

IN THE SUPREME COURT OF FLORIDA

JOSEPH WILLIAM COLBERT, :
 :
 Petitioner, :
 :
 vs. :
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

Case No. 67,607

FILED

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DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

REPLY BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This Brief is filed on behalf of the Petitioner, JOSEPH WILLIAM COLBERT, in reply to the Brief of the Respondent, the State of Florida. Petitioner will rely upon his argument in the Brief of Petitioner on Merits on Issue II.

SUMMARY OF ARGUMENT

Petitioner's failure to object to the trial court's error in applying the pre-amendment sentencing guidelines rule in effect on the date of the offense rather than the post-amendment rule in effect on the date of sentencing does not foreclose review of the issue. The contemporaneous objection rule does not apply to sentencing errors apparent from the face of the record. Petitioner failed to present this argument to the District Court because the law in effect at the time of his direct appeal required application of the guidelines rule in effect on the date of the offense. This Court subsequently ruled that the trial court must apply the guidelines rule in effect on the date of sentencing. This Court must apply the law now in effect to decide that the trial court's departure sentence was illegal because the court applied the wrong guidelines rule.

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED BY APPLYING THE SENTENCING GUIDELINES RULE IN EFFECT ON THE DATES OF THE OFFENSES RATHER THAN THE RULE IN EFFECT ON THE DATE OF SENTENCING.

Petitioner's failure to object to the use of the pre-amendment guidelines scoresheet provided by Florida Rule of Criminal Procedure 3.988(c) at his sentencing hearing on July 11, 1984, (R64 - 78) does not foreclose review of this issue. The trial court's error is apparent from the face of the record. (R84) This Court has held that the contemporaneous objection rule does not apply to sentencing errors which are apparent from the face of the record. State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984).

Petitioner failed to argue that the trial court erred by applying the pre-amendment guidelines on direct appeal to the District Court of Appeal, Second District because the existing law at the time of his appeal required application of the guidelines rule in effect on the date of the offense. Sueiro v. State, 471 So.2d 1317 (Fla. 3d DCA 1985); Moore v. State, 469 So.2d 947 (Fla. 5th DCA 1985); Miller v. State, 468 So.2d 1018 (Fla. 4th DCA 1985). Petitioner's appeal was decided on August 9, 1985. Colbert v. State, 474 So.2d 218 (Fla. 2d DCA 1985). This Court decided State v. Jackson, 478 So.2d 1054 (Fla. 1985), on October 17, 1985. In Jackson, this Court held for the first time that the trial court must apply the guidelines rule in effect on the date of sentencing, rather than the rule in effect on the date of the

offense. Thus, Jackson represented a substantial change in the law not anticipated by Petitioner.

It is well-established that the law in effect at the time a reviewing court issues its decision governs the issues decided. Wheeler v. State, 344 So.2d 244 (Fla. 1977); McIntire v. State, 381 So.2d 1154 (Fla. 1st DCA 1980). Petitioner appealed to the District Court on the ground that the trial court's reason for departure--"Multiple Robberies not scored because guidelines sheet scores none after 4" (R84)--was invalid. This Court granted review of the District Court's decision affirming the departure sentence. This Court should apply the law now in effect to find that the departure sentence was illegal because the trial court applied the wrong guidelines rule, as argued in the Brief of Petitioner on Merits, pages 4 - 6.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 13th day of March, 1986



PAUL C. HELM

PCH:rms