IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

V.

JESSE JAMES TISDALE,

Respondent.

CASE NO.

Chief Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

Respondent was charged by a two count information with burglary of a dwelling and petit theft. The alleged offenses occurred on June 6, 1984. At trial on October 22, 1984, a jury found respondent guilty of burglary of a dwelling and acquitted respondent of grand theft. Amendments to the sentencing guidelines took effect on July 1, 1984. Respondent was sentenced on November 30, 1984. The trial court sentenced respondent pursuant to the amended guidelines which were in effect on the date of sentencing.

Respondent appealed his sentence to the Fifth District Court of Appeal. The district court of appeal reversed the sentencing order of the trial court holding that the sentencing guidelines in effect at the time the crime was committed controlled respondent's sentencing and relying upon cases suggesting that application of the amended guidelines to offenses occurring prior to their effective date is a violation of the ex post facto doctrine of the Florida and United States constitutions.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal expressly construes a provision of the federal and state constitution and is in express and direct conflict with other decisions of this honorable court. As such, this court should exercise its discretionary jurisdiction to review that decision.

POINT I

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL WHICH EXPRESSLY CONSTRUES PROVISIONS OF THE FLORIDA AND UNITED STATES CONSTITUTION.

ARGUMENT

On November 30, 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 Rule of Criminal Procedure - (3.701, 9.988 - Sentencing Guidelines, 451 So.2d 824 (Fla. 1984). The offense for which respondent was convicted occurred on June 6, 1984. The amended sentencing guidelines became effective July 1, 1984.

See, Ch. 84-328, Laws of Fla. The Fifth District Court of Appeal reversed the sentence, holding that the sentencing guidelines in effect at the time the crime was committed controlled and relying upon cases suggesting to an offense which occurred prior to the amendment is a violation of the ex post facto doctrine of the United States and Florida Constitutions. See, Art. I, §10, U.S. Const. and Art. I, §10, Fla. Const.

Petitioner contends that the Fifth District Court of Appeal, in reversing the sentence imposed by the trial court, erroneously construed provisions of the Florida and United States Constitutions. This court has jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii).

POINT II

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT ON THE SAME QUESTION OF LAW.

ARGUMENT

In reversing the sentence imposed by the trial court below, the Fifth District Court of Appeal held that sentencing guidelines adopted after the commission of respondent's offenses could not be used to calculate the recommended range for sentencing and sentenced respondent. The decision of the district court of appeal conflicts with the same point of law decided by this court in May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983), and the decision of this court in Lee v. State, 294 So.2d 305 (Fla. 1974).

In <u>May</u>, 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 (10) years beyond his original PPRD.

On appeal to this court, May contended that the parole date guideline adopted <u>after</u> the commission of his inprison offense could not be used to recalculate his PPRD for that offense and that doing so was an unconstitutional application of more

stringent guidelines. This court disagreed and approved application of the new 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 (9184), 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 decision of the district court of appeal directly conflicts with this prinicple of law.

In Lee, supra, this court stated:

If the subsequent statute merely re-enacted 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 expost facto law. (Emphasis in the original), 294 So.2d at 307.

The amendments to the sentencing guidelines merely change the procedure for arriving at a recommended guidelines sentence. Thus, there is no ex post facto application of the amended guidelines to the respondent, since the penalty pro-

visions for offenses proscribed by general law have not increased. Additionally, 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).

Since the decision in the instant case conflicts with the rules of law set forth in $\underline{\text{May}}$, $\underline{\text{supra}}$, and $\underline{\text{Lee}}$, $\underline{\text{supra}}$, this court has jurisdiction. 1

To this writer's knowledge, this issue is present in pending petitions for discretionary review in the cases of <u>State v. Miller</u>, Case No. 67,276; <u>State v. Mott</u>, Case No. 67,278; <u>State v. Fletcher</u>, Case No. 67,275; <u>State v. Moore</u>, Case No. 67,281; <u>State v. Taylor</u>, Case No. 67,605; <u>State v. Griffin</u>, Case No. 67,713.

CONCLUSION

Based on the above and foregoing arguments and authorities presented herein, the court should exercise its discretionary jurisdiction favorably and review the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing petitioner's brief on jurisdiction has been furnished, by mail, to: Daniel J. Schafer, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32014, this 22nd day of October, 1984.

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