

IN THE SUPREME COURT OF FLORIDA

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Chief Deputy Clerk

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs)
)
 GARY J. MOORE,)
)
 Respondent.)
 _____)

Case No. 67,281

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
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ATTORNEY FOR RESPONDENT

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TABLE OF CITATIONS

CASES CITED:

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OTHER AUTHORITIES CITED:

Article I, Section 10, United States Constitution 3
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Case No. 67,281

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.

SUMMARY OF ARGUMENT

Respondent contends that a change in points scored under the sentencing guidelines is a substantive rather than procedural change, thus violating the prohibition of the ex post facto doctrine. Respondent submits that this Court's holding in State v. Jackson, 478 So.2d (Fla. 1985), is not as broad as it appears at first blush. This Court should at least reconsider its holding in Jackson.

ARGUMENT

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

Petitioner contends that since the sentencing guidelines are advisory, a subsequent amendment thereto which increases the recommended sentence without affecting the statutory maximum does not violate the constitutional proscription against ex post facto laws. The state's contention is based in large part on this Court's holding in State v. Jackson, 478 So.2d 1054 (Fla. 1985), in which this Court held that amendments to guidelines or procedural changes do not in any way alter the statutory limits of the applicable sentence. Respondent contends that such an application is in violation of the ex post facto doctrine as well as the constitutional guarantee of equal protection. Article I, Section 10, Amendment XIV, United States Constitution; Article I, Section 2 and 10, Florida Constitution.

On April 2, 1984, when Moore committed the offense, the sentencing guidelines grid in effect resulted in a recommended sentence of any non-state prison sanction. By virtue of the amendment, the recommended sentence was 30 months to 3½ years incarceration. Without giving written reasons or intending to impose a "departure" sentence, the trial court sentenced Respondent to 3½ years imprisonment.

State v. Jackson, supra, is distinguishable from the instant case since that case involved a change in the scoring of

a probation violation. The instant case involves a substantive change in the actual guidelines grid. The result is a substantial change in the recommended guideline sentence.

Respondent cannot ignore that this Court's holding in State v. Jackson, supra, was predicated on the fact that the change in recommended range did not change the statutory limit. In this regard, Respondent must ask that this Court reconsider its holding in State v. Jackson. While it is true that a defendant does not have the "right" to be sentenced to the recommended guidelines sanction, it is also true that a defendant is entitled to a presumptive guideline sanction computed in accordance with the guidelines procedure. This necessarily results in a sentence within the presumptive guidelines range unless the trial court can cite written reasons justifying a departure sentence. If these reasons are not present in an individual case, the presumptive sentence must be imposed. Conversely, if no reasons exist to justify a lessor sentence (i.e. departure through mitigation), the recommended guideline sentence must be imposed. It is clear that the benefit and the detriment works both ways as to a particular criminal defendant.

In reconsidering the holding of State v. Jackson, this Court should be well aware of the well-reasoned opinion of Justice Ehrlich in that case in which Justice Shaw concurred. Respondent respectfully submits that Justice Ehrlich is correct in his assessment of the substantive rather than procedural change. Similarly, Judge Barfield expressed concern in a recent

concurring opinion on this same issue:

...I have serious concern with the Supreme Court construction in Jackson which would characterize all sentencing guideline rules as procedural and not substantive and which would appear to eliminate constitutional considerations of equal protection and improper applications of constitutionally prohibited ex post facto laws. One need only consider the disparate treatment between co-defendants who are otherwise equal in the eyes of the court, but are sentenced on separate days by the same or different judges with an intervening rule change that enhances the presumptive guideline range. Jackson should not be held to answer questions not for the court. It should be limited to the issue of appropriate rule application in probation revocation proceedings.

Wilkerson v. State, 11 FLW 45, 46 (Fla. 1st DCA December 23, 1985). As a result of Wilkerson, this Court has pending before it a question certified to be one of great public importance:

Whether all sentencing guideline amendments are to be considered procedural in nature so that the guidelines as most recently amended shall be applied at the time of sentence without regard to the ex post facto doctrine?

Id. at 46.

Respondent submits that the evidence that the sentencing guidelines are "directory" in nature is not that compelling. This contention is supported by the large numbers of departure guideline sentences which have been vacated by appellate courts in this state with instructions to impose the presumptive sentence unless clear and convincing reasons can be cited to support a departure. These reversals have included both mitigated and aggravated departure sentences. Respondent contends that his "right" to a presumptive guideline sentence is more substantive

than Petitioner contends. Respondent suggests that applying Jackson to all guideline changes, may be a broader interpretation of the opinion then intended by this Court. Respondent submits that the intervening amendment to the sentencing guidelines resulted in an actual increase in his sentence in contravention of the ex post facto doctrine. Respondent's constitutional rights have been abridged as a result of this ex post facto application and in violation of his guarantee of equal protection.

CONCLUSION

Based upon the cases, authorities and policies cited herein, Respondent respectfully requests that this Honorable Court affirm the decision of the District Court of Appeal, Fifth District, vacate the sentence and remand for resentencing.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

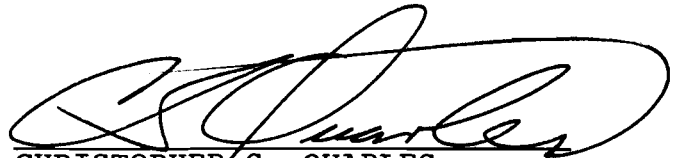


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Ave., 4th Floor, Daytona Beach, FL 32014, and to Gary T. Moore, #094982, Marion Correctional Institute, P.O. Box 158, Lowell, FL 32663, on this 3rd day of March, 1986.



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