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IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 67,605

LENARD TAYLOR,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent was charged by a two-count information with burglary of a dwelling and grand theft (R 143). The alleged offenses occurred on March 1, 1984. At trial on June 22, 1984, a jury found respondent guilty of burglary of a dwelling and acquitted respondent of grand theft (R 125, 145). At the time appellant committed these crimes, Committee Note (d)(12) to Florida Rule of Criminal Procedure 3.701, provided in relevant part:

> If a split sentence is imposed (i.e., a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guideline range, and the total sanction imposed cannot exceed the maximum guideline range.

That rule was subsequently amended on July 1, 1984.

Committee Note (d)(12) now reads:

> If a split sentence is imposed (i.e., a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guideline range, nor exceed the maximum of the range. The total sanction (incarceration and probation) shall not exceed the term provided by general law.

Appellant was sentenced on August 24, 1984, pursuant to the amended guidelines in effect at the time of sentencing, to three years incarceration followed by twelve years probation (R 153-155). Under the previous guidelines recommendation, the combined term of incarceration and probation could not exceed three years without clear and convincing reasons for departure.

Respondent appealed his sentence to the Fifth District Court of Appeal. The district court of appeal on motion for

rehearing by the respondent, reversed the sentence of the trial court, holding that the application of the amended sentencing guidelines to an offense which occurred prior to the enactment of the amendment is a violation of the ex post facto doctrine of Article 1, Section 10 of the Florida Constitution and Article I, Section 10 of the United States Constitution. A motion for rehearing filed by petitioner was denied.

Petitioner filed a timely notice of appeal and this court accepted jurisdiction.

SUMMARY OF ARGUMENT

The sentencing guidelines are procedural rules designed to guide circuit judges in their use of discretion in sentencing throughout Florida. They were not intended to usurp judicial discretion. Since a defendant can demonstrate nothing more than a tenuous expectancy regarding his punishment under the guidelines, a critical element of the ex post facto doctrine (that the retrospectively applied law disadvantages the offender by increasing the punishment prescribed for the offense) cannot be established.

POINT ON APPEAL

THE APPLICATION OF THE SENTENCING GUIDELINES IN EFFECT AT THE TIME OF SENTENCING IS CONSISTENT WITH THE EX POST FACTO CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

ARGUMENT

On August 24, 1984, the trial court sentenced the respondent pursuant to the amended sentencing guidelines which were in effect at the time of sentencing. See, The Florida Bar: Amendment to Rules of Criminal Procedure - (3.701,3.988-Sentencing Guidelines, 451 So.2d 824 (Fla. 1984). The offense for which respondent was convicted occurred on March 1, 1984. The amended sentencing guidelines became effective on July 1, 1984. See, Ch. 84-328, Laws of Fla. The Fifth District Court of Appeal reversed the sentence holding that the application of the amended sentencing guidelines to an offense which occurred prior to the amendment is a violation of the ex post facto doctrine of the United States Constitution and Florida Consitution. See, Art. I, § 10, U.S. Const. and Art. I, § 10, Fla. Const.

The United States Supreme Court has held that in order for a law to be forbidden as ex post facto, the law must be criminal or penal in nature, it must apply to events occurring before its enactment (be retrospective) and, it must disadvantage the offender affected by it, that is, it must increase the punishment prescribed for the offense. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984). This court has recognized these critical elements in May v. Florida Parole and Probation Commis-

sion, 435 So.2d 834 (Fla. 1983).

In May, May was serving a prison sentence for several felony convictions. His parole release date (PPRD) was originally set for July 31, 1984. On May 30, 1981, May was convicted of an offense while still in prison. Based upon this conviction, the Parole Commission using his present and previous convictions recalculated his PPRD based upon new parole guidelines adopted September 10, 1981. His new PPRD was October 4, 1994, an extension of almost ten years beyond his original PPRD.

On appeal to this court, May contended that the parole date guideline adopted after the commission of his in prison offense could not be used to recalculate his PPRD for that offense and that doing so was an unconstitutional application of more stringent guidelines saying:

> . . . [W]here a prisoner can establish no more than a tenuous expectancy regarding probable punishment under the law existing at the time of his offense it becomes difficult or impossible to establish (a critical ex post facto element) . . . that the retrospectively applied law disadvantages the offender affected by it.

435 So.2d at 836.

Similarly, in the instant case, respondent has at best nothing more than a tenuous expectancy regarding his punishment under the sentencing guidelines. The sentencing guidelines are subject to amendment from year to year, section 921.001(4)(b) Florida Statutes (1984), and a trial court is not required to inform a defendant prior to sentencing that it intends to depart from the recommended sentence and the reasons therefore. Mincey

v. State, 460 So.2d 396 (Fla. 1st DCA 1984). The constitution deals with substance, not shadows. Weaver, 450 U.S. at 32 & n.15, 101 S.Ct. at 965 & n.15. Respondent's only substantive guarantee was that the court could not sentence him above the maximum penalty provided by law.

In Lee v. State, 294 So.2d 305 (Fla. 1974), this court stated:

> If the subsequent statute merely reenacted the previous penalty provision 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. (Emphasis in the original), 294 So.2d at 307.

Since the amended sentencing guidelines have no effect on the penalty provisions prescribed for the violation of the various criminal statutes, there is no ex post facto violation.

The sentencing guidelines are procedural rules designed to guide circuit judges in their use of discretion in sentencing throughout Florida. See, Fla. R. Crim. P. 3.701(b). They were not intended to usurp judicial discretion. Fla. R. Crim. P. 3.701 (b)(6). The amendments to the guidelines merely change the procedure for arriving at a recommended sentence not requiring the application of the ex post facto doctrine. State v. Jackson, 10 F.L.W. 564 (Fla. Oct. 17, 1985). Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto . Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977); Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262, n.12 (1884).

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on the Merits has been furnished by mail to Michael L. O'Neill, Assistant Public Defender, 112 Orange Ave., Suite A, Daytona Beach, Florida 32014, counsel for the respondent, this 31 day of December, 1985.

Kevin K. Carson

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