IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 67,558

DONALD R. BEGGS,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The State again adopts the opinion of the First District in Beggs v. State, 473 So.2d 9 (Fla. 1st DCA 1985), as its statement of the case and facts, with Respondent's concurrence.

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 v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983), Preston v. State, 444 So.2d 939 (Fla. 1984), and Lee v. State, 294 So.2d 305 (Fla. 1974), affirmed sub. nom., 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 its brief on the merits in this cause, the State painstakingly demonstrated that the First District's decision in Beggs v. State forbidding employment of the Fla.R.Crim.P. 3.701 and 3.988 sentencing guidelines as amended effective July 1, 1984 upon defendants whose crimes were committed prior to that date, was inconsistent with this Court's aforecited decisions in May, Preston, Lee, and Jackson. Those cases held that 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 not violative of constitutional provisions against ex post facto application of the law. Respondent responded by totally ignoring the import of the first three aforementioned decisions--which the State takes as a concession that these decisions cannot be distinguished away--and by lamely seeking to either distinguish or discredit Jackson. It is true that Jackson involved a retrospective application of the guidelines for resentencing upon a revocation of probation, which is not the situation here; however, Respondent

never even attempts to explain why this factual distinction between Jackson and Beggs should make a legal difference, and indeed the First District has recently concluded that it should not, Wilkerson v. State, ___ So.2d ___ (Fla. 1st DCA 1985), 11 F.L.W. 45, review pending (Fla. 1986), Case No. 68,181.

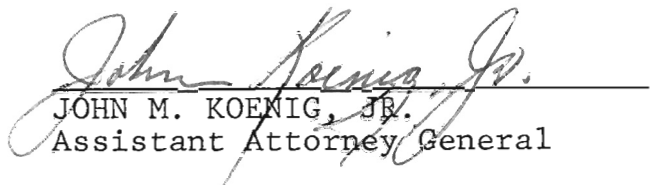
Respondent also seems to defend Beggs by arguing that the sentencing guidelines are "substantive" rather than "procedural" law, in an effort to come within the ambit of Weaver v. Graham, 450 U.S. 24 (1981), wherein our Supreme Court held that a substantive Florida statute mandatorily and retrospectively reducing the amount of "gain time" for which previously sentenced prisoners were eligible violated constitutional ex post facto prohibitions. If the guidelines prescribed in part by this Court are substantive, then they are also unconstitutional, compare Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975); and if the guidelines are unconstitutional, then of course Respondent cannot insist that the unamended versions thereof be applied to him, and the sentences imposed below would indisputably be proper as within statutory parameters. Brown v. State, 13 So.2d 458 (Fla. 1943). But because the guidelines are constitutional procedural rules to be applied flexibly to modify unvested wishes, see generally Hart v. State, 405 So.2d 1048 (Fla. 4th DCA 1981), review denied, 415 So.2d 1359 (Fla. 1982), rather than substantive laws to be applied rigidly to revoke vested rights, Weaver v. Graham in no way proscribes their "retrospective" application, just as this Court correctly perceived in Jackson.

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,

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 25th day of February, 1986.

John Koenig, Jr.

JOHN M. KOENIG, JR.