to the guidelines. The trial court erred in refusing to utilize the guidelines in imposing the defendant's sentence.

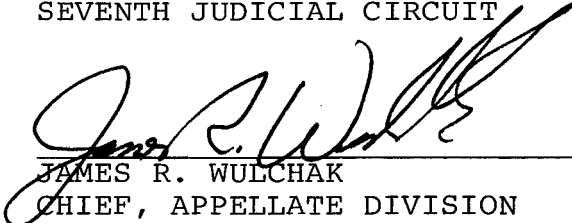
The decision of the District Court of Appeal, Fifth District, correctly vacated the sentence and remanded for sentencing in accordance with the guidelines. This Court should answer the certified question in the affirmative and affirm the decision of the district court.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the respondent requests that this Honorable Court answer the certified question in the affirmative and affirm the decision of the District Court of Appeal, Fifth District.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, FL 32014 and Mr. Jeffrey J. Milton, Inmate No. 749153, P. O. Box 699, Sneads, FL 32460 on this 19th day of February, 1985.



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