

115 ✓  
*Amended Brief*

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,

vs.

CASE NO. 67,558

DONALD R. BEGGS,  
Respondent.

\_\_\_\_\_ /

**FILED**

SIO J. WHITE

SEP 18 1985

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

JIM SMITH  
ATTORNEY GENERAL

JOHN M. KOENIG, JR.  
ASSISTANT ATTORNEY GENERAL

THE CAPITOL  
TALLAHASSEE, FLORIDA 32301  
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
<u>ISSUE</u>	
WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL WHICH EXPRESSLY CONFLICTS WITH DECISIONS OF THIS COURT.	
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Dobbert v. Florida,</u> 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977)	3, 4
<u>Lee v. State,</u> 294 So.2d 305 (Fla. 1974). <u>affirmed sub. nom.</u>	3, 4, 5
<u>May v. Florida Parole and</u> <u>Probation Commission,</u> 435 So.2d 834 (Fla. 1983)	3, 4, 6
<u>Preston v. State,</u> 444 So.2d 939 (Fla. 1984)	3, 4, 6
<u>The Florida Bar: Amendment to</u> <u>Rules of Criminal Procedure,</u> 451 So.2d 824 (Fla. 1984)	4
<u>Weaver v. Graham,</u> 450 U.S. 24, 67 L.Ed.2d 17, 101 S.Ct. 960 (1981)	6
 <u>OTHER AUTHORITIES</u>	
Chapter 84-328, Laws of Florida	4
Article V, §3(b)(3), Fla. Const.	4
Fla.R.App.P. 9.030(a)(2)(A)(iv)	4

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 67,558

DONALD R. BEGGS,

Respondent.

\_\_\_\_\_ /

PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

The Respondent was the Appellant in the First District Court of Appeal and the defendant in the circuit court. The State of Florida was the Appellee in the First District and the prosecuting authority in the circuit court.

References to the appendix of this brief will be made by use of the symbol "A," followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The Respondent pled nolo contendere to the offense of lewd and lascivious act upon a child under the age of fourteen (14) years. This offense occurred April 29, 1984. On August 3, 1984, the trial court sentenced the Respondent to 30 months incarceration followed by 12½ years probation, which was within the guidelines range as amended July 1, 1984.

On appeal, the First 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 29, 1984, the date the crimes were committed (A 2). The court reaffirmed its position in its written order denying the Petitioner's Motion for Rehearing (A 3).

SUMMARY OF 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 is in express and direct conflict with several decisions of this Court: May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983); Preston v. State, 444 So.2d 939 (Fla. 1984); Lee v. State, 294 So.2d 305 (Fla. 1974), affirmed sub. nom.; Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977).

ARGUMENT

ISSUE

WHETHER THIS COURT SHOULD EXERCISE ITS  
DISCRETIONARY JURISDICTION TO REVIEW  
THE DECISION OF THE FIRST DISTRICT COURT  
OF APPEAL WHICH EXPRESSLY CONFLICTS  
WITH DECISIONS OF THIS COURT.

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 this Court: May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983); Preston v. State, 444 So.2d 939 (Fla. 1984); Lee v. State, 294 So.2d 305 (Fla. 1974), affirmed sub. nom.; Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977).

The Respondent committed the criminal offense for which he was convicted on April 29, 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 Procedure, 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 August 3, 1984, pursuant to the amended sentencing guidelines which provided for a revised version of the category 2 scoresheet.

Defendant argued on appeal, and the First District held, that the sentencing guidelines may not be applied retroactively

and thus the sentencing guidelines in effect at the time of the commission of the crime are to be applied. By so holding, the First District has created conflict by announcing a rule of law contrary to that announced in Lee v. State, supra.

In Lee, this Court stated:

Therefore, that portion of the penalty provision dealing with the amount of punishment is clearly a creature of statute and as such forms part of the substantive law. If the subsequent statute merely re-enacted the previous penalty provisions 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.

Id. at 307 (emphasis in original).

Sub judice, the amended guidelines did not increase "any penalty provision which could have been imposed" under the statute in effect when the crime was committed. The maximum penalty under the statute was still fifteen (15) years and therefore there was no ex post facto application of the amended guidelines. 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. Therefore, the amended guidelines could be retroactively applied since they did not change the substance of the sentencing law. This Court so held in Preston v. State, 444 So.2d 939 (Fla. 1984) where it found that a recently



enacted aggravating circumstance for purpose of death penalty could be applied retroactively as statute did not change substance of sentencing law to the detriment of capital offenders. Preston at 946.

The instant case is also in conflict with this Court's decision in May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983). In May, this Court distinguished Weaver v. Graham, 450 U.S. 24, 67 L.Ed.2d 17, 101 S.Ct. 960 (1981) on the grounds that gain time involved no discretion whereas parole eligibility did and objective guidelines were to curtail arbitrary action by the Parole Commission. The Court found:

. . . the use of the terms "guidelines" and "presumptive parole release date" clearly conveys the message that the final parole decision will depend upon the commission's finding that the prisoner meets the conditions provided in section 947.18. It is precisely this discretionary element that distinguishes May's circumstances from Weaver's and which mandates a fundamentally different ex post facto analysis and outcome.

May at 837.

Sub judice, precisely the same circumstances exist. The final sentencing decision rests with the trial judge. The discretionary element is still present although the "guidelines" are more stringent. As in May, the Respondent here has suffered no legislative increase in punishment and therefore there can be no violation of the ex post facto clause.

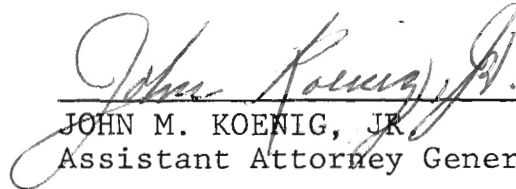
Since the First District's decision is clearly in express and direct conflict with the foregoing decisions, this Honorable Court has discretionary jurisdiction to hear this case.

CONCLUSION

The State of Florida respectfully urges this Court to grant certiorari in this case.

Respectfully submitted,

JIM SMITH  
ATTORNEY GENERAL

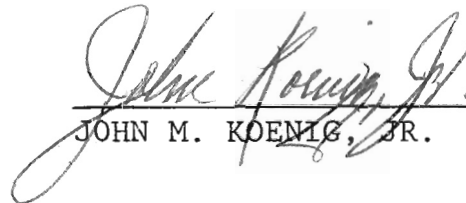
  
\_\_\_\_\_  
JOHN M. KOENIG, JR.  
Assistant Attorney General

The Capitol  
Tallahassee, Florida 32301  
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 18th day of September, 1985.

  
\_\_\_\_\_  
JOHN M. KOENIG, JR.