IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 67,605
	)	
LENARD TAYLOR,	)	
	)	
Respondent.	)	
_____	)	

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

Between the time Taylor committed the offense and the time he was sentenced for it, the sentencing guidelines were amended to increase the sentence in a split-sentence scheme of prison term followed by probation. In Taylor's case the difference was twelve years probation, an increase in the punishment assigned by law when the act to be punished occurred. To apply the amendment to Taylor is to apply the ex post facto increase in sentence.

ARGUMENT

APPLYING AN AMENDMENT TO THE SENTENCING GUIDELINES RETROSPECTIVELY TO AN OFFENSE COMMITTED PRIOR TO ITS ENACTMENT WHICH INCREASES A DEFENDANT'S SENTENCE IS A VIOLATION OF THE EX POST FACTO CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

The change in the sentencing guidelines brought about by the July, 1984 amendment clearly altered Taylor's situation to his disadvantage, Higginbotham v. State, 88 Fla. 26, 101 So. 233 (1924), made more burdensome the punishment for a crime after its commission, and thus was more onerous than the prior law, Dobbert v. Florida, 432 U.S. 282,292,294, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). At the time of the commission of the offense for which Taylor was convicted and sentenced, he was subject to a total guidelines sentence of three years, including prison and probation, but because of the change being applied to him ex post facto (the factum being the commission of the offense). Taylor was given an additional twelve years probation.

Although this extra twelve years is not the same punishment as a prison term, it is still punishment, and represents an increase in the punishment from that assigned by law when the act to be punished occurred. Weaver v. Graham, 450 U.S. 24,30, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Petitioner attempts to avoid the obvious by describing the sentencing guidelines as "procedural rules" which give a defendant like Taylor "nothing more than a tenuous expectancy regarding his punishment" (Brief of Petitioner, Page 5,6). As noted by Justice Ehrlich in his

dissent in Florida v. Jackson, 10 FLW 564 (Fla. October 17, 1985), the guidelines are not simply procedural rules, but represent a delegation by the legislature of its authority to effectuate substantive law in the area of proscribing criminal penalties and placing limitations upon the application of such penalties. They have the same force and effect as if they had been statutorily enacted.

While they do not usurp judicial discretion in sentencing, they certainly qualify and circumscribe it, especially with the requirement, not observed in this case, that any departure from the recommended guidelines sentence must be accompanied with a written statement of clear and convincing reasons for departure articulated at the time of sentencing. The amendment to the guidelines in this case did not merely change the procedure for arriving at a recommended sentence (Brief of Petitioner, page 6), but changed the sentence. Before the change, Taylor could expect to receive a maximum guidelines sentence of three years. After the change the expected maximum was fifteen, if the judge chose to add twelve years probation, on top of a three years prison term. Again, the difference is the twelve years probation, a substantive difference for Taylor. In his case, the punishment did not remain unaffected by the change in the guidelines subsequent to his commission of the offense for which he was sentenced, unlike the statutory change in Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). The punishment was affected to the extent of the twelve years probation, and this was no "tenuous expectancy" (Brief of Petitioner, page 5), but

an open invitation to a judge like Taylor's to add a twelve years probation term onto a previously established three years guidelines sentence.

It makes no difference that the sentencing guidelines are subject to amendment from year to year: so are any penal statutes. If anything, before the guidelines, and indeed one reason why they were created, a defendant had an even more "tenuous expectancy regarding his punishment". The existence of a statutory maximum sentence makes no difference in that regard, but the guidelines attempt to provide for more consistency and uniformity in sentencing and in the exercise of sentencing discretion; in that sense they constitute a less tenuous expectancy.

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.

CONCLUSION

BASED UPON the arguments made and authorities presented herein, Respondent respectfully asks this Honorable Court to uphold the decision of the Fifth District Court of Appeal in this cause.

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, #537, DeSoto Correctional Institute, Post Office Drawer 1072, Arcadia, Florida 33821, on this 20th day of January, 1986.

Michael L. O'Neill

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