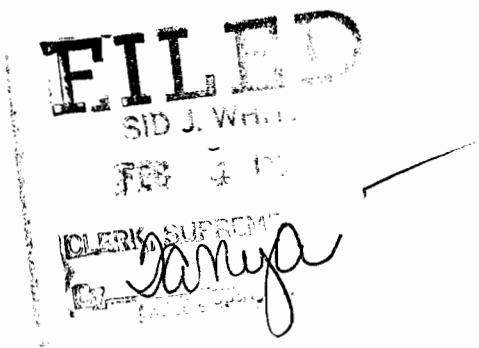
IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. JEFFREY JEROME MILTON, Respondent.	)	CASE NO. 66,393

PETITIONER'S BRIEF ON MERITS



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STATEMENT OF THE CASE AND FACTS

Jeffrey Milton, (hereinafter referred to as respondent) was charged by Information with grand theft. This offense occurred on May 28, 1981. This charge was filed on June 19, 1981 (R 1). Subsequently, the respondent entered a plea of guilty as charged to the Information on July 29, 1982 and pursuant to this plea was placed on two (2) years probation (R 3). During this period of probation, an affadavit of probation was filed on April 18, 1983 (R 4). On April 28, 1983, respondent pled not guilty to the violation of probation (R 27-30). But on August 19, 1983, respondent changed his plea to guilty to the violation of probation pursuant to a plea agreement, whereby the state would nol pros a pending robbery charge against respondent which had a lower case number of 83-349-CF-M (R 31-48).

On November 10, 1983, a sentencing hearing was conducted pursuant to the violation of probation plea on August 19, 1983 (R 49-54). At this hearing defense counsel for respondent specifically requested that the respondent be sentenced pursuant to the new guidelines (R 52). The trial court held that the sentencing guidelines would not apply since the sentence would relate back to the original sentencing date and order of probation on the substantive charge of grand theft (which was on July 29, 1982) (R 3). The trial court made a written order to that effect (R 14). Subsequently, during this hearing the trial judge adjudicated the respondent guilty of the original substantive offense of grand theft pursuant to the

order of probation revocation on November 10, 1983 (R 14-15). The trial court then sentenced respondent to five (5) years in the Department of Corrections with credit for time served but the sentence was a non-guidelines sentence (R 17).

Thereafter, respondent filed a notice of appeal on December 7, 1983. Respondent contended that the trial court erred in refusing to sentence the respondent under the sentencing guidelines following his probation revocation in his initial brief.

Subsequently, the state filed an answer brief. The state in its answer brief, argued in one of its issues, that section 948.06(1), Florida Statutes (1981), must be construed in pari materia with Florida Rule of Criminal Procedure 3.701 and section 921.001(4)(a), Florida Statutes (1983), and in so doing the trial court was correct by imposing a sentence not utilizing the guidelines. Respondent then filed a reply brief. Oral argument was held before the Fifth District Court of Appeal on October 15, 1984.

On November 8, 1984 the Fifth District issued its opinion in Milton v. State, 9 F.L.W. 2333, (Fla. 5th DCA, November 8, 1984). The opinion acknowledged the dissenting opinion of Judge Campbell in Boyett v. State, 452 So.2d 958 (Fla 2d DCA 1984). But the court held that pursuant to a line of cases in the Fifth District, as well as Duggar v. State, 446 So.2d 222 (Fla. 1st DCA 1984), that the trial court had to sentence respondent under the guidelines. Therefore, on that authority the Fifth District vacated the sentence imposed and

remanded for sentencing under the new sentencing guidelines.

Thereafter, the petitioner, the State of Florida, filed a motion for rehearing or in the alternative to certify the question to the Florida Supreme Court in accordance with the question certified to this court in Boyett, supra. Pursuant to this motion, the Fifth District did certify to this court as a question of great public importance, the following:

> Is a defendant who was placed on probation before October 1, 1983, entitled to elect to be sentenced under the sentencing guidelines after October 1, 1983, upon a revocation of his probation?

Milton v. State, 10 F.L.W. 112, (Fla. 5th DCA, January 3, 1985), on motion for rehearing.

After the question was certified by the Fifth District to this court, the petitioner filed a notice to invoke discretionary jurisdiction. This court accepted jurisdiction and petitioner's brief on the merits follows herein.

SUMMARY OF ARGUMENT

POINT I

Under section 948.06(1), Florida Statutes (1983), the trial court may impose any sentence which it might have originally imposed before placing the probationer on probation and since respondent was on probation before the guidelines were implemented the trial court's sentence was proper.

POINT II

The sentencing guidelines contemplate probation as a sentence. Therefore, respondent's sentence was imposed before the effective date of the guidelines and the guidelines would not be applicable to respondent's sentence.

POINT III

Under article X, section 9 of the Florida Constitution, the trial court must sentence respondent to the applicable statute in effect at the time of the offense. If the guidelines are deemed a more onerous sanction than the prior sentencing law, then the trial court must sentence respondent to the law in effect at the time of the offense. If the guidelines are deemed an ameliorative sentence, then under article X, section 9, the trial court still must impose a non-guideline sentence.

POINT IV

If this cause is remanded for resentencing the trial court has the discretion to sentence respondent up to the statutory maximum [five (5) years] without parole considerations.

ARGUMENT

POINT I

SECTION 948.06(1) FLORIDA STATUTES (1983), MUST BE CONSTRUED IN PARI MATERIA WITH FLORIDA RULE OF CRIMINAL PROCEDURE 3.701 AND SECTION 921.001(4)(a), FLORIDA STATUTES (1983), AND IN SO DOING THE TRIAL COURT WAS CORRECT BY IMPOSING A NON-GUIDELINE SENTENCE.

Section 948.06(1), Florida Statutes (1983), in the pertinent part contains the following language:

> If probation is revoked, the court shall adjudge the probationer guilty of the offense charged and . . . impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control . . . If such charge is not at that time admitted by the probationer . . . the court . . . shall give the probationer . . . an opportunity to be fully heard . . .
>
> A. After such hearing the court may revoke . . . the probation . . .
>
> If such probation . . . is revoked, the court shall adjudge the probationer . . . guilty of the offense charged . . . and impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control.

The language of this statute was reflected in respondent's original probation order (R 3).

In Boyett v. State, 452 So.2d 958 (Fla. 2d DCA 1984), (Campbell, J., concurring in part; dissenting in part), held contrary to petitioner's position. But the court certified the

question based upon Judge Campbell's dissent. The dissent explained the language of the above quoted statute in the following manner:

> When appellant was placed on probation, sentencing guidelines were not in effect. The trial judge placed appellant on probation as an alternative to other punishment available to the trial judge at that time.

(Emphasis supplied.) Id. at 961. Respondent, in the case at bar, is in the same posture as the appellant was in Boyett.

The case law is also in accord with the statute in that the sentence should be imposed for a probation violation based upon what the offender would have got back at the time that he was placed on probation originally. See, McNeely v. State, 186 So.2d 520 (Fla. 2d DCA 1966), (holding that a defendant can be sentenced for a violation of probation as he might have been sentenced at the time the suspended sentence was promulgated) and Crossin v. State, 244 So.2d 142 (Fla. 4th DCA 1971), (holding that under the terms of section 948.06(1), Florida Statutes (1961), a trial court has authority after adjudicating a probationer guilty of the offense to "impose any sentence which it might have originally imposed before placing the probationer on probation."). See also, Ruiter v. State, 205 So.2d 556 (Fla. 2d DCA 1967) and Wilson v. State, 194 So.2d 33 (Fla 2d DCA 1967), which had similar facts and holdings as the McNeely and Crossin opinions. In Russ v. State, 313 So.2d 758 (Fla. 1975), the defendant was adjudged guilty and sentenced for a violaiton of probation even though he was aquitted of a criminal offense,

which comprised the allegations for the violation of probation. The defendant argued that collateral estoppel pr cluded the state from "retrying" him on the probation violation because he had been acquited on the substantive offense. This court, in rejecting Russ' claim held:

> This is not a second prosecution for the same offense after an aquittal. If it were, a second and separate punishment could be imposed in addition to punishment for the offense previously established for which the petitioner is on probation. A revocation proceeding concerns conduct which violates the terms of probation for an already established criminal offense.

Id. at 760. Since respondent was placed on probation on July 29, 1982, (R 3), he cannot now claim that the new sentencing guidelines promulgated pursuant to section 921.001, Florida Statutes (1983), repeal by implication the dictates of section 948.06(1), Florida Statutes (1983).

Section 948.06(1), must be construed in pari materia with the new sentencing guideline statute and rule. In Curry v. Lehman, 47 So. 18, 55 Fla. 847 (Fla. 1908), this court held that a trial court, in construing a statute, must if possible, avoid such a construction as will place the statute in conflict with another statute. A reasonable field of operation which preserves the force and effect of each possibly conflicting statute must be found so that the statutes will be harmonized. This statutory construction rule was promulgated in Palmquist v. Johnson, 41 So.2d 313 (Fla. 1949). No language in section 921.001 or Florida Rule of Criminal Procedure 3.701 remotely

repeals the dictates of section 948.06(1) by implication.[1]

In Dotty v. State, 197 So.2d 315 (Fla. 4th DCA 1967), the appellate court held that a construction contrary to the strict letter of the statute could be applied when construction based on strict-letter-law would lead to an unintended result and defeat the evident purpose of the legislature. Petitioner submits that the construction recorded to these applicable statutes in Milton v. State, 9 F.L.W. 2333, (Fla. 5th DCA, Nov. 8, 1984), would defeat the evident purpose of the legislation. Under Florida Rule of Criminal Procedure 3.701(b)(2) the primary purpose of the sentencing guidelines is "to punish the offender." Judge Campbell, in his dissent in Boyett expressed the point succinctly as follows:

> A trial judge should not be forced to alternatives that limit him after violation of probation to methods of punishment more restrictive than existed when he afforded the defendant the alternative of probation.

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[1]This argument does not preclude an appellate court from construing the sentencing guidelines to be applicable to situations where a defendant is to be sentenced after October 1, 1983 for a substantive crime committed prior to that date or that the guidelines cannot be construed to apply to a violation of probation revocation which is entered after October 1, 1983. See, In re Rules of Criminal Procedure, 439 So.2d 848 (Fla. 1983), which held that a defendant could elect to be sentenced under the guidelines for sentences imposed after October 1, 1983 for applicable crimes occurring prior thereto (emphasis supplied.) . . . Both statutes can operate without implying any conflict and neither statute pre-empts the field from the operation of the other. But during the latest period, section 948.06 is still in full force and effect and should not be ignored.

Id. at 961. By sentencing respondent within the guidelines, yet claiming that this guideline sentence must revert back to the time of the original order of probation of July 29, 1982 (R 3), respondent ignores the conduct entailing the violation itself. Ignoring the conduct that led to the violation of probation revocation would not be consistent with the primary purpose of the sentencing guidelines.

The latter argument is reinforced by the language of section 921.005(1)(a)2, Florida Statutes (1983), which states in the pertinent part:

> The court shall use the following criteria for sentencing all persons who committed crimes before October 1, 1983:
>
> (1)(a) A court shall not impose a sentence of imprisonment unless . . . the court finds that imprisonment is necessary for the protection of the public because:
>
> (2) there is a probability that during the period of a suspended sentence or probation the defendant will committ another crime.

The above quoted statute mandates that a trial court sentence all persons who committed a crime before October 1, 1983 using the criteria quoted above. The mandates of this statute would be consistent with the requirements of section 948.06(1) and consistent with the premise that an offense committed before October 1, 1983 should not be imposed pursuant to the guidelines. The trial court should have the discretion to sentence the offender to any sentence "which it might have imposed before placing the probationer on probation." § 948.06(1). As explained in

Judge Campbell's dissent in Boyett, at 961, Duggar v. State, 446 So.2d 222 (Fla. 1st DCA 1984), does not address this issue regarding the language in section 948.06(1).

POINT II

UNDER THE SENTENCING GUIDELINES, RESPONDENT WAS ALREADY SENTENCED WHEN HE WAS ORIGINALLY PLACED ON PROBATION BEFORE OCTOBER 1, 1983 AND HENCE SENTENCING GUIDELINES WOULD NOT BE APPLICABLE FOR THE NEW SENTENCE.

Duggar acknowledged that probation was not a sentence pursuant to section 948.01(3), Florida Statutes (1983). Again, Judge Campbell in his dissent in Boyett, questioned this rationale as evidenced by the following quote:

> However, as a result of "sentencing guidelines," probation will often be imposed and thus, under the guidelines, equate to a "sentence." Rule 3.701b seems to contemplate that all dispositions under the guidelines in fact equate to a "sentence" when it refers to the "sentence decision-making process." The concept of probation as a "sentence" under the guidelines is further supported by the contrast of "incarcerative sanctions" referred to in rule 3.701b7. Further, Florida Rule of Criminal Procedure 3.701(sic) makes reference to "sentences other than probation."

Id. at 961.

In further support of this argument, petitioner notes the language of the third committee note to Florida Rule of Criminal Procedure 3.701(c), which is a follows:

> If a defendant is to be sentenced for a probation violation, and the sentencing judge elects to revoke probation, the new sentence must be in accordance with the guidelines.

In reading Florida Rule of Criminal Procedure 3.701(d)(8) along

with its committee note and comment, it is apparent that the guidelines contemplate a term of probation as a "sentence." No distinction has been made in Florida Rule of Criminal Procedure 3.988(a)-(i) as to probation and imprisonment. Rather probation falls under the grid entitled "any non-state prison sanction." Thus for purposes of the guidelines, respondent had been sentenced prior to October 1, 1983 when he was first placed on probation. Therefore, since the "sentence" has all ready been imposed before October 1, 1983, the mandate of section 921.001(4)(a) is not applicable.

POINT III

UNDER ARTICLE X, SECTION 9 OF THE FLORIDA CONSTITUTION, RESPONDENT IS NOT ENTITLED TO RECEIVE THE BENEFIT OF AN AMELIORATIVE SENTENCE BASED UPON A SUBSEQUENT AMENDMENT OF A CRIMINAL STATUTE.

Under article X, section 9 of the Florida Constitution, it states:

> Repeal or amendment of a criminal cannot affect prosecution or punishment for any crime previously committed.

Castle v. State, 337 So.2d 10 (Fla. 1976), held that a subsequent amendment of a criminal statute [which declared that the maximum punishment would be only five (5) years incarceration, instead of ten (10)] would not inure to the benefit of the defendant because at the time of the offense the maximum punishment was ten (10) years. Based upon article X, section 9, this court held that the ten (10) year sentence imposed upon Mr. Castle was lawful.

In the case at bar, respondent will not be entitled to any ameliorative benefit of the sentencing guidelines, inasmuch as he has committed the offense (as well as the violation of probation) on a date prior to the guidelines being implemented.[2]

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[2] Under Dobbert v. Florida, 432 U.S. 282, 292-293, 97 S.Ct. 2290, 2298-2299, 53 L.Ed.2d 344 (1977) and Paschal v. Wainwright, 738 F.2d 1173 11th Cir. (1984) a law cannot be declared an ex post facto law (unless, examining the entire statute by itself as opposed to the circumstances of the individual offender) it provides a more onerous penalty. Before the guidelines were enacted, respondent could receive a maximum of five (5) years

imprisonment but also had to be considered for parole. Under the guideline system, respondent can likewise receive a maximum sentence of five (5) years, but can only obtain gain time. It may very well be that the guideline sentence is a more "onerous" penalty. That is not an issue in the case at bar, since respondent at the sentencing hearing below, as well as on appeal, seeks to "elect" the sentencing guidelines.

POINT IV

IF THE SENTENCE IS REMANDED TO THE TRIAL COURT, TO HAVE A SENTENCE IMPOSED UNDER THE SENTENCING GUIDELINES, THE TRIAL COURT STILL MAY IMPOSE THE SAME TERM OF IMPRISONMENT BUT WITHOUT THE POSSIBILITY OF PAROLE.

Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984), held that a violation of probation could be the basis to depart from a guideline range sentence pursuant to Florida Rule of Criminal Procedure 3.701(d)(11). Respondent pled guilty to the violation of probation predicated upon a new criminal offense, i.e., a robbery (R 4, 13). Not only does this violation of probation constitute an escalating pattern of criminal behavior (inasmuch as the first offense for which the respondent was placed on probation was grand theft of the second degree), it also demonstrates that respondent is a poor candidate for probation. Therefore, under section 921.005(1)(a)2, Florida Statutes (1983), and Carter, supra, the trial court could impose a maximum sentence of five (5) years imprisonment under the guidelines if this cause is remanded for resentencing.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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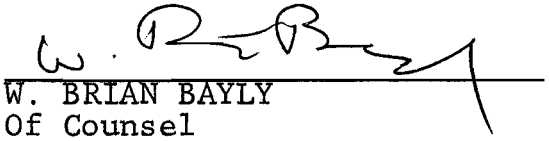
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief on the Merits has been furnished, by mail, to Mr. James R. Wulchak, Assistant Public Defender for respondent at 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 31st day of January, 1985.



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