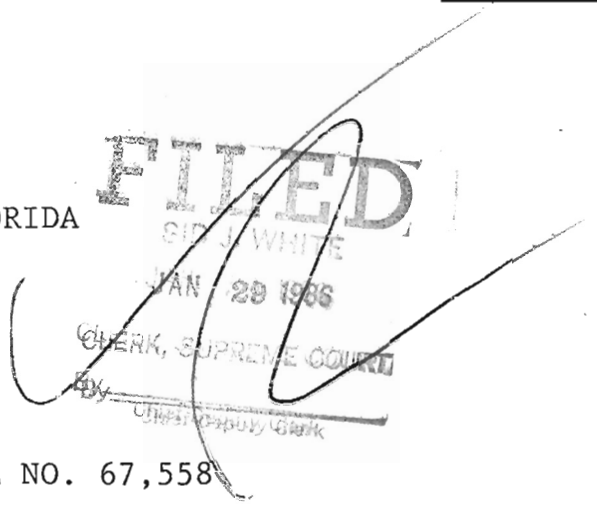
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 67,558

DONALD R. BEGGS,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

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.

STATEMENT OF THE CASE AND FACTS

For purposes of a resolution of the narrow legal question presented upon certiorari, the State adopts the opinion of the First District Court of Appeal in Beggs v. State, 473 So.2d 9, 10 (Fla. 1st DCA 1985), as its statement of the case and facts. In addition, Petitioner makes note that this Court on January 10, 1986, granted the State's petition to review the decision below under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv) on grounds that this decision expressly and directly conflicts with 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).

SUMMARY OF ARGUMENT

The decision in Beggs precludes employment of the sentencing guidelines as they exist subsequent to their procedural July 1, 1984 amendment upon defendants whose offenses were committed prior to that date. Said holding is contrary to this Court's decisions in May, Preston, and Lee on the legal question of whether ameliorative procedural changes effected subsequent to the commission of a defendant's offense, which may increase the actual length of his incarceration in the discretion of an autonomous authority but do not increase the quantum of punishment to which he is legislatively exposed, are violative of the ex post facto provisions of the Constitution, a fact which this Court confirmed in its subsequent and controlling decision of State v. Jackson, ___ So.2d ___ (Fla. 1985), 10 F.L.W. 564, rehearing denied December 27, 1985. The First District has subsequently announced that Beggs is no longer good law, and this Court should do the same.

ARGUMENT

ISSUE

THE FIRST DISTRICT REVERSIBLY ERRED IN DETERMINING THAT THE FLA.R.CRIM.P. 3.701 AND 3.988 SENTENCING GUIDELINES AS AMENDED EFFECTIVE JULY 1, 1984 MAY NOT BE APPLIED RETROACTIVELY.

In Beggs v. State, 473 So.2d 9, 10 (Fla. 1st DCA 1985), the First District crucially held that the sentencing guidelines, as amended effective July 1, 1984, may not be applied retroactively, citing to Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984) and Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984); and thus the sentencing guidelines in effect at the commission of the crime are to be applied. The Court's reasoning was more fully explained in Richardson v. State, 472 So.2d 1278 (Fla. 1st DCA 1985), where the Court held that the application of amended sentencing guidelines which exposed the defendant to a greater penalty than the guidelines in effect at the time of the offense was ex post facto and unconstitutional. Id. at 1279.

Sub judice, the Court reached its decision notwithstanding the fact that Respondent was actually "exposed" to the exact same maximum penalty for lewd and lascivious act upon a child, see §§800.04 and 775.082(3)(c), Fla. Stat., and indeed was even "exposed" to these same maximum penalties through the exact same procedural mechanism, a 3.701(b)(6) departure from the sentence recommended under the guidelines. The mere fact that Respondent could have been ordered to serve a greater percentage of the

maximum possible sentence under the amended guidelines without the trial judge exercising his discretion to depart, apparently led the First District to decide that their "retrospective" application was in violation of the ex post facto doctrine.

By so holding, the First District's decision created conflict with the decisions of this Court in May v. Parole and Probation Commission, supra, Preston v. State, supra, and Lee v. State, supra, on the legal question of whether ameliorative procedural changes effected subsequent to the commission of a defendant's offense which may increase the actual length of his incarceration in the discretion of an autonomous authority, but do not increase the quantum of possible punishment to which he is legislatively exposed, are violative of federal constitutional protections against ex post facto application of the law. In May, this Court held that procedural changes in the rules governing a prisoner's presumptive parole release date effected subsequent to the commission of the offense for which he was jailed, which had the effect of postponing his actual date of release in the discretion of the Florida Parole and Probation Commission but did not increase the quantum of punishment to which he was legislatively exposed, were consonant with the ex post facto provisions. In Preston v. State, this Court had harmoniously confirmed that ex post facto concepts were not affronted by a trial judge's finding as an aggravating factor in a capital case that the defendant committed murder in a cold, calculated and premeditated manner without pretense of moral or legal justification, even though the legislation authorizing such a finding in aggravation was not

passed until after the defendant's crime was committed. See also Justus v. State, 438 So.2d 358 (Fla. 1983), cert. denied, ___ U.S. ___, 79 L.Ed.2d 726 (1984); Combs v. State, 403 So.2d 418 (Fla. 1981); cert. denied, 456 U.S. 984 (1982); and Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, ___ U.S. ___, 77 L.Ed.2d 1379 (1983). This is consistent with this Court's statement in Lee v. State, where the Court held:

> 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). See also Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984) and Dobbert v. Florida, 432 U.S. 282 (1977).

After the First District had ruled adversely to the State in the case at bar, this Court, in a precise opinion authored by Mr. Justice Overton, implicitly validated the State's interpretation of the foregoing precedents vis-a-vis the instant context by holding:

> [T]he 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.

State v. Jackson, 10 F.L.W. 564 (emphasis supplied). Shortly thereafter, the First District explicitly recognized that its holding in the instant case was erroneous under Jackson, and overruled same. Wilkerson v. State, 11 F.L.W. 45 (Fla. 1st DCA 1985). It remains only for this Court to formally confirm that the First District was right in Wilkerson about being wrong in Beggs.

CONCLUSION

WHEREFORE, Petitioner, the State of Florida, respectfully submits that this Honorable Court must REVERSE the decision of the First District with directions that the sentence imposed by the trial court be REINSTATED.

Respectfully submitted,

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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 29th day of January, 1986.

John Koenig, Jr.

JOHN M. KOENIG, JR.