

No Reg Case 017

IN THE  
SUPREME COURT OF FLORIDA

**FILED**  
SID J. WHITE  
FEB 10 1986  
CLERK, SUPREME COURT  
By [Signature]  
Chief Deputy Clerk

STATE OF FLORIDA,  
Petitioner,

v.

CASE NO. 67,582

JAMES DOUGHERTY,  
Respondent.

\_\_\_\_\_ /

PETITIONER'S  
BRIEF ON THE MERITS

JIM SMITH  
ATTORNEY GENERAL

PATRICIA CONNERS  
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS  
THE CAPITOL  
TALLAHASSEE, FLORIDA 32301  
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii-iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2-3
SUMMARY OF ARGUMENT	4
ISSUE	
THE FIRST DISTRICT REVERSIBLY ERRED IN DETERMINING THAT THE SENTENCING GUIDE- LINES, AS AMENDED EFFECTIVE JULY 1, 1984, MAY NOT BE APPLIED RETROACTIVELY.	5-9
CONCLUSION	9
CERTIFICATE OF SERVICE	10
APPENDIX	11

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Combs v. State,</u> 403 So.2d 418 (Fla. 1981), <u>cert. denied, 456 U.S. 984 (1982)</u>	7
<u>Dobbert v. State,</u> 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 229 (1977)	3, 7
<u>Dougherty v. State,</u> 474 So.2d 11 (Fla. 1st DCA 1985)	4, 5
<u>Justus v. State,</u> 438 So.2d 358 (Fla. 1983), <u>cert. denied, _____ U.S. _____,</u> 79 L.Ed.2d 726 (1984)	7
<u>Lee v. State,</u> 294 So.2d 305 (Fla. 1974), <u>aff'd sub. nom.</u>	3, 4, 6
<u>May v. Florida Parole and</u> <u>Probation Commission,</u> 435 So.2d 834 (Fla. 1983)	3, 4, 6
<u>Paschal v. Wainwright,</u> 738 F.2d 1173 (11th Cir. 1984)	7
<u>Preston v. State,</u> 444 So.2d 939 (Fla. 1984)	3, 4, 6
<u>Richardson v. State,</u> 472 So.2d 1278 (Fla. 1st DCA 1985)	3, 5
<u>Smith v. State,</u> 424 So.2d 726 (Fla. 1982), <u>cert. denied, _____ U.S. _____,</u> 77 L.Ed.2d 1379 (1983)	7
<u>State v. Beggs,</u> F.S.C. Case No. 67,558	3
<u>State v. Jackson,</u> 10 F.L.W. 564 (Fla. October 17, 1983), <u>reh'g denied, December 27, 1985</u>	4, 8

State v. Richardson,  
F.S.C. Case No. 67,560 3

Wilkerson v. State,  
11 F.L.W. 45 (Fla. 1st DCA December 23, 1985) 9

OTHER AUTHORITIES

§ 775.082(3)(c), Fla. Stat. 5

§ 777.04(4)(c), Fla. Stat. 5

§ 794.011(5), Fla. Stat. 5

Fla.R.Crim.P. 3.701(b)(6) 5

Fla.R.App.P. 9.030(a)(2)(A)(iv) 3

Art. V, § 3(b)(3), Fla. Const. 3

IN THE  
SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,

vs.

CASE NO. 67,582

JAMES DOUGHERTY,  
Respondent.

\_\_\_\_\_ /

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent, James Dougherty, was the appellant in the First District Court of Appeal and the defendant in the circuit court. Petitioner, the State of Florida, was the appellee in the First District and the prosecuting authority in the circuit court.

The record on appeal consists of one volume of transcript and one volume of docket instruments. Any references thereto will be designated by "T" and "R" respectively followed by the appropriate page number and enclosed in parentheses.

Pursuant to Florida Rule of Appellate Procedure 9.220, a conformed copy of the decision under review is attached to this brief as part of the appendix.

STATEMENT OF THE CASE AND FACTS

By information filed April 25, 1984, respondent was charged with one count of sexual battery by threat or force or violence likely to cause serious personal injury and a second count of sexual battery by use of force not likely to cause serious personal injury (R 3). The offenses were alleged to have occurred on April 6, 1984. (R 3).

On July 16, 1984, the respondent pled guilty to attempted sexual battery as a lesser of count II in exchange for the State's nolle pros of count I. (R 33). A sentencing hearing was held September 4, 1984. (T 1-18).

At the hearing, the trial court utilized the amended guidelines, effective July 1, 1984, to score respondent's recommended sentencing range at thirty months to three and one-half years. (R 37). Under the guidelines in effect at the time the offenses occurred, respondent's recommended sentence would have been any non-state prison sanction.

Pursuant to the scoresheet calculated under the amended guidelines, the trial court imposed the minimum sentence of thirty months. (R 37, T 17). Respondent was adjudicated guilty and sentence accordingly with credit for 152 days served. (R 38-41).

On appeal to the First District Court of Appeal, respondent contended that the trial court erred in utilizing the amended guidelines scoresheet inasmuch as its application

to an offense committed prior to the amendment was a violation of the prohibition against ex post facto laws. The First District agreed, and, relying upon Richardson v. State, 472 So.2d 1278 (Fla. 1st DCA 1985), reversed and remanded the cause for resentencing. (App. A).

On January 23, 1986, this Court 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 Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) on grounds that this decision expressly and directly conflicts with the following decisions of the 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. 229 (1977).

This identical issue is presently before this Court in State v. Beggs, F.S.C. No. 67, 558 and State v. Richardson, F.S.C. No. 67,560.

## SUMMARY OF ARGUMENT

The First District's decision in Dougherty v. State precludes employment of the sentencing guidelines as they exist subsequent to their July 1, 1984, procedural amendment upon defendants whose offenses were committed prior to that date. As such, the court's 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 quantum of the 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, 10 F.L.W. 564 (Fla. October 17, 1985), reh'g denied, December 27, 1985. The First District has subsequently announced that holdings identical to the instant one are no longer good law, and this Court is urged to likewise disapprove the First District's holding here.



ISSUE

THE FIRST DISTRICT REVERSIBLY ERRED IN DETERMINING THAT THE SENTENCING GUIDELINES, AS AMENDED EFFECTIVE JULY 1, 1984, MAY NOT BE APPLIED RETROACTIVELY.

In Dougherty v. State, 474 So.2d 11 (Fla. 1st DCA 1985), the First District held that the sentencing guidelines, as amended effective July 1, 1984, may not be applied retroactively, and thus, that the sentencing guidelines in effect at the commission of the crime are to be applied. In so holding, the court relied upon Richardson v. State, 472 So.2d 1278 (Fla. 1st DCA 1985), in which, explaining its reasoning more fully, 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 statutory penalty for attempted sexual battery as before the effective date of the amendment, see sections 794.011(5), 777.04(4)(c), and 775.082(3)(c), Florida Statutes, 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 guidelines without the trial judge exercising his discretion to depart, apparently led the First District to decide that their "retrospective" application would be 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 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).

The Sentencing Guidelines Commission essentially espoused this viewpoint with regard to the July 1, 1984, amendments when in its July 12, 1985 pronouncements, the Commission, chaired by Mr. Justice McDonald, stated 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.<sup>1</sup> (App B).

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 holdings in cases deciding the same issue of law as the instant case were erroneous under Jackson, and overruled

---

<sup>1</sup> Petitioner has included the Commission's minutes with regard to the July 12, 1985 pronouncements as part of the attached appendix. These minutes were also attached to the petitioner's jurisdictional brief in this cause and were, at that time the subject of a motion to strike filed by respondent. The motion was denied by this Court at the time it accepted jurisdiction in this case.

them. Wilkerson v. State, 11 F.L.W. 45 (Fla. 1st DCA December 23, 1985). It remains only for this Court to ensure that same result with regard to the First District's decision here.

CONCLUSION

WHEREFORE, petitioner respectfully requests this Court to REVERSE the decision of the First District with directions, if necessary, that the sentence imposed by the trial court be REINSTATED.

Respectfully submitted,

JIM SMITH  
ATTORNEY GENERAL

*Patricia Conners*  
PATRICIA CONNERS  
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS  
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 forwarded by hand delivery to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this the 10th day of February, 1986.

  
\_\_\_\_\_  
PATRICIA CONNERS  
OF COUNSEL