

IN THE  
SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,

vs.

JAMES DOUGHERTY,  
Respondent.

CASE NO. 67582

**FILED**  
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JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and the appellee below in Dougherty v. State, 10 F.L.W. 1934 (Fla. 1st DCA August 13, 1985), and the petitioner here, will be referred to as "the State." James Dougherty, the criminal defendant and appellant below, and the respondent here, will be referred to as "respondent."

Pursuant to Florida Rules of Appellate Procedure 9.120(d) and 9.220, a conformed copy of the decision under review is attached to this brief as part of the appendix.

References to the appendix of this brief will be designated by "A" followed by the appropriate page number and enclosed in parentheses.

STATEMENT OF THE CASE AND FACTS

On September 4, 1984, respondent was adjudicated guilty of attempted sexual battery by threat or force not likely to cause serious personal injury and was sentenced to 30 months incarceration with credit for 152 days served. The offense was committed on April 6, 1984, and the sentence imposed was within the recommended guidelines range as amended July 1, 1984.

On appeal, the First District Court of Appeal reversed the respondent's sentence, holding that even though the respondent was sentenced after the effective date of the amended guidelines the trial court should have sentenced the respondent pursuant to the guidelines in effect on April 6, 1984, the date the crimes were committed. (A 1).

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), aff'd sub nom.; Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977).

This same issue is the subject of State v. Richardson, F.S.C. Case No. \_\_\_\_\_, and State v. Beggs, F.S.C. Case No. \_\_\_\_\_. Both of these cases are presently before this Court on the issue of jurisdiction.

## ARGUMENT

### ISSUE

THE FIRST DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THREE OF THIS COURT'S DECISIONS ON THE SAME QUESTION OF LAW.

The petitioner invokes this Court's "conflict" jurisdiction pursuant to Article V, § 3(b)(3), Florida Constitution (1980) and Florida Rule of Appellate Procedure 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), aff'd 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 6, 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 September 4, 1984, pursuant to the amended sentencing guidelines which provided for a revised version of the category 2 scoresheet.

Respondent 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 five (5) years and 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.<sup>1</sup> 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 the statute did not change the substance of the sentencing law to the detriment of capital offenders. Preston at 946.

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1. This was specifically addressed most recently by the Sentencing Guidelines Commission on July 12, 1985. A copy of the minutes are attached. (A 2)



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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Mr. Andrew Thomas, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 9<sup>th</sup> day of September, 1985.

Patricia Connors  
PATRICIA CONNERS  
OF COUNSEL