IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 67,560

LUKE RICHARDSON,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and the appellee below in Richardson v. State, 472 So.2d 1278 (Fla. 1st DCA 1985), review granted (Fla. 1986), Case No. 67,560, and the petitioner here, will be referred to as "the State." Luke Richardson, the criminal defendant and appellant below, and the respondent here, will be referred to as "respondent."

Pursuant to Fla.R.App.P. 9.220, a conformed copy of the decision under review is attached to this brief as an appendix; as are selected materials from certain prior filings in this cause.

No references to the record on appeal will be necessary.

All emphasis will be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Those details essential to a resolution of the narrow legal question presented upon certiorari are related in the opinion of the First District in Richardson v. State, which the State adopts as its statement of the case and facts. It need be noted here only that this Court on January 10 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)(ii) and (iv) on grounds that this decision expressly construes Article I, Sections 9 and 10 of the Constitution of the United States, and expressly and directly conflicts with decisions of this Court, May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983), Mills v. State, 462 So.2d 1075 (Fla. 1985), and Preston v. State, 444 So.2d 939 (Fla. 1984), on the same question of law.

SUMMARY OF ARGUMENT

Richardson construes the ex post facto provisions of the Constitution of the United States to preclude 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. Such construction was contrary to this Court's decisions in May, Mills and Preston 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 these constitutional provisions, 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 Richardson is no longer good law, and this Court should do the same.

ISSUE

THE FIRST DISTRICT REVERSIBLY ERRED IN DETERMINING THAT EMPLOYMENT OF THE FLA.R.CRIM.P. 3.701 AND 3.988 SENTENCING GUIDELINES AS AMENDED EFFECTIVE JULY 1, 1984 UPON DEFENDANTS WHOSE OFFENSES WERE COMMITTED PRIOR TO THAT DATE AMOUNTED TO AN UNCONSTITUTIONAL EX POST FACTO APPLICATION OF THE LAW.

ARGUMENT

In Richardson v. State, 472 So.2d 1278,1279, the First District crucially held that "application of the guidelines [as amended effective July 1, 1984] would be ex post facto and unconstitutional...[because] [t]he amended guidelines expose [respondent] to a greater penalty than the [unamended] guidelines in effect on the [pre-July 1] date of his [sale of cocaine and escape] offenses." The Court reached this holding notwithstanding the fact that respondent was actually "exposed" to the exact same maximum penalties for sale of cocaine and escape, fifteen years of imprisonment each, see §§893.13(1)(a), 944.40, and 775.082 (3)(c), Fla.Stat; and indeed was even "exposed" to these same maximum penalties through the exact same procedural mechanism, a Fla.R.Crim.P. 3.701(b)(6) departure from the sentences recommended under the guidelines. The mere fact that respondent could have been ordered to serve a somewhat greater percentage of these maximum possible sentences under the amended guidelines without the trial judge exercising his discretion to depart

evidently led the First District to decide that their "retrospective" application was illegal under the afore-cited ex post facto provisions.

Thus postured, the First District's decision conflicted at the time it was rendered with the decisions of this Court in May v. Florida Parole and Probation Commission, Mills v. State, and Preston v. State on the legal question of whether ameliorative procedural changes effected subsequent to the commission of a defendant's offenses 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 had 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.[1]

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[1] May was cited with approval in Paschal v. Wainwright, 738 F.2d 1173,1178 (11th Cir. 1984), wherein the Eleventh Circuit ruled that the retroactive application of parole guidelines pursuant to §947.002, Fla.Stat., did not constitute an ex post facto violation, see also Johnson v. Wainwright, 772 F.2d 826 (11th Cir. 1985). The Eleventh

(Footnote continued on next page)

In Mills, this Court had held that procedural changes in the law governing retention of jurisdiction over a prisoner's proposed release on parole effected subsequent to the commission of the offense for which he was convicted and sentenced, which could have the effect of postponing his actual date of release in the discretion of the trial judge but did not increase the quantum of punishment to which he was legislatively exposed, were also consistent with the ex post facto provisions. And 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 of legal justification, even

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Footnote One Continued

Circuit, in Paschal, 738 F.2d 1173,1181, footnote 12, obliquely critized the Third Circuit's decision in United States ex.rel. Forman v. McCall, 709 F.2d 852 (3rd Cir. 1983), upon which the First District relied to decide the instant case. The Eleventh Circuit's disdain for McCall was made explicit in its subsequent decision in Dufresne v. Baer, 744 F.2d 1543,1549, footnote 19 (11th Cir. 1984), cert. denied, ___U.S.___, 88 L.Ed.2d 49 (1985), wherein the court further held that amendments to the federal parole guidelines - like, the State would assert, amendments to the Florida sentencing guidelines - do not constitute criminal "laws" for purposes of ex post facto analysis.

It is interesting to note that the First District, in Randolph v. State, 458 So.2d 64,65 (Fla. 1st DCA 1984), rejected a State argument similar to that tendered below by finding Paschal "distinguishable" without stating why.

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).

Despite the force of the foregoing authorities, and also despite the February 1 and July 12, 1985 pronouncements of the Sentencing Guidelines Commission chaired by Mr. Justice McDonald of the Court that revisions to the guidelines were intended to be "procedural in nature" and thus inferentially not violative of the aforecited ex post facto prohibitions if applied retrospectively[2], the respondent artfully persuaded the First District that a decision in his favor was required under Lee v. State, 294 So.2d 305 (Fla. 1974), receded from on other grounds, Lee v. State, 340 So.2d 474 (Fla. 1976).

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The February 1 minutes were appended without objection to the State's unsuccessful "Motion For Rehearing; or Suggestion For Certification of Question of Great Public Importance and Motion For Stay of Mandate" filed with the First District on July 15, while the July 12 minutes were cited without objection as supplemental authority in support of this motion on August 9. Both minutes were appended without objection to the "Brief of Petitioner on Jurisdiction" filed by the State with this Court on August 27. As a convenience to the Court, the States takes the liberty of appending these minutes to this brief as well.

In Lee, this Court had held that a defendant who committed first degree murder prior to the enactment of a statutory provision that those sentenced to life imprisonment for this offense could not be paroled for at least 25 years thereafter could not be required to serve this mandatory minimum sentence under the ex post facto provisions. The First District failed to perceive, however, that Lee was distinguishable from the instant situation and those present in May, Mills and Preston as involving mandatory increases in legislatively authorized punishment, cf also Weaver v. Graham, 450 U.S. 24 (1981), rather than discretionary changes in the manner in which a constant legislatively authorized punishment may be imposed and/or served. Indeed, in Dobbert v. Florida, 432 U.S. 282 (1977) our Supreme Court had rejected the argument that a capital defendant whose crimes were committed when no statutory provision for a trial judge to override a jury recommendation of mercy existed could be sentenced to death in such an eventuality under the statutory scheme in place at the time the defendant was sentenced; see also Vaught v. State, 410 So.2d 147 (Fla. 1982).

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 via-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.

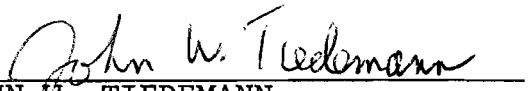
State v. Jackson, 10 F.L.W. 564. Shortly thereafter, the First District explicitly recognized that its holding in the instant case was erroneous under Jackson, and overruled same. Wilkerson v. State, ___So.2d___(Fla. 1st DCA 1985), 11 F.L.W. 45. It remains only for this Court to formally confirm that the First District was right in Wilkerson about being wrong in Richardson.

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



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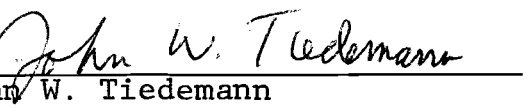
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Petitioner on the Merits has been forwarded to Mr. Carl S. McGinnes, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32302, by hand delivery, this 17th day of January, 1986.



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