IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 67,570

LUKE RICHARDSON,

Respondent.
_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
Attorney General

JOHN W. TIEDEMANN
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHERS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 67,560

LUKE RICHARDSON,

Respondent.
_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

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 again be referred to as "the State." Luke Richardson, the criminal defenant and appellant below, and the respondent here, will again be referred to as "respondent."

Pursuant to Fla.R.App.P. 9.200, a conformed copy of the decision under review is again 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 again be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State again adopts the opinion of the First District in Richardson v. State as its statement of the case and facts, with respondent's concurrence.

SUMMARY OF ARGUMENT

The decision below is inconsistent with this Court's decisions of May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983), Mills v. State, 462 So.2d 1075 (Fla. 1985), Preston v. State, 444 So.2d 939 (Fla. 1984), and State v. Jackson, 478 So.2d 1054 (Fla. 1985) that ameliorative procedural charges 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 punishment to which he is legislatively exposed, are not violative of constitutional provisions against ex post facto application of the law, Article I, Sections 9 and 10 of the Constitution of the United States and Article I, Section 10 of the Constitution of the State of Florida.

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 its "Initial Brief of Petitioner on the Merits" in this cause, the State painstakingly demonstrated that the First District's decision in Richardson 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, Mills, Preston and Jackson that 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 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 afoementioned decisions - which the State takes as a concession that these decisions cannot be distinguishd away - and by lamely seeking to either distinguish or discredit Jackson. It is true that Jackson involved

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 betweeb Jackson and Richardson should make a legal difference, and indeed the First District has recntly 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. It is equally true that Jackson did not explicitly mention Article I, Section 10 of the Constitution of the State of Florida in rejecting that defendant's ex post facto claim; however, to the State this omission signifies not sloppy workmanship but rather a belief that the reaches of the ex post facto clauses of the federal and our state constitutions are co-extensive. Compare State v. Cantrell, 417 So.2d 260 (Fla. 1982).

Respondent also seems to defend Richardson 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 eligble 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 sentences imposed by the trial court be REINSTATED.

Respectfully submitted,

JIM SMITH
Attorney General

JOHN W. TIEDEMANN
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply 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, on this 10th day of February, 1986.

John W. Tiedemann
Assistant Attorney General