IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 67,658

DONALD R. BEGGS,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

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Respondent.	:	
_____	:	

BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. No references to the record will be necessary. Attached hereto as an appendix is the opinion of the lower tribunal, Beggs v. State, 473 So.2d 9 (Fla. 1st DCA 1985).

II STATEMENT OF THE CASE AND FACTS

The history of this case is acurately stated in the opinion:

> Defendant was charged by information with sexual battery upon a child under the age of eleven years, alleged to have occurred on April 29, 1984. In July 1984, defendant pled nolo contendere to the lesser offense of lewd assault upon a child and a sentencing hearing was conducted on August 3, 1984. The sentencing guidelines scoresheet utilized at the sentencing hearing reflected a total of 183 points and a recommended range of community control or twelve to thirty months incarceration. Appellant was adjudicated guilty and sentenced to thirty months in state prison, to be followed by twelve and one half years probation.
>
> The scoresheet utilized by the trial court was a revised version of the Category 2 scoresheet, which became effective on July 1, 1984. Defendant argues on appeal that the trial court erred in failing to use the version of the sentencing guidelines scoresheet for Category 2 offenses which was in effect at the time of the crime. We agree.

473 So.2d at 10 (footnote omitted); Appendix at 2. Respondent has advised the undersigned that he has been released from the prison portion of his sentence, and is currently residing in Tifton, Georgia.

III SUMMARY OF ARGUMENT

Respondent contends that the guidelines in effect on the date the offense was committed should be used to calculate his presumptive guideline sentence. The sentencing guidelines are substantive not procedural law. An amendment to the sentencing guidelines is likewise a matter of substantive law and not merely procedural law. In Weaver v. Graham, 450 U.S. 24 (1981), the United States Supreme Court set forth a twofold test to assess an ex post facto violation. Respondent maintains that retrospective application of the amended guidelines in these circumstances results in a violation of the ex post facto clauses.

Respondent submits that the case relied upon by the petitioner, State v. Jackson, 478 So.2d 1054 (Fla. 1985) is distinguishable from the situation at bar. The Jackson decision indicates that it should be limited solely to its facts.

Respondent contends that the retroactive application of enhanced amended sentencing guidelines in these circumstances not only violates the ex post facto clauses but also Article X, Section 9 of the Florida Constitution (1968), Florida law and public policy. Therefore on the grounds stated herein, this Honorable Court should affirm the decision of the First Distict Court of Appeal.

IV ARGUMENT

ISSUE PRESENTED

RESPONDENT, WHOSE OFFENSE WAS COMMITTED PRIOR TO JULY 1, 1984, BUT WHO WAS SENTENCED AFTER THAT DATE, WAS IMPROPERLY SENTENCED UNDER THE AMENDED SENTENCING GUIDELINES.

The sentencing guidelines set forth in Florida Rule of Criminal Procedure 3.701, are based on specific delineation of the sentence ranges to be imposed for various offense categories. Section 921.001, Florida Statutes (1983); In Re Rules of Criminal Procedure, 439 So.2d 848 (Fla. 1983). In 1983, the Legislature authorized the Florida Supreme Court upon receipt of the commission's recommendations, to develop by September 1, 1983, statewide sentencing guidelines. Section 921.001(4)(a), Florida Statutes (1983). This Court adopted the guidelines to become effective on October 1, 1983. See In Re Rules of Criminal Procedure, 451 So.2d 824 (Fla. 1984). The effective date of this Amendment is July 1, 1984. Ch. 84-328, Laws of Florida (1984). One of the principle effects of the amendments was "increased rates and length of incarceration for sexual offenders." 451 So.2d at 824, fn. Under Section 921.001(4)(b), Florida Statutes (1983), these amendments were effective only upon adoption by the Florida Legislature. In Chapter 84-328, Section 1, Laws of Florida, the legislature adopted the amended guidelines.

Respondent was charged with committing the offense on

April 29, 1984. Respondent was sentenced pursuant to the Rule 3.701 sentencing guidelines on August 8, 1984. The question remains, however, whether the original guidelines or amended guidelines apply to the crime committed in March, 1984, where the sentence is imposed after the effective date of the amended guidelines. Respondent contends that the First District Court of Appeal was correct in holding that the trial court was wrong in sentencing respondent under the amended sentencing guidelines.

Respondent contends that the Jackson decision is distinguishable from the situation at bar. In addition, application of the amended guidelines in these circumstances would result in a violation of the ex post facto clause, Article X, §9 of the Florida Constitution (1968) and established principles of Florida law.

An examination of the Jackson decision indicates that the decision is distinguishable from the situation at bar. In Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984), the defendant was placed on probation prior to the effective date of the sentencing guidelines. His probation was revoked subsequent to the effective date of the guidelines. At the time of sentencing, the defendant affirmatively selected to be sentenced under the sentencing guidelines pursuant to Section 921.001(4)(a), Florida Statutes (1984). The trial judge denied the defendant's request. On appeal, the First District held that the defendant was entitled to select

the sentencing guidelines. The Court further held that the original guidelines apply to the defendant. The amendment to the sentencing guidelines, Florida Rule of Criminal Procedure 3.701(d)(14), effective July 1, 1984, delineating the procedure to use in scoring a probation revocation under the guidelines could not be applied retroactively to defendant. His sentence was vacated and the case was remanded for resentencing. This Honorable Court accepted the state's petition for review.

In State v. Jackson, supra, this Honorable Court addressed the issue, inter alia, of which sentencing guidelines are to be used upon resentencing of the defendant. This Honorable Court held:

> 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 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. at 564.

This Court clearly specified that the revision in the guidelines "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." This Court emphasized that it was rejecting Jackson's contention that "Weaver v. Graham, 450 U.S. 24 (1981), should control in these circumstances." The language of the opinion indicates that it should be limited solely to its facts.

At bar, respondent was charged with a substantive criminal offense. A probation revocation or the method in calculating said revocation was not involved. In Jackson, the probationer had the right granted by legislation under §921.001(4)(a), Florida Statutes (1984), to "affirmatively select" the sentencing guidelines. Respondent, who was charged with an offense committed after the effective date of the sentencing guidelines (October 1, 1983), had no such right. The Rule 3.701 sentencing guidelines were mandatory as to respondent's sentence.

In Jackson, the probationer's alleged ex post facto

violation was in fact non-existent. The Jackson case is really an "affirmative selection" case. The defendant in an "affirmative selection" case has the ultimate authority to accept or reject the sentencing guidelines. If a defendant "affirmatively selects" the sentencing guidelines prior to the July 1, 1984, amendments, he would receive the original guidelines. Likewise, if a defendant "affirmatively selects" the sentencing guidelines subsequent to the July 1, 1984, amendments, he would receive the amended guidelines. Since this defendant has ultimate authority to accept or reject the sentencing guidelines because his crime was committed before October 1, 1983, there would be no ex post facto violation in imposition of the guidelines in effect on the date of the "affirmative selection" to him. In Cone v. State, 469 So.2d 945 (Fla. 5th DCA 1985), the district court held that application of the amended sentencing guidelines which were not in effect in any form at time of offense, did not violate the ex post facto doctrine, where defendant elected sentencing guidelines. See also Hanabury v. State, 459 So.2d 1113, 1114 (Fla. 4th DCA 1985), where Judge Barkett, now Justice Barkett, writing for the majority held that the defendant "elected to be sentenced under the guidelines as they were on October 19, 1983. He should be entitled to rely on them as they were when he made the election." Hence as an "affirmative selection" case, no ex post facto violation occurred in the Jackson case. Respondent

respectfully submits that the Jackson decision could have been decided solely on the basis that it was an "affirmative selection case."

A. Ex Post Facto Clause

Article I, Section 10, of the United States Constitution prohibits a state from passing any "ex post facto law." In Beazell v. Ohio, 269 U.S. 167,169-170, 46 So.2d 68 (1925), the Court summarized the characteristics of an ex post facto law:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Article, I Section 10, Florida Constitution (1968), provides that no ex post facto law shall be passed. An ex post facto law is "one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which in relation to the offense or its consequences alters the situation of a party to his disadvantage." Higginbotham v. State, 88 Fla. 26, 101 So. 233, 235 (Fla. 1924); Wilensky v. Fields, 267 So.2d 1 (Fla. 1972).

In Lindsey v. Washington, 301 U.S. 377, 57 S.Ct. 797 (1937), the defendant claimed that a change in the state

law respecting the sentence to be imposed upon one convicted of grand theft violated the ex post facto clause. At the time the defendant committed the theft, the law provided for a maximum sentence of fifteen (15) years, and a minimum sentence of not less than six (6) months. At the time the defendant was sentenced, the law had been changed to provide for a mandatory fifteen year sentence. Even though under the new statute a convict could be admitted to parole at a time far short of the expiration of his mandatory sentence, the Court observed that even on parole he would remain "subject to the surveillance" of the parole board and that his parole itself was subject to revocation. The Court held:

> The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or cancelled at the will of the governor. It is true that petitioners might have been sentenced to fifteen years under the old statute. But the ex post facto clause looks to the standard of punishment prescribed by a satute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer.

Id. at 3 (emphasis supplied).

The United States Supreme Court has also held that

no ex post facto violation occurs if the change effected is merely procedural and does "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." Hopt v. Utah, 110 U.S. 574, 590 (1884)1 see, Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290 (1977). In Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960 (1981), a prisoner requested habeas corpus relief claiming that a statute which altered the method of prisoner gain-time computation and which was enacted subsequent to the crime for which the prisoner was incarcerated affected him detrimentally and was therefore an ex post facto law. The United States Supreme Court held that the statute was violative of the constitutional prohibition against ex post facto laws. The Court also noted:

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe then the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Id., at 31-32.

The initial issue that this Court must decide is whether

the amendments to the Rule 3.701 sentencing guidelines effective July 1, 1984, are procedural or substantive.

Under Florida law the power to prescribe the penalty to be imposed for commission of a crime rests with the legislature, not with the courts. See Dorminez v. State, 314 So.2d 134, 136 (Fla. 1975). "It is well settled that the Legislature has the power to define crimes and to set punishments." Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984).

The Legislature created the sentencing commission which is responsible for the initial development of a statewide system of sentencing guidelines. Section 921.001, Florida Statutes (1984). The Legislature in creating the Sentencing Commission declared: "The provision of criminal penalties and of limitations upon the application of such penalties is a matter predominately substantive law and, as such, is a matter properly addressed by the Legislature." Section 921.001(1), Florida Statutes(1984).

The Legislature reserved the right to delay the implementation of the sentencing guidelines. Section 921.001(4)(a), Florida Statutes (1984). The Legislature mandated that the sentencing guidelines be applied to all non-capital felonies committed on or after October 1, 1983. Certain felons who committed their offense prior to this date were given the right to affirmatively select the sentencing guidelines. Section 921.001(4)(a), Florida Statutes (1984).

The Sentencing Commission was mandated to present

annual recommendations for changes in the sentencing guidelines. Section 921.001(4)(b), Florida Statutes (1984). This Honorable Court was authorized by the Legislature to revise the sentencing guidelines. But the Legislature pursuant to Rule 921.001(4)(b) expressly reserved the right to approve said revisions as follows: "However such revision shall become effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised."

The sentencing guidelines are not merely rules of this Court. The intention of the Legislature is the guiding consideration. Under the express terms of §921.001, Florida Statutes (1983), the "application of such penalties is a matter of predominately substantive law..." It is clear that the sentencing guidelines are substantive not procedural. The sentencing guidelines have the same force and effect as if they had been statutorily enacted. And any amendments to the sentencing guidelines likewise have the same force and effect as if they had been statutorily enacted. See §921.001(4)(b), Florida Statutes (1984). Potential revisions of the sentencing guidelines cannot become law unless adopted by the Legislature. See §921.001(4)(b), Florida Statutes (1984).

In Allen v. State, 383 So.2d 674 (Fla. 5th DCA 1980), the Fifth District held that the Youthful Offender Act (§958.001 et.seq. Florida Statutes (1978)) was not merely

procedural. The Court held:

> This statute is not, as suggested by appellant, merely procedural so as to give it immediate effect, and reliance on cases such as Collins v. Wainwright, 311 So.2d 787 (Fla. 4th DCA 1975) [presentence investigation report] or Johnson v. State, 371 So.2d 556 (Fla. 2d DCA 1979) [sentencing juvenile as adult pursuant to §39.111(b), F.S.] is misplaced. In those situations the statutory directives prescribed a procedure to be followed prior to or at sentencing, but did not affect the ultimate punishment.

Id. at 675-676 (emphasis supplied).

At bar, retrospective application of the revisions in the presumptive guideline sentence result in a greater sentence or punishment. Hence the revision in the guidelines are not merely procedural and affect substantive rights.

The Rule 3.701 sentencing guidelines provide that the sentence scored under the guidelines is presumptive. Rule 3.701(b)(6). Any departure from the presumptive guideline sentence range should be avoided. Rule 3.701(d)(11). To warrant an aggravating or mitigating sentence there must be clear and convincing reasons for departure stated in writing. Rule 3.701(d)(11). As this Court held in Hendrix v. State, 475 So.2d 1218, 1220 (Fla. 1985). Although the sentencing guidelines do not eliminate judicial discretion in sentencing, "it does seek to discourage departures from the guidelines."

Under the guidelines an offender may expect a certain range of sentence based on the guidelines and has an expecta-

tion of receiving a sentence within that range unless clear and convincing reasons exist to permit the judge to depart from the guidelines. The offender has the right to have those clear and convincing reasons stated in writing. Thus, the average offender who commits a crime under circumstances where no clear and convincing reasons exist for departure has an expectation of being sentenced within the range provided for by the sentencing guidelines. Absent clear and convincing reasons, it is impermissible for the judge to depart from the guidelines, in effect guaranteeing the offender committing an "average" crime a sentence within the guideline range. There is thus a substantial right to receive a sentence within the guideline range. Any alteration in the guidelines which permits a lengthier sentence alters a substantive right.

The majority in Jackson v. State, supra, relied on Dobbert v. Florida, supra, for the principle test a change in the "quantum of punishment." In Weaver v. Graham, the United States Supreme Court set forth a two-fold test to assess an ex post fact violation: (1) does the law attach legal consequences to crimes committed before the law took effect, and (2) does the law affect the prisoners who committed those crimes in a disadvantageous fashion? If the answer to both questions is yes, then the law constitutes an ex post facto law and is void as applied to those persons.

Under the situation at bar, both prongs of the Weaver

test are met. First, retrospective application of the amended sentencing guidelines would result in it being applied to persons who committed offenses prior to its effective date. Second, these consequences have a disadvantageous effect in that the prisoner's sentences are enhanced. Just as the statutory changes in gain-time in Weaver v. Graham altered the "quantum of punishment," 450 U.S. at 33, so too at bar changes in the sentencing guidelines which result in a lengthier presumptive sentence alters the "quantum of punishment." The trial judge cannot, under Rule 3.701(d)(11), deviate from the presumptive guideline sentence. The requirement of written clear and convincing reasons for departure raises the right to be sentenced within the presumptive guideline range to the level of a substantial right. This right is enforceable on appeal. See §921.001(5) ("The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to Chapter 924".). A defendant's substantive right to appeal a departure would be violated if a trial court could depart from a defendant's presumptive guideline sentence through retrospective application of more onerous guidelines than those in effect when he committed the crimes.

The First, Second, Fourth and Fifth District Courts of Appeal were in agreement that application of the amended sentencing guidelines which increased the presumptive sentence for a defendant violated the ex post facto clause.

In Miller v. State, 468 So.2d 1018 (Fla. 4th DCA 1985), rev. pending, #67,276, the Fourth District therein vacated the sentence because the sentencing judge utilized the amended sentencing guidelines in scoring the presumptive guideline sentence. The lower court held:

> 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. See Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); State v. Williams, 397 So.2d 663, 665 (Fla. 1981); Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984); Arnold v. State, 429 So.2d 819 (Fla. 2d DCA 1983).
>
> We remand for resentencing in accordance with the sentencing guidelines in effect at the time the offense was committed.

Id. at 1018.

In Moore v. State, 469 So.2d 947 (Fla. 5th DCA 1985), the defendant committed the offense of lewd assault in April, 1984. He pled guilty in June and was sentenced in September, 1984. Under the original guidelines in effect on the date of the offense, the defendant's recommended sentence would have been any nonstate prison sanction. The recommended sentence under the amended guidelines was thirty months to three and one-half years incarceration. The trial judge imposed a three and one-half year sentence upon the defendant without any indication of a departure. The Fifth District quashed the defendant's sentence holding: Id. at 948.

The First District and Second District have held that

the amendments to the sentencing guidelines cannot be applied retroactively to a defendant who committed a crime prior to the effective date of the amendment. See Walker v. State, 458 So.2d 396 (Fla. 1st DCA 1984); Hopper v. State, 465 So.2d 1269 (Fla. 2d DCA 1985). Hence the First, Second, Fourth and Fifth District Courts of Appeal were in agreement that application of the amended sentencing guidelines which increased recommended sentence for a defendant violated the ex post facto clause.

The State of Minnesota has adopted a statewide system of sentencing guidelines similar to the sentencing guidelines implemented in Florida. This Honorable Court has cited to Minnesota sentencing guideline decision with approval. See Hendrix v. State, supra. In State v. Willis, 364 NW 498 (Minn.Ct.App. 1985), the defendant was convicted of aggravated robbery and burglary. On appeal, the defendant, inter alia, challenged a three month additional sentence imposed on his guideline sentence. The Court held:

> Appellant's concurrent 124 month sentences included the 97 month presumptive sentence, a 24 month upward durational departure, and a three-month additional sentence pursuant to Minnesota Sentencing Guidelines II.B.2.b for offenders with a criminal history score of six or more when a custodial status point is assigned.
>
> 1. Appellant is correct that the three-month additional sentence was improper because Minnesota Sentencing Guidelines II.B.2.b was effective for offenses committed on or after November 1, 1983, not for sentences after that date.

This is further support for respondent's position that retroactive application of the amended guidelines in these circumstances results in an ex post facto violation.

B. Article X, Section 9, Florida Constitution

Article X, §9, of the Florida Constitution (1968) provides:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed prior to its enactment.

It is clear under Florida law that the statute in effect at the time an offense is committed controls the maximum penalty at sentencing. Castle v. State, 330 So.2d 10 (Fla. 1976); Ellis v. State, 298 So.2d 527 (Fla. 2d DCA 1984); State v. Pizarro, 383 So.2d 762 (Fla. 4th DCA 1980). The amendment to the sentencing guidelines is not as suggested by petitioner merely procedural so as to give it immediate effect. The amendments to the sentencing guidelines are substantive. It clearly affects the ultimate punishment in the context of presumptive sentences mandated by the sentencing guidelines. (See Argument, supra).

At bar, respondent committed the lewd assault on April 29, 1984, a date within the period covered by the original guidelines. The application of the amended guidelines to the case at bar violates the state constitutional protection embodied in Article X, Section 9. Accordingly, the First District Court of Appeal was correct in reversing the trial

court's decision to apply the amended guidelines in these circumstances.

C. Rules of Procedure

Florida rules of court pertaining to criminal procedure have only prospective effect, absent an express statement to the contrary. Arnold v. State, 429 So.2d 819 (Fla. 2d DCA 1983). Further, where the application of amendments to a rule of civil procedure to pending cases would result in deprivation of substantial rights previously acquired by litigants, such amendments, promulgated by supreme court order to be effective on a specified date, apply only to cases commenced on or after such date. 13 Fla.Jur.2d, Courts and Judges §176.

In State v. Green, 473 So.2d 823 (Fla. 2d DCA 1985), the Second District ruled that the recent amendments to the speedy trial rule must be applied prospectively. The Court held:

> Florida rules of court have prospective effect only, absent an express statement to the contrary. Poyntz v. Reynolds, 37 Fla. 533, 19 So. 649 (1896); Arnold v. State, 429 So.2d 819 (Fla. 2d DCA 1983); Jackson v. Green, 402 So.2d 553 (Fla. 1st DCA 1981).
>
> * * *
>
> The event which began the running of speedy trial time was the taking of defendant into custody on June 25, 1984. Arnold; Jackson. Since this event occurred before the effective date of the 1985 amendments, new rule 3.191(i)(4) does not apply. Consequently, the trial judge properly applied the former rule

> 3.191 in granting defendant's motion for discharge after the speedy trial time had run.

Id. at 824. Hence the amendments to Rule 3.701 have only a prospective effect and cannot be applied to crimes committed before the effective date of the amendments. Hence the First District's ruling at bar should be affirmed on this basis.

D. Public Policy

Finally, in the event this Honorable Court declines to hold that the Constitution and/or Florida law does not compel sentencing a defendant to the guidelines in effect when the crime was committed, respondent submits that this Honorable Court should as a matter of public policy hold that the guidelines in effect when the crime was committed should control. The express purpose of the "sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the decision-making process." Rule 3.701(b). By mandating that the guidelines in effect when the crime was committed control guideline scoring, this goal of uniformity in calculation, administration and application of the guidelines will be maintained.

If the sentencing date controls guideline scoring, the sentencing procedure will be open to unfairness, capriciousness, manipulation and fraud. A defendant who commits a crime and pleads guilty will be subject to one set of guidelines. A co-defendant or another defendant who

commits the same offense but delays in entering the plea can be subjected to another set of guidelines. A co-defendant or another defendant who commits the crime on the same date and goes to trial can be subjected to another set of guidelines because of the delay in reaching the sentencing date necessitated by the trial. If a defendant "affirmatively selects" the guidelines before a change in the guidelines which guidelines apply at sentencing or resentencing? Can defendants who committed their crime prior to the guidelines line up the day before the effective date a disadvantageous amendment change to the guidelines and "affirmatively select" the guideline thereby prohibiting imposition of the disadvantageous amended guideline thereafter at a later sentencing date? If a defendant fails to appear at a sentencing hearing because of a valid medical reason, can the trial judge sentence the defendant under amendment guidelines that go in effect on the date of the subsequent postponed sentencing hearing? Did this defendant lose his right to the original guidelines because of the illness?

It is clear that the sentencing date can be inadvertently or intentionally delayed, postponed or accelerated to reach some desired result in the trial court. The sentencing date is too capricious or elastic a concept to gauge a uniform statewide system of sentencing guidelines. If a revision or amendment is proposed and approved by

the legislature pursuant to Section 921.001(4)(b) this will surely set in motion a wave of accelerations or postponements by the parties. By gauging the calculation of the guideline scoresheet from the date an offense was committed, the unfairness, capriciousness and manipulation inherent in calculating the guidlines from the sentencing date will be eliminated.

Calculating the guideline from date of offense brings the necessary unformity and certainty to an already turbulent procedure. The goal of uniformity and fairness will be assured. Therefore on the grounds stated herein, this Honorable Court should approve the holding of the First District Court of Appeal, distinguish Jackson, and hold that the guidelines in effect on the date of an offense should control.

V CONCLUSION

On the grounds stated herein, the decision of the First District Court of Appeal should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General John M. Koenig, Jr., The Capitol, Tallahassee, Florida, 32302; and by mail to Mr. Donald R. Beggs, Route 4, Box 457, Tifton, Georgia, 31794, this 7 day of February, 1986.

P. Douglas Brinkmeyer

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Assistant Public Defender