

IN THE SUPREME COURT OF FLORIDA

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THE STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 ELLIS C. FLETCHER,)
)
 Respondent.)
 _____)

CASE NO. 67,275

RESPONDENT'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

TATJANA OSTAPOFF
Assistant Public Defender

Counsel for Respondent.

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PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the lower courts. In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"PB"	Petitioner's Brief on the Merits

STATEMENT OF THE CASE AND FACTS

Respondent agrees with the recitation of the case and facts set forth in petitioner's brief on the merits.

SUMMARY OF ARGUMENT

The sentencing guidelines in effect on the date the offense was committed should be used to calculate the presumptive guideline sentence. The sentencing guidelines are substantive, not procedural, law. An amendment to the sentencing guidelines is likewise a matter of substantive law and not merely procedural law. In Weaver v. Graham, 450 U.S. 24 (1981), the United States Supreme Court set forth a twofold test to assess an ex post facto violation. Respondent maintains that retrospective application of the amended guidelines in these circumstances results in a violation of the ex post facto clauses and of Article X, Section 9 of the Florida Constitution (1968), Florida law and public policy.

The case cited by Petitioner, State v. Jackson, 10 F.L.W. 564 (Fla. October 17, 1985), is distinguishable from the situation at bar. The Jackson decision indicates that it should be limited solely to its facts.

ARGUMENT

RESPONDENT, WHOSE OFFENSES WERE COMMITTED PRIOR TO JULY 1, 1984, BUT WHO WAS SENTENCED AFTER THAT DATE, WAS IMPROPERLY SENTENCED UNDER THE AMENDED SENTENCING GUIDELINES.

The offenses for which Respondent was sentenced were committed on May 19 and June 6, 1984. Respondent was sentenced pursuant to the Rule 3.701 sentencing guidelines on October 10, 1984. The question raised by this case, then, is whether the original guidelines or amended guidelines apply to crimes committed before the effective date of the amended guidelines. Respondent contends that the Fourth District Court of Appeal was correct in holding that the trial court erred in sentencing Respondent under the amended sentencing guidelines.

Petitioner contends in its brief that the issue whether the amended guidelines apply to all sentencings under the Rule 3.701 sentencing guidelines has been answered contrary to the Fourth District Court of Appeal's holding below by this Court's decision in State v. Jackson, ___ So.2d ___, 10 FLW 564 (Fla. op. filed October 17, 1985). Petitioner maintains that on the authority of "Jackson, the court below erred in considering the October 2, 1984, sentencing of the Defendant to which the amended guidelines were applied, to have violated ex post facto principles." (PB p.6). However, Jackson is distinguishable from the case at bar. In Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984), the defendant was placed on probation prior to the effective date of the sentencing guidelines. His probation was revoked subsequent to the effective date of the guidelines. At the time of sentenc-

ing, the defendant affirmatively selected to be sentenced under the sentencing guidelines pursuant to §921.001(4)(a), Fla. Stat. (1984). The trial judge denied the defendant's request.

On these facts, this Court addressed the issue, inter alia, of which sentencing guidelines are to be used sentence the defendant:

Citing the Fifth District Court of Appeal decision in *Carter v. State*, 452 So.2d 953 (Fla.5th DCA 1984), for the proposition that an amendment to the guidelines cannot be applied retroactively, the district court concluded that Jackson was entitled to be sentenced under the guidelines in effect at the time the sentence was imposed. The state argues that the district court erred in so holding and contends that the current guidelines must be used in the resentencing process.

We agree with the state that the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense. We conclude that a modification in the sentencing guidelines procedure, which changes how a probation violation should be counted in determining a presumptive sentence, is merely a procedural change, not requiring the application of the ex post facto doctrine. In *Dobbert v. Florida*, 432 U.S. 282 (1977), the United States Supreme Court upheld the imposition of a death sentence under a procedure adopted after the defendant committed the crime, reasoning that the procedure by which the penalty was being implemented, not the penalty itself, was changed. We reject Jackson's contention that *Weaver v. Graham*, 450 U.S. 24 (1981), should control in these circumstances.

Id., at 564 [Emphasis added].

But factually, Jackson is really an "affirmative selection" case. The defendant in an "affirmative selection" case has the ultimate authority to accept or reject the sentencing guidelines.

If a defendant "affirmatively selects" the sentencing guidelines prior to the July 1, 1984, amendments, he would receive the original guidelines. Likewise if a defendant "affirmatively selects" the sentencing guidelines subsequent to the July 1, 1984, amendments he would receive the amended guidelines. Since the defendant has ultimate authority to accept or reject the sentencing guidelines because his crime was committed before October 1, 1983, there would be no ex post facto violation in imposition of the guidelines in effect on the date of the "affirmative selection" to him. In Cone v. State, 469 So.2d 945 (Fla. 5th DCA 1985), the district court held that application of the amended sentencing guidelines which were not in effect in any form at time of offense, did not violate the ex post facto doctrine, where defendant elected sentencing guidelines. See also, Hanabury v. State, 459 So.2d 1113, 1114 (Fla. 4th DCA 1985), where Judge Barkett, now Justice Barkett, writing for the majority held that the defendant "elected to be sentenced under the guidelines as they were on October 19, 1983. He should be entitled to rely on them as they were when he made the election." Hence as an "affirmative selection" case, no ex post facto violation occurred in the Jackson case. Respondent respectfully submits that the Jackson decision could have been decided solely on the basis that it was an "affirmative selection case."

At bar, to the contrary, Respondent was charged with a substantive criminal offense. A probation revocation was not involved. In Jackson, the probationer had the right granted by legislation under §921.001(4)(a), Fla. Stat. (1984), to "affirma-

tively select" the sentencing guidelines. Respondent who was charged with an offense committed after the effective date of the sentencing guidelines (October 1, 1983) had no such right. The Rule 3.701 sentencing guidelines were mandatory as to Respondent's sentence. Consequently, more detailed examination of the ex post facto problem raised by these facts is necessary.

A. Ex Post Facto Clause

Article I, §10, of the United States Constitution prohibits a state from passing any "ex post facto law." In Beazell v. Ohio, 269 U.S. 167, 169-170, 46 So.2d 68 (1925), the Court summarized the characteristics of an ex post facto law:

"It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."

Article I, §10, Florida Constitution (1968), provides that no ex post facto law shall be passed. An ex post facto law is "one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which in relation to the offense or its consequences alters the situation of a party to his disadvantage." Higginbotham v. State, 88 Fla. 26, 101 So. 233, 235 (Fla. 1924); Wilensky v. Fields, 267 So.2d 1 (Fla. 1972).

In Lindsey v. Washington, 301 U.S. 377, 57 S.Ct. 797 (1937), the defendant claimed that a change in the state law respecting the sentence to be imposed upon one convicted of grand theft

violated the ex post facto clause. At the time the defendant committed the theft, the law provided for a maximum sentence of fifteen (15) years, and a minimum sentence of not less than six (6) months. At the time the defendant was sentenced, the law had been changed to provide for a mandatory fifteen year sentence. Even though under the new statute a convict could be admitted to parole at a time far short of the expiration of his mandatory sentence, the Court observed that even on parole he would remain "subject to the surveillance" of the parole board and that his parole itself was subject to revocation. The Court held:

"The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or cancelled at the will of the governor. It is true that petitioners might have been sentenced to fifteen years under the old statute. But the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer.

Id., at 3 [Emphasis added].

The United States Supreme Court has also held that no ex post facto violation occurs if the change effected is merely procedural and does "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." Hopt v. Utah, 110 U.S. 574, 590 (1884); see, Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290 (1977). In

Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960 (1981), a prisoner requested habeas corpus relief claiming that a statute which altered the method of prisoner gain-time computation and which was enacted subsequent to the crime for which the prisoner was incarceration affected him detrimentally and was therefore an ex post facto law. The United States Supreme Court held that the statute was violative of the constitutional prohibition against ex post facto laws. The Court also noted:

The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Id., at 31-32.

That the sentencing guidelines are substantive law rather than a mere matter of procedure is demonstrated by the Legislature's own pronouncements. The power to prescribe the penalty to be imposed for commission of a crime rests with the legislature, after all, not with the courts. See Dorminez v. State, 314 So.2d 134, 136 (Fla. 1975). "It is well settled that the Legislature has the power to define crimes and to set punishments." Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984). The Legislature created the sentencing commission which is responsible for the initial development of a statewide system of sentencing guidelines.

Section 921.001, Fla. Stat. (1984). The Legislature in creating the Sentencing Commission declared: "The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature." Section 921.001(1), Fla. Stat. (1984). Thus, although the Sentencing Commission was mandated to present annual recommendations for changes in the sentencing guidelines, Section 921.001(4)(b), Fla. Stat. (1984), and this Court was authorized by the Legislature to revise the sentencing guidelines, the Legislature pursuant to Rule 921.001(4)(b) expressly reserved the right to approve said revisions as follows: "However such revision shall become effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised." [Emphasis added].

Clearly, the sentencing guidelines are not merely rules of this Court: they are substantive not procedural. The sentencing guidelines have the same force and effect as if they had been statutorily enacted. And any amendments to the sentencing guidelines likewise have the same force and effect as if they had been statutorily enacted. See §921.001(4)(b), Fla. Stat. (1984).

The sentencing guidelines also meet the test set forth in Weaver v. Graham, supra, to assess an ex post facto violation: (1) does the law attach legal consequences to crimes committed before the law took effect, and (2) does the law affect the prisoners who committed those crimes in a disadvantageous

fashion? If the answer to both questions is yes, then the law constitutes an ex post facto law and is void as applied to those persons.

Under the situation at bar, both prongs of the Weaver test are met. First, retrospective application of the amended sentencing guidelines would result in it being applied to persons who committed offenses prior to its effective date. Second, these consequences have a disadvantageous effect in that the prisoner's sentences are enhanced. Just as the statutory changes in gain-time in Weaver v. Graham altered the "quantum of punishment", 450 U.S. at 33, so too at bar changes in the sentencing guidelines which result in a lengthier presumptive sentence alter the "quantum of punishment".

Rule 3.701 sentencing guidelines provide that the sentence scored under the guidelines is presumptive. Rule 3.701(b)(6). Any departure from the presumptive guideline sentence range should be avoided. Rule 3.701(d)(11). To warrant an aggravating or mitigating sentence there must be clear and convincing reasons for departure stated in writing, Rule 3.701(d)(11). As this Court held in Hendrix v. State, 475 So.2d 1218, 1220 (Fla. 1985), although the sentencing guidelines do not eliminate judicial discretion in sentencing, "it does seek to discourage departures from the guidelines." Under the guidelines, an offender will receive a sentence within a certain range based on the guidelines. Departure from that range requires clear and convincing reasons. The offender has the right to have those clear and convincing reasons stated in writing. Thus, the average offender

who commits a crime under circumstances where no clear and convincing reasons exist for departure will be sentenced within the range provided for by the sentencing guidelines.

The trial judge cannot under Rule 3.7019d)(11) arbitrarily deviate from the presumptive guidelines sentence. The requirement of written clear and convincing reasons for departure raises the right to be sentenced within the presumptive guideline range to the level of a substantive right. This right is enforceable on appeal. See §921.001(5) ("The failure of a trial court to impose sentence within the sentencing guidelines shall be subject to appellate review pursuant to Chapter 924"). A defendant's substantive right to appeal a departure would be violated if a trial court could depart from a defendant's presumptive guidelines sentence through retrospective application of more onerous guidelines than those in effect when he committed the crimes.

Therefore, a substantive right to receive a sentence within the guideline range exists. Any alteration in the guidelines which mandates a lengthier sentence, without requiring written reasons for departure, alters a substantive right. The instant case is thus distinguishable from these situations where mere "procedure" is involved, it is, rather, like the Allen v. State, 383 So.2d 674 (Fla. 5th DCA 1980), Youthful Offender Act (§958.011 et.seq. Fla. Stat. [1978]), which

is not, as suggested by appellant, merely procedural so as to give it immediate effect, and reliance on cases such as Collins v. Wainwright, 311 So.2d 787 (Fla.4th DCA 1975) [presentence investigation report] or Johnson v. State, 371 So.2d 556 (Fla.2d DCA 1979) [sentencing juvenile as adult pursuant to §39.111(b), F.S.] is misplaced. In those situations the statutory directives prescribed

a procedure to be followed prior to or at sentencing, but did not affect the ultimate punishment.

Id., at 675-676 [Emphasis added].

The revisions in the presumptive guideline sentence also result in a greater sentence or punishment, and thus operate to "alter the situation of a party to his disadvantage."

The First, Second, Fourth and Fifth District Courts of Appeal were in agreement that application of the amended sentencing guidelines which increased the presumptive guideline sentence for a defendant violated the ex post facto clause. In Miller v. State, 468 So.2d 1018 (Fla. 4th DCA 1985), the Fourth District therein vacated Respondent's sentence because the sentencing judge utilized the amended sentencing guidelines in scoring Respondent's presumptive guideline sentence. The lower court held:

A rule change that has a disadvantageous effect on an offender does not apply to crimes committed before the effective date of the rule change. See Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); State v. Williams, 397 So.2d 663, 665 (Fla. 1981); Carter v. State, 452 So.2d 953 (Fla.5th DCA 1984); Arnold v. State, 429 So.2d 819 (Fla.2d DCA 1983).

We remand for resentencing in accordance with the sentencing guidelines in effect at the time the offense was committed.

Id., at 1018.

In Moore v. State, 469 So.2d 947 (Fla. 5th DCA 1985), the defendant committed the offense of lewd assault in April, 1984. He pled guilty in June and was sentenced in September, 1984. Under the original guidelines in effect on the date of the

offense, the defendant's recommended sentence would have been any nonstate prison sanction. The recommended sentence under the amended guidelines was thirty months to three and one-half years incarceration. The trial judge imposed a three and one-half year sentence upon the defendant without any indication of a departure. The Fifth District quashed the defendant's sentence holding:

Inasmuch as the amended guidelines increased the punishment so as to alter Moore's situation to his disadvantage in relation to the date he committed the offense, their application in this case violates the *ex post facto* clause. U.S. CONST., art. I, §10, Fla.Const.; *Wilensky v. Fields*, 267 So.2d 1 (Fla. 1972); *Miller v. State*, 468 So.2d 1018 (Fla.4th DCA 1985); *Brown v. State*, 460 So.2d 427 (Fla.5th DCA 1984); *Carter v. State*, 452 So.2d 953, n.3 at 954 (Fla.5th DCA 1984). Even though we affirm the balance of this appeal, the sentence received exceeds the presumptive range for a "non-departing" sentence under the guidelines in effect at the time of the offense.

Id., at 948.

The First District and Second District have held that the amendments to the sentencing guidelines cannot be applied retroactively to a defendant who committed a crime prior to the effective date of the amendment. See *Walker v. State*, 458 So.2d 396 (Fla. 1st DCA 1984); *Hopper v. State*, 465 So.2d 1269 (Fla. 2d DCA 1985). Hence the First, Second, Fourth and Fifth District Courts of Appeal were in agreement that application of the amended sentencing guidelines which increased recommended sentence for a defendant violated the *ex post facto* clause.

The State of Minnesota has adopted a statewide system of sentencing guidelines similar to the sentencing guidelines implemented in Florida. This Honorable Court has cited to Minnesota's sentencing guideline decision with approval. See Hendrix v. State, supra. In State v. Willis, 364 NW 498 (Minn. CT.App.1985), the defendant was convicted of aggravated robbery and burglary. On appeal, the defendant, inter alia, challenged a three month additional sentence imposed on his guideline sentence. The Court held:

Appellant's concurrent 124 month sentences included the 97 month presumptive sentence, a 24 month upward durational departure, and a three-month additional sentence pursuant to Minnesota Sentencing Guidelines II.B.2.b for offenders with a criminal history score of six or more when a custodial status point is assigned.

1. Appellant is correct that the three-month additional sentence was improper because Minnesota Sentencing Guidelines II.B.2.b was effective for offenses committed on or after November 1, 1983, not for sentences after that date.

Id., at 500.

Consequently, reasoned analysis of the implimentation and operation of the sentencing guidelines in Florida leads to the inescapable conclusion that retroactive application of the amended guidelines in these circumstances results in an ex post facto violation.

Should this Honorable Court nevertheless rule that the retroactive application of the sentencing guidelines in these circumstances does not violate the ex post facto clause, Respon-

dent contends that alternative grounds support the lower court's decision. See generally, Stuart v. State, 360 So.2d 406 (Fla. 1978) (Ruling of trial court can be affirmed on other grounds).

B. Article X, Section 9, Florida Constitution

Article X, §9, of the Florida Constitution (1968), provides:

Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed prior to its enactment.

It is clear under Florida law that the statute in effect at the time an offense is committed controls the maximum penalty at sentencing. Castle v. State, 330 So.2d 10 (Fla. 1976); Ellis v. State, 298 So.2d 527 (Fla. 2d DCA 1984); State v. Pizarro, 383 So.2d 762 (Fla. 4th DCA 1980). The amendment to the sentencing guidelines is not as suggested by Petitioner merely procedural so as to give its immediate effects. The amendments to the sentencing guidelines are substantive. It clearly affects the ultimate punishment in the context of presumptive sentences mandated by the sentencing guidelines. (See Argument, supra).

At bar, Respondent committed the crimes in May and June, 1984, a date within the period covered by the original guidelines. The application of the amended guidelines to the case at bar violates the state constitutional protection embodied in Article X, §9 . Accordingly, the Fourth District Court of Appeal was correct in reversing the trial court's decision to apply the amended guidelines in these circumstances.

C. Rules of Procedure

Florida rules of court pertaining to criminal procedure have only prospective effect, absent an express statement to the contrary. Arnold v. State, 429 So.2d 819 (Fla. 2d DCA 1983). Further, where the application of amendments to a rule of civil procedure to pending cases would result in deprivation of substantial rights previously acquired by litigants, such amendments, promulgated by supreme court order to be effective on a specified date, apply only to cases commenced on or after such date. 13 Fla.Jur.2d, Courts and Judges §176.

In State v. Green, 473 So.2d 823 (Fla. 2d DCA 1985), the Second District ruled that the recent amendments to the speedy trial rule must be applied prospectively. The Court held:

Florida rules of court have prospective effect only, absent an express statement to the contrary. Poyntz v. Reynolds, 37 Fla.533, 19 So.649 (1896); Arnold v. State, 429 So.2d 819 (Fla.2d DCA 1983); Jackson v. Green, 402 So.2d 553 (Fla.1st DCA 1981).

The event which began the running of speedy trial time was the taking of defendant into custody on June 25, 1984. Arnold; Jackson. Since this event occurred before the effective date of the 1985 amendments, new rule 3.191 (i)(4) does not apply. Consequently, the trial judge properly applied the former rule 3.191 in granting defendant's motion for discharge after the speedy trial time had run.

Id., at 824.

Hence the amendments to Rule 3.701 have only a prospective effect and can not be applied to crimes committed before the effective date of the amendments. Hence the Fourth District's ruling at bar can be affirmed on this basis.

D. Public Policy

Finally in the event this Honorable Court declines to hold that the Constitution and/or Florida law does not compel sentencing a defendant to the guidelines in effect when the crime was committed, Respondent submits that this Honorable Court should as a matter of public policy hold that the guidelines in effect when the crime was committed should control. The express purpose of the "sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the decision-making process." Rule 3.701(b). By mandating that the guidelines in effect when the crime was committed control guideline scoring, this goal of uniformity in calculation, administration and application of the guidelines will be maintained.

If the sentencing date controls guideline scoring, the sentencing procedure will be open to unfairness, capriciousness, manipulation and fraud. A defendant who commits a crime and pleads guilty will be subject to one set of guidelines. A co-defendant or another defendant who commits the same offense but delays in entering the plea can be subjected to another set of guidelines. A co-defendant or another defendant who commits the crime on the same date and goes to trial can be subjected to another set of guidelines because of the delay in reaching the sentencing date necessitated by the trial. If a defendant "affirmatively selects" the guidelines before a change in the guidelines which guidelines apply at sentencing or resentencing. Can defendants who committed their crime prior to the guidelines line up the day before the effective date a disadvantageous

amendment change to the guidelines and "affirmatively select" the guideline thereby prohibiting imposition of the disadvantageous amended guideline thereafter at a later sentencing date? If a defendant fails to appear at a sentencing hearing because of a valid medical reason, can the trial judge sentence the defendant under amendment guidelines that go in effect on the date of the subsequent postponed sentencing hearing? Did this defendant lose his right to the original guidelines because of the illness?

It is clear that the sentencing date can be inadvertently or intentionally delayed, postponed or accelerated to reach some desired result in the trial court. The sentencing date is too capricious or elastic a concept to gauge a uniform statewide system of sentencing guidelines. If a revision or amendment is proposed and approved by the legislature pursuant to Section 921.001(4)(b) this will surely set in motion a wave of accelerations or postponements by the parties. By gauging the calculation of the guideline scoresheet from the date an offense was committed, the unfairness, capriciousness and manipulation inherent in calculating the guidelines from the sentencing date will be eliminated.


Calculating the guideline from date of offense brings the necessary uniformity and certainty to an already turbulent procedure. The goal of uniformity and fairness will be assured. Therefore on the grounds stated herein, this Honorable Court should approve the holding of the Fourth District Court of Appeal that the guidelines in effect on the date of a offense should control.

CONCLUSION

On the grounds stated herein, the decision of the Fourth District Court of Appeal should be affirmed.

Respectfully submitted,

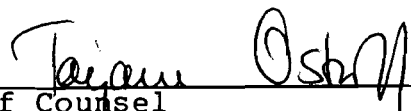
RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, FL 33401
(305) 837-2150



TATJANA OSTAPOFF
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, Room 704 Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, FL 33401, this 17 th day of December, 1985.



Of Counsel