

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 LENARD TAYLOR,)
)
 Respondent.)
 _____)

CASE NO. 67,605

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as set forth in the Petitioner's jurisdictional brief in this cause.

SUMMARY OF THE ARGUMENT

Respondent's offense took place before the July 1, 1984 change in the sentencing guidelines which increased the penalty range in a split-sentence, prison and probation, situation. The sentencing court applied the change to increase Respondent's guideline sentence from three to fifteen years. This was a clear application of an ex post facto law to Respondent's detriment, contrary to Article I, Section 9 of the United States Constitution and Article I, Section 10 of the Florida Constitution.

The discrete exercise of a court's jurisdiction under the sentencing guidelines is not the same as the continuing exercise of discretion by the Parole and Probation Commission, so the May case is not in conflict with the District Court of Appeal, rendering unnecessary discretionary review by this Court.

ARGUMENT

THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL, BECAUSE THAT DECISION IS CLEARLY IN KEEPING WITH THE CONSTITUTIONAL PROHIBITIONS OF EX POST FACTO LAWS, AND IS NOT IN CONFLICT WITH THE MAY CASE.

The July 5, 1985 decision of the Fifth District Court of Appeal in this case, Taylor v. State, 10 FLW 1663 (Fla. 5th DCA July 5, 1985), recognizes the obvious, that the July 1, 1984 amendment to Florida Rule of Criminal Procedure 3.701 of Committee Note (d)(12) altered Taylor's situation to his disadvantage. Higginbotham v. State, 88 Fla. 26, 101 So. 233 (1924). Under the sentencing guidelines in effect when Taylor committed the offense, if a split-sentence were imposed, the combination of prison and probation could not exceed the maximum period of the guideline range, in Taylor's case three years. In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983). By contrast, under the amended Committee Note (d)(12), which came into effect after Taylor committed the offense but before he was sentenced, and which the trial judge took advantage of to increase Taylor's sentence, the prison term of a split-sentence could not exceed the maximum period of the guideline range, in Taylor's case three years, but the probation term could extend beyond that to the maximum statutory sentence, in Taylor's case fifteen years. The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 451

So.2d 824 (Fla. 1984).

To apply the amendment to Taylor, as the trial judge did, for a crime committed before the amendment took effect, which resulted in increasing his sentence by twelve years, was a clear violation of the constitutional prohibition against ex post facto laws. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17,24,26 (1981). In addition, the judge went beyond the guideline range without written reasons for doing so, contrary to Florida Rule of Criminal Procedure 3.701 d.11.

The July 1, 1984 amendment did not "merely change the procedure for arriving at a recommended guidelines sentence" (BP5)^{1/}; it changed the sentence itself, in this case by twelve years. In remanding to the trial court, the Fifth District Court of Appeal told it to either impose sentence according to the guidelines in effect at the time the offense was committed, under which the total prison and probation sentence could not exceed three years, or state clear and convincing reasons for departing from that sentence. 10 FLW at 1663. Under the July 1, 1984 amendment by contrast, the judge could impose the fifteen years split-sentence on Taylor without having to state any reasons, as the judge attempted to do.

While it is conceivable that the result could be the same, three years in prison and twelve years probation, as long as the judge comes up with clear and convincing reasons to depart

^{1/} Brief of Petitioner, page 5

from the three years of the total applicable guidelines sentence, that is not the ex post facto law issue. On its face, the difference between the guidelines sentence under the original Committee Note (d)(12) and under the amended rule as applied in this case is twelve years additional punishment. This was not merely a procedural change, like a law of evidence; it made the punishment for Taylor's crime more burdensome. Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344,356 (1977). The subsequent amendment did not merely re-enact the previous penalty provisions, without increasing any penalty provision which could have been imposed under Florida Rule of Criminal Procedure 3.701 at the time of the commission of the offense for which Taylor was being punished. Lee v. State, 294 So.2d 305,307 (Fla. 1974). It increased the guidelines sentence, even if it did not affect the term provided by general law. As already noted, the penalty increase is twelve years.

This case is not in conflict with May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983). Sentencing under the guidelines system by a trial court is not the same exercise of continuing discretion that is the responsibility of the Parole and Probation Commission. The sentencing court exercises its discretion once and for all when it imposes sentence under the guidelines. The Parole Commission exercises an ongoing discretion to set an inmate's parole date. The function of the trial court analogous to such continuing discretion now no longer exists under the sentencing guidelines regimen, retention by the judge of jurisdiction over a portion of the

sentence, because parole no longer exists under the guidelines.

Florida law at the time of Taylor's offense called for a maximum three-year split-sentence punishment under the guidelines; the sentencing court used the later amendment to give him a fifteen years' guideline sentence. This was clearly the application of an ex post facto law, to Taylor's disadvantage. 435 So.2d at 838.

CONCLUSION

BASED UPON the arguments made and authorities cited herein, Respondent respectfully requests that this Court not exercise its discretionary jurisdiction to review the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Lenard Taylor, Inmate No. A-081775, DeSoto Correctional Institute, Post Office Drawer 1072, Arcadia, Florida 33821, on this 24th day of September, 1985.

Michael L. O'Neill

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