

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 67,276

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, FL 32301

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement	1
Statement of the Case and Facts	2
Point Involved	3
Summary of the Argument	4
Argument	5-7
THE DEFENDANT, WHOSE OFFENSES WERE COMMITTED PRIOR TO JULY 1, 1984, BUT WHO WAS SENTENCED AFTER THAT DATE, WAS PROPERLY SENTENCED UNDER THE AMENDED GUIDELINES AND THIS WAS NOT IN CONTRAVENTION OF <u>EX POST FACTO</u> PRINCIPLES.	
Conclusion	8
Certificate of Service	8

TABLE OF AUTHORITIES

	<u>Page</u>
Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984)	5
Dobbert v. Florida, 432 U.S. 282 (1977)	6
Miller v. State, 468 So.2d 1018 (4DCA Fla. 1985)	2
Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984)	7
State v. Jackson, ___ So.2d ___, 10 FLW 564 (Fla. op. filed October 17, 1985)	4,5,6,7
Weaver v. Graham, 450 U.S. 24 (1981)	6

PRELIMINARY STATEMENT

The Petitioner, the State of Florida, was the Prosecution in the trial court and the Appellee in the District Court of Appeal, Fourth District. The Respondent was the Defendant and the Appellant, respectively, in the lower courts.

In the brief the parties will be referred to as they appeared in the trial court, State and Defendant. The symbol "R" will designate the record and "SR" the supplemental record.

STATEMENT OF THE CASE AND FACTS

The Defendant was convicted of the criminal offenses of sexual battery, burglary with an assault, and petit theft (R 24). These crimes were committed on April 25, 1984 (R 13). On October 2, 1984, the Defendant was sentenced to a prison term of seven years, which was in the guidelines range as amended July 1, 1984 (R 25-26, SR).

On appeal, the Fourth District held that even though the Defendant was sentenced after the amended guidelines' July 1, 1984, effective date, the trial court should have sentenced the Defendant pursuant to the original guidelines which were in effect on April 25, 1984, the date the crimes were committed. Miller v. State, 468 So.2d 1018 (4DCA Fla. 1985).

The State filed an application seeking discretionary review, and this Court accepted jurisdiction of the case by an order entered November 13, 1985.

POINT INVOLVED

DOES APPLICATION OF THE SENTENCING
GUIDELINES AS AMENDED EFFECTIVE
JULY 1, 1984, UPON THE DEFENDANT
WHOSE OFFENSES WERE COMMITTED
PRIOR TO THAT DATE CONSTITUTE AN
IMPERMISSIBLE EX POST FACTO APPLICA-
TION OF THE LAW?

SUMMARY OF THE ARGUMENT

This Court's decision in State v. Jackson, ___ So.2d ___, 10 FLW 564 (Fla. op. filed October 17, 1985) is dispositive of the instant case. Application of the amended sentencing guidelines to all sentencings after July 1, 1984, does not violate ex post facto principles because the amendments were merely procedural. Thus, the trial court's sentence was correct and the Court of Appeal erred in reversing it.

ARGUMENT

THE DEFENDANT, WHOSE OFFENSES
WERE COMMITTED PRIOR TO JULY 1,
1984, BUT WHO WAS SENTENCED AFTER
THAT DATE, WAS PROPERLY SENTENCED
UNDER THE AMENDED GUIDELINES AND
THIS WAS NOT IN CONTRAVENTION OF
EX POST FACTO PRINCIPLES.

The issue presented in the instant case--
whether the amended guidelines apply only to offenses
committed after July 1, 1984, or to all sentencings
after that date to which the guidelines apply¹--has been
answered contrary to the 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). In Jackson,
the court stated:

The second issue in this case concerns
the guidelines to be used in resentencing.
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

¹i.e., this case does not involve an offense
committed before October 1, 1983, the effective date of
the original guidelines.

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., emphasis added.

Pursuant to 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. Just as in Jackson, which involved a change in how a probation violation is calculated into the presumptive sentence, the change here involved an increase in the presumptive sentence for sexual offenses. There was no increase in the statutory limits of the sentence to be imposed for this type of crime. Thus, the guidelines change was merely procedural and did not add to the quantum of punishment so its application to the Defendant did

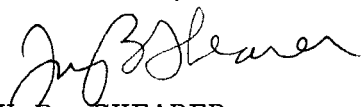
not violate the ex post facto clause. Jackson.
Id., Paschal v. Wainwright, 738 F.2d 1173, 1176
(11th Cir. 1984).

CONCLUSION

Wherefore, based upon the foregoing reasons and authorities, the State respectfully requests that the opinion of the Court of Appeal be reversed and remanded with directions to affirm the sentence imposed by the trial court.

Respectfully submitted,

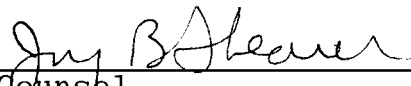
JIM SMITH
Attorney General
Tallahassee, FL 32301


JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been sent by courier to Gary Caldwell, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, FL 33401, this 15th day of November, 1985.



Of Counsel