

FILED

SID J. WHITE

JUN 27 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

ELLIS C. FLETCHER,

Respondent.

CASE NO. 67 275

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial Court. The Respondent was the Appellant and the defendant, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Petitioner's appendix, which is a conformed copy of the Appellate Court's opinion.

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On appeal, the Fourth District Court of Appeal vacated Respondent's sentence, and remanded the case for re-sentencing in accordance with the sentencing guidelines in effect at the time Respondent committed the offense which lead to the sentence at issue (A1).

Petitioner's timely motion for rehearing and for certification of conflict was denied by the Fourth District Court of Appeal (A2).

POINTS INVOLVED

I

WHETHER PETITIONER PROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS HONORABLE COURT, AS THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN SEVERAL DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL AND THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ISSUED IN THE INSTANT CASE, WHICH HELD THAT RESPONDENT IS ENTITLED TO BE SENTENCED UNDER THE SENTENCING GUIDELINES IN EFFECT AT THE TIME HE COMMITTED THE OFFENSES?

II

WHETHER APPLICATION OF THE AMENDED SENTENCING GUIDELINES WHICH BECAME EFFECTIVE JULY 1, 1984, TO SENTENCING OF INDIVIDUALS WHO COMMITTED THE OFFENSE BETWEEN OCTOBER 1, 1983, AND JULY 1, 1984, IS AN EX POST FACTO APPLICATION?

SUMMARY OF THE ARGUMENT

I. The rule of law set forth in the instant case sets forth a rule of law contrary to the rule of law set forth in several decisions of the First District Court of Appeal.

II. Since the amended sentencing guidelines which became effective July 1, 1984, merely re-enacted the sentencing guidelines in effect since October 1, 1983, without increasing any penalty provision which could have been imposed under the guidelines in effect at the time of the commission of the offense, then the amended guidelines are a mere procedural change and there was no application of a subsequent penalty provision which would do violence to the concept of ex post facto law.

ARGUMENT

POINT I

PETITIONER PROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS HONORABLE COURT, AS THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN SEVERAL DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL AND THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ISSUED IN THE INSTANT CASE, WHICH HELD THAT RESPONDENT IS ENTITLED TO BE SENTENCED UNDER THE SENTENCING GUIDELINES IN EFFECT AT THE TIME HE COMMITTED THE OFFENSES.

Petitioner seeks to establish this Court's "conflict" jurisdiction under Art. V, §3(b)(3), Fla. Const. (1980) and Fla.R.App.P. 9.030(a)(2)(A)(iv). Conflict exists between the instant decision and several decisions of the First District Court of Appeal, to wit: Saunders v. State, 459 So.2d 1119

(Fla. 1st DCA 1984); Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984); and Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984); and Dubose v. State, 10 F.L.W. 1181 (Fla 1st DCA, Opinion filed May 13, 1985).

Conflict jurisdiction is properly invoked when a district court of appeal either (1) announces a rule of law which conflicts with a rule previously announced by the supreme court or another district, or (2) applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975).

The First District Court of Appeal has consistently held that the sentencing guidelines in effect at the time of sentencing are the rules that apply. Saunders, supra; Randolph, supra; Jackson, supra; and Dubose, supra. The Fourth District Court has in the instant case created conflict by announcing that Respondent "is entitled to be sentenced under the guidelines in effect at the time he committed the offenses."

Since the opinion in the instant case announces a rule of law contrary to the rule of law established by the First District Court of Appeal, this Honorable Court has discretionary jurisdiction to hear this case.

POINT II

APPLYING THE AMENDED SENTENCING
GUIDELINES WHICH BECAME EFFECTIVE
JULY 1, 1984, TO SENTENCE INDI-
VIDUALS WHO COMMITTED THE OFFENSE
BETWEEN OCTOBER 1, 1983, AND JULY
1, 1984, BUT WHO WERE SENTENCED AFTER
JULY 1, 1984, IS NOT AN EX POST FACTO
APPLICATION.

Respondent in the instant case committed the offenses of possession of marijuana and possession of cocaine on June 6, 1984. In Ch. 84-328, the Legislature adopted the May 8, 1984, Florida Supreme Court's proposed revisions to the sentencing guidelines. See The Florida Bar: Amendment to Rules of Criminal Procedures, 451 So.2d 824 (Fla. 1984). On July 1, 1984, the amended version of the sentencing guidelines became effective. Ch. 84-328 Laws of Florida. Respondent was sentenced on October 10, 1984, pursuant to the amended sentencing guidelines.

Respondent in his appeal to the Fourth District Court argued that application of the amended guidelines was a prohibited ex post facto application. By the Order of the Fourth District Court dated April 9, 1985, (A 3) and the instant decision, it is clear the Fourth District agreed with Respondent's argument. See also the Fourth District's Opinion in Miller v. State, Case No. 84-2188, filed April 17, 1985, on which the Fourth District relies to reverse the sentence in the instant case. As stated under Point I of this Brief, conflict jurisdiction is properly invoked when a district court of appeal announces a rule of law which conflicts with a rule previously announced by the supreme court. The court below has created conflict by announcing a rule of law contrary to that announced in Lee v. State, 294 So.2d 305 (Fla. 1974). See also Dobbert v. State of Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

In Lee, this Court stated:

If the subsequent statute merely re-enacted the previous penalty provision without increasing any penalty provision which could have

been imposed under the statute in effect at the time of the commission of the offense, then there could be no application of a subsequent penalty provision which would do violence to the concept of an ex post facto law. (Emphasis in the original) 294 So. 2d at 307.

The amended guidelines, as well as the original rules, changed only the procedural form in which the trial court's inherent sentencing discretion is to be exercised. Thus, there is no ex post facto application of the amended guidelines when a defendant is sentenced after July 1, 1984, the effective date of the amendments. Since, under Point I, Petitioner submits that the amendment is to be applied to a sentencing which occurs after the effective date of the amendment, the retroactive prohibition is relevant only to the date of sentencing, and not the date of the offense.

Since the decision in the instant case announces a rule of law contrary to the rule of law set forth in Lee, supra, this Honorable Court has discretionary jurisdiction to hear this case.

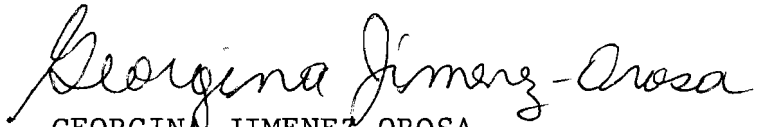
Further, this issue is a recurring legal problem, and this Honorable Court needs to resolve the issue so that appellate and trial courts will have a well-defined and workable rule of law to guide them. Petitioner therefore respectfully requests this Honorable Court accept jurisdiction in this case.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited therein, Petitioner respectfully requests this Honorable Court accept discretionary jurisdiction in the instant case.

Respectfully submitted,

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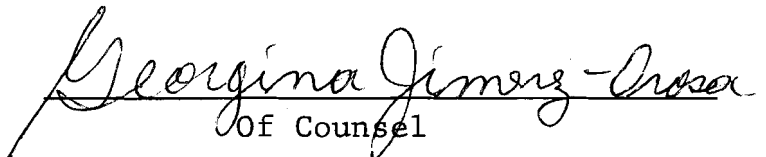


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on Jurisdiction has been furnished by courier to:
TATJANA OSTAPOFF, Assistant Public Defender, 224 Datura Street,
W. Palm Beach, FL 33401, this 25th day of June 1985.



Of Counsel