

IN THE SUPREME COURT OF FLORIDA

**FILED**  
SID J. WHITE  
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STATE OF FLORIDA, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 THEODORE J. MOTT, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 67,278

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

NANCYE R. CROUCH  
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ATTORNEY FOR RESPONDENT

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, )  
 )  
           Petitioner, )  
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vs.                    ) )  
 ) )  
THEODORE J. MOTT,    ) )  
 ) )  
           Respondent. )  
 )  
\_\_\_\_\_ )

CASE NO. 67,278

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth by Petitioner in his brief on the merits.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal correctly determined that it was a violation of the ex post facto doctrine to retroactively apply amendments to the sentencing guidelines which effectively increased the Appellant's presumptive sentence. An amendment which directly increases the point total for the offense is a substantive rather than a procedural change and is thus improperly applied retroactively.

## ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL  
CORRECTLY DETERMINED THAT IT WAS A  
VIOLATION OF THE EX POST FACTO DOCTRINE  
TO RETROACTIVELY APPLY AMENDMENTS TO THE  
SENTENCING GUIDELINES WHICH EFFECTIVELY  
INCREASED THE APPELLANT'S PRESUMPTIVE  
SENTENCE.

This case is before this Honorable Court so that it may consider and hopefully definitively determine whether amendments to the sentencing guidelines which increase the presumptive sentence of a defendant, should be applied retroactively to offenses committed prior to their enactment. Respondent contends that such an application is a violation of the ex post facto doctrine and is therefore prohibited by the United States and Florida Constitutions. United States Constitution, Article I, Section 9; Florida Constitution, Article I, Section 10, and Article X, Section 9.

The Fifth District Court of Appeal accepted the argument of the Respondent as to this issue. On May 30, 1985, the court reversed the Appellant's sentence and remanded the cause for resentencing under the guidelines in effect at the time the crime was committed. Mott v. State, 469 So.2d 946 (Fla. 5th DCA 1985) Subsequently, this Honorable Court decided the case of State v. Jackson, 478 So.2d 1054 (Fla. 1985). In Jackson, supra, the guideline amendment which was applied retroactively was a change in the way a probation violation was scored. This Court held therein:

We conclude that a modification in the sentencing guideline 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. [emphasis added]

State v. Jackson, supra at 1056.

In the wake of Jackson, the Fifth District Court of Appeal, as well as the First District Court of Appeal have reluctantly applied Jackson to other amendments to the guidelines. In Wilkerson v. State, 11 FLW 4546 (Fla. 1st DCA December 23, 1985), the First District Court of Appeal expressed doubt as to the application of Jackson to all changes and certified the following questions as one of great importance:

WHETHER ALL SENTENCING GUIDELINES  
AMENDMENTS ARE TO BE CONSIDERED PROCE-  
DURAL IN NATURE SO THAT THE GUIDELINES  
AS MOST RECENTLY AMENDED SHALL BE  
APPLIED AT THE TIME OF SENTENCING  
WITHOUT REGARD TO THE EX POST FACTO  
DOCTRINE?

The language used by this Court in Jackson clearly limited its application to changes in the amendments which affect the manner in which probation violations are counted. Respondent respectfully asserts that applying Jackson to all guidelines changes, including the amendment in question in the instant case, is a broader interpretation of the opinion than intended by this Court.

Petitioner contends that an amendment to the sentencing guidelines which does not affect the maximum statutory penalty for an offense does not violate the ex post facto doctrine. He asserts that the recommended sentencing range for a particular defendant is not something he has a right to rely upon at the

time of sentencing but is only, at best, an uncertain hope. This argument must fail for a number of reasons.

In Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the United States Supreme Court held that the ex post facto prohibition forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. The case involved a state statute which was used to determine the amount of "gain time" the petitioner could receive for good conduct. The statute in question had been amended subsequent to the offense for which the petitioner was being sentenced and, as amended, the gain time computed thereunder was less than it would have been under the old statute. It was applied retroactively to the petitioner's case, effectively reducing any gain time he may have been entitled to for good conduct.

The Florida Supreme Court decided that there was no violation of the ex post facto doctrine, relying on an earlier decision in which it reasoned that gain time is an "act of grace" rather than a vested right and thus may be withdrawn, modified or denied. In reversing that decision, the United States Supreme Court held that a law need not impair a "vested right" to violate the ex post facto prohibition. See Weaver, 67 S.Ed.2.d at 23, fn. 13. The court set forth two critical elements which must be present for a criminal or penal law to be ex post facto: it must be retrospective and it must disadvantage the offender affected by it.

Petitioner would have us believe that a change in a defendant's presumptive guideline sentence range does not



disadvantage the offender because he has no "right" to rely on said range when considering his possible sentence. Respondent asserts that the sentencing guidelines were established to promote uniformity in sentencing and that a judge is required to sentence a defendant within the established presumptive range unless there are clear and convincing reasons to exceed it.

Through the case law that has evolved since the inception of the guidelines, we know that clear and convincing reasons are those that are so unique as to remove that particular case from the restriction of the presumptive guideline range. When such reasons are established, the court may then, and only then, exercise its discretion in sentencing up to the maximum statutory penalty. It is clear that the converse is also true. A defendant has the right to rely on his established recommended range when he anticipates his sentence except in those isolated cases where unique circumstances exist which take away his right to a presumptive sentence.

Respondent respectfully asserts that, under the analysis of Weaver, 67 L.Ed.2d 17, an amendment to the guidelines which increases a defendant's point total and, accordingly, his recommended sentence range has a disadvantageous effect on the offender and is more onerous than the rule in effect on the date of the offense. The trial court in the instant case sentenced the Respondent within the recommended range, as determined after retroactively applying the amendment to Florida Rules of Criminal Procedure 3.988(i). Obviously, there were no clear and

convincing reasons for departure. But for the application of that amendment, the Respondent would have been sentenced within the 9-12 year range. Clearly, a 15 year sentence is more onerous than a 9-12 year sentence and thus the application of the amendment retroactively was a violation of the ex post facto doctrine prohibited by the United States and Florida Constitutions.


Finally, Respondent admits that Jackson, supra, held that modification in the sentencing guideline procedure which changed how a probation violation should be counted was merely a procedural change and as such, was not within the realm of the ex post facto doctrine. However, since amendments in the sentencing guidelines, such as the one in the instant case, must be approved by the legislature prior to their application, it is clear they are substantive rather than procedural changes. As such, the amendment in question in this case was improperly applied retroactively. It clearly had a disadvantageous effect on the Respondent. The ruling of the Fifth District Court of Appeal in this case was correct and should be affirmed.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the Respondent requests that this Honorable Court affirm the decision of the District Court of Appeal, Fifth District, vacate the judgments and sentences, and remand for resentencing.

Respectfully submitted,

JAMES B. GIBSON  
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SEVENTH JUDICIAL CIRCUIT

  
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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Jim Smith, Attorney General, 125 N. Ridgewood Ave., 4th Floor, Daytona Beach, FL and to the Respondent, Theodore Mott, #A-040510, P.O. Box 14, Boise, Idaho 83707, on this 17th day of February, 1986.

  
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NANCYE R. CROUCH  
ASSISTANT PUBLIC DEFENDER