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SID J. WHITE

JUL 1 1985

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 JAMES ERNEST MILLER,)
)
 Respondent.)
 _____)

CASE NO. 67 276

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 the 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 contains conformed copies of the appellate court's initial opinion and its opinion on rehearing.

STATEMENT OF THE CASE AND FACTS

The Respondent was convicted of sexual battery, burglary with an assault, and petit theft in the circuit court. These offenses occurred on April 25, 1984. On October 2, 1984, the trial court sentenced the Respondent to a term of seven years, which was within the guidelines range as amended July 1, 1984.

On appeal, the Fourth District held that even though the Respondent was sentenced after the amended guidelines, July 1, 1984, effective date, the trial court should have sentenced the Respondent pursuant to the guidelines which were in effect on April 25, 1984, the date the crimes were committed (A 1). The court stated, "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." The court reaffirmed its position in its written order denying the Petitioner's Motion for Rehearing (A 2-3).

POINTS INVOLVED

POINT I

WHETHER THERE IS DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF ANOTHER COURT OF APPEAL REGARDING THE ISSUE OF WHETHER THE AMENDED SENTENCING GUIDELINES CAN BE APPLIED ONLY TO OFFENSES COMMITTED AFTER THE AMENDMENTS' EFFECTIVE DATE?

POINT II

WHETHER THERE IS DIRECT CONFLICT BETWEEN THE DECISION BELOW AND A DECISION OF THIS COURT REGARDING WHETHER APPLICATION OF THE AMENDED GUIDELINES TO INDIVIDUALS WHO COMMITTED OFFENSES BETWEEN OCTOBER 1, 1983, AND JULY 1, 1984, AND WERE SENTENCED AFTER JULY 1, IS EX POST FACTO?

SUMMARY OF THE ARGUMENT

The decision below holds that as to all offenses committed between October 1, 1983, the effective date of the original sentencing guidelines, and July 1, 1984, the effective date of the amended guidelines, the original guidelines must be applied. This decision conflicts with the rule of law announced by the First District that the guidelines in effect on the date of sentencing apply.

The decision below also conflicts with the decision in Lee v. State, 294 So.2d 305 (Fla. 1974) in concluding that to apply the guidelines in effect on the date of sentencing would be an ex post facto violation.

ARGUMENT

POINT I

THERE IS CONFLICT BETWEEN THE
OPINION BELOW AND DECISIONS OF
THE FIRST DISTRICT COURT OF
APPEAL REGARDING WHETHER THE
AMENDED SENTENCING GUIDELINES
APPLY ONLY TO OFFENSES COMMITTED
AFTER THEIR EFFECTIVE DATE.

The Petitioner invokes this Court's "conflict" jurisdiction pursuant to Article V, §3(b)(3), Florida Constitution (1980) and Fla. R. App. P. 9.030(a)(2)(a)(iv). The instant decision conflicts with several decisions of the First District Court of Appeal: Saunders v. State, 459 So.2d 1119 (1DCA Fla. 1984); Randolph v. State, 458 So.2d 64 (1DCA Fla. 1984); Jackson v. State, 454 So.2d 691 (1DCA Fla. 1984); and Dubose v. State, ___ So.2d ___, 10 FLW 1181 (1DCA Fla., op. filed 5/13/85). In the foregoing First District decisions, the court has consistently held the guidelines in effect at the time of sentencing are those that apply. In the instant case, the court held the guidelines in effect at the time the offense was committed are applicable.

The Fourth District's decision is thus in express and direct conflict with the First District cases, for it has announced a rule of law which conflicts with a rule previously announced. Mancini v. State, 312 So.2d 732 (Fla. 1975). The Petitioner has properly invoked this Court's discretionary jurisdiction.

POINT II

THE DECISION BELOW, WHICH HOLDS
APPLICATION OF THE AMENDED GUIDE-
LINES TO AN OFFENSE COMMITTED PRIOR TO
THEIR EFFECTIVE DATE IS EX POST FACTO
CONFLICTS WITH A DECISION OF THIS
COURT.

The Respondent committed criminal offenses on April 25, 1984. In Chapter 84-328, the legislature adopted the May 8, 1984, revisions to the sentencing guidelines proposed by this Court. 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. Chapter 84-328, Laws of Florida. Respondent was sentenced on October 2, 1984, pursuant to the amended sentencing guidelines.

In his appeal to the Fourth District, the Respondent argued that application of the amended guidelines to his sentence was a prohibited ex post facto application. It is clear from the appellate court's citation to Weaver v. Graham, 450 U.S. 24 (1981) in its initial opinion (A 1), and its discussion of "retroactive application" in its opinion on rehearing (A 2), the court agreed with the Respondent's argument.

As the Petitioner has noted in Point I, supra, conflict jurisdiction is properly invoked when a district court of appeal announces a rule of law which conflicts with a rule previously announced by this Court. Mancini v. State,

supra. The court below has created such conflict by announcing a rule of law contrary to that announced in Lee v. State, 294 So.2d 305 (Fla. 1974). 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.

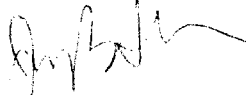
Since the decision in the instant case announces a rule of law contrary to the rule of law set forth in Lee, supra, this Honorable Court has discretionary jurisdiction to hear this case.

CONCLUSION

The Petitioner has properly invoked this Court's conflict jurisdiction and requests that this Court, in the exercise of its discretion, accept the case for review. The sentencing guidelines are a relatively new area of the law in which this Court's guidance is needed, and the issue presented herein is a recurring legal problem. Resolution of the issue will give the appellate and trial courts of this state a clear and workable rule to follow.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on Jurisdiction has been sent by courier to Gary Caldwell, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, FL 33401, this 27th day of June, 1985.



Of Counsel