

**IN THE
SUPREME COURT OF FLORIDA**

ROBERT PAUL PATTERSON,)	
)	
Petitioner-Appellant,)	
)	
vs.)	CASE NO. 68,608
)	
STATE OF FLORIDA,)	
)	
Respondent-Appellee.)	
_____)	

PETITIONER'S INITIAL BRIEF ON REMAND

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QUESTION PRESENTED

As certified by the district court:

Whether all sentencing guidelines are to be considered procedural in nature so that the guidelines most recently amended shall be applied at the time of sentencing without regard to the ex post facto doctrine?

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STATEMENT OF THE CASE

A. Course of Prior Proceedings

1. Trial Court

An information was filed on March 19, 1984 charging Mr. Patterson with one count of manslaughter by intoxicated driver (§§ 316.1931(2), 782.07, Fla. Stat. (1983)) and one count of vehicular homicide (§ 782.071, Fla. Stat. (1983)). R 49-50.¹ the offenses were alleged to have occurred on February 2, 1984.

Mr. Patterson entered a plea of guilty on February 28, 1985 to Count I of the information, manslaughter, and Count II was dismissed. R 4, 47, 51, 53. The sentencing hearing was held on March 27, 1985, and since his offenses occurred after October 1, 1983, Mr. Patterson was sentenced pursuant to the sentencing guidelines.

At the sentencing hearing both the prosecutor and defense counsel agreed that Mr. Patterson fell within the presumptive sentence range of three to seven years imprisonment. R 21-22, 58-60. The State urged the court to impose a "split" sentence within this range consisting of three years imprisonment followed by four years probation so that the total sanction would remain within the seven year maximum presumptive sentence. R 21. The defense presented sixteen witnesses in mitigation of the sentence. In essence, they testified to Mr. Patterson's sincere

¹ References to the appellate record below are designated in this brief by the symbol "R" followed by the appropriate page number.

efforts to overcome substance addiction, his remarkable progress in turning his life around, and his extreme remorse over the death of the victim. R 24-43.

The trial court, however, chose not to follow these recommendations and instead determined that it would depart from the presumptive sentence. It imposed a "split" sentence of seven years imprisonment to be followed by three years probation. R 52, 54, 58-60.

2. District Court of Appeal

A timely appeal from the sentence was taken by Mr. Patterson to the Fourth District Court of Appeal where Mr. Patterson challenged the trial court's departure from the sentencing guidelines. The split sentence of seven years imprisonment followed by three years probation exceeded the seven-year maximum presumptive sanction and the trial court's reasons for departing from that range were improper and/or not "clear and convincing."

The district court agreed with Mr. Patterson, holding in an opinion dated January 22, 1986 that "[t]he trial judge clearly departed from the guidelines sentence," but failed to state written reasons, and "also failed to justify its departure from the guidelines by clear and convincing reasons." Patterson v. State, 11 FLW 238 (Fla. 4th DCA 1986). The court reversed the sentence and "remanded for sentencing in accordance with the sentencing guidelines." Id. at 239.

The State moved for rehearing, arguing that the sentencing law had been changed since Mr. Patterson's offense. The new guidelines law, it argued, would now permit the sentence that had

been imposed. Mr. Patterson objected to the application of the new law, arguing in his response to the motion for rehearing that applying the amended guidelines law would violate the Ex Post Facto Clause.

The district court, however, granted rehearing, and substituted a new opinion dated April 9, 1986. Patterson v. State, 486 So.2d 74 (Fla. 4th DCA 1986). The court reaffirmed that the trial court had erred in departing from the guideline sentence. Id. at 76. It felt bound by this court's opinion in State v. Jackson, 478 So.2d 1054 (Fla. 1985), which held that changes to the guidelines were to be retroactively applied. It reasoned that Jackson would require the amended guidelines to be applied on resentencing, and those amended guidelines now would permit the original sentence imposed by the trial court. Thus, the trial court's error under the original guidelines would be "harmless," since on remand it could legally impose the same sentence. The sentence was therefore affirmed. 486 So.2d at 76.

The court did acknowledge "concern over the breadth of [this Court's] Jackson [decision]" and so certified the question to this Court. Id. at 76 n.1. By incorporation,² the following

² The court adopted and incorporated the question certified by two other appellate courts, and did not restate it in its opinion. 486 So.2d at n.1 (citing Wilkerson v. State, 480 So.2d 213 (Fla. 1st DCA 1985); Carter v. State, 483 So.2d 740 (Fla. 5th DCA 1986)).

question was certified "as one of great public importance" for resolution by this Court:

WHETHER ALL SENTENCING GUIDELINES ARE TO BE CONSIDERED PROCEDURAL IN NATURE SO THAT THE GUIDELINES MOST RECENTLY AMENDED SHALL BE APPLIED AT THE TIME OF SENTENCING WITHOUT REGARD TO THE EX POST FACTO DOCTRINE?

Mr. Patterson filed a notice of invoking the discretionary jurisdiction of this Court, and thereby presented the above question.

3. Florida Supreme Court

Mr. Patterson challenged the retroactive application of the statute by the district court. In a per curiam opinion this Court, relying upon State v. Jackson, supra, held that amendments to the sentencing guideline law could be retrospectively applied to Mr. Patterson whose offense predated the effective date of those amendments. Patterson v. State, 499 So.2d 831 (Fla. 1987). In Jackson this court had reasoned that under Dobbert v. Florida, 432 U.S. 282 (1977) retroactive application of amendments to the guidelines were not subject to the Ex Post Facto Clause because the guidelines were "procedural" in nature.

This court thus answered the certified question in the affirmative and upheld the district court's application of the later-enacted guideline changes to affirm Mr. Patterson's sentence. 499 So.2d at 832.

4. The Supreme Court of the United States

Mr. Patterson timely filed a petition for writ of certiorari requesting review of this court's affirmance of the retroactive application of the amendment to the guidelines to uphold his

sentence. At that time certiorari had been granted in Miller v. Florida and Mr. Patterson urged that his case would be controlled by the decision in Miller. The State agreed that Mr. Patterson's case "involves exactly the same issue which is currently before the Honorable Court in Miller v. Florida, No. 86-5344." Respondent's Brief in Opposition, at pg. 2.

The Miller opinion was announced on June 9, 1987 and then on June 15, 1987 the Supreme Court entered its order in this case granting certiorari, vacating the judgment of this court and remanding "for further consideration in light of Miller v. Florida." Patterson v. Florida, 107 S.Ct. 3206 (1987).

B. Material Facts: Sentencing Guidelines

In its first annual review the Sentencing Guidelines Commission recommended certain changes. These recommendations were submitted first to this court for review. After approval by this Court on May 8, 1984,³ they then went to the Legislature for final approval and were adopted, effective July 1, 1984. Laws of Florida, Ch. 84-328.

The amendment at issue in the present case involves the total permissible length of a "split" sentence that combines imprisonment and probation. The guidelines in effect at the time of Mr. Patterson's offense in February, 1984, contained the following controlling committee note:

If a split sentence is imposed (i.e., a combination of state prison and probation supervision), the incarcerative portion imposed

³ The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 Sentencing Guidelines), 451 So.2d 824 (Fla. 1984). App. 36a-40a.

shall not be less than the minimum of the guideline range, and the total sanction imposed cannot exceed the maximum guideline range.

In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 852 (Fla. 1983).⁴ The total combined sanction thus could not exceed the upper limit of the guideline range. In Mr. Patterson's case it meant that, with his presumptive 3 to 7 year sentence range, the incarcerative portion of the split sentence could not fall below three years, and the combined length of imprisonment and probation could not exceed seven years. This provision is what made unlawful the ten year sanction (seven years imprisonment followed by three years probation) imposed by the trial court. As the district court of appeal held, this sentence was excessive under the guidelines in effect at the time of Mr. Patterson's offense.

This provision was amended, effective July 1, 1984, and now provides that in a "split" sentence,

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 law.

Fla.R.Crim.P. 3.701, Committee Note to subsection (d)(12). The underlined portion quoted above is the new provision. Under that provision only the incarcerative portion of the split sentence is limited to guideline range. The probationary portion of the sentence can be any length up to the statutory maximum. In this

⁴ The committee notes were expressly adopted by this Court. 439 So.2d at 849.

case the statutory maximum is 15 years imprisonment.⁵ Therefore, under the newly-enacted guidelines the formerly illegal three year probationary term imposed upon Mr. Patterson would be authorized. For that reason, on rehearing, the district court found the illegality of Mr. Patterson's sentence to be "harmless" and changed its holding to affirm the sentence.

Accordingly, under the guidelines in effect at the time of his offense, Mr. Patterson's sentence was unlawfully excessive. By retrospectively applying the later-enacted guidelines law, the courts approved a departure sentence totaling a ten-year sanction for Mr. Patterson.

SUMMARY OF ARGUMENT

The decision in Miller v. Florida, 107 S.Ct. 2446 (1987) controls the resolution of this case and requires the certified question to be answered in the negative. The district court had upheld an unlawful departure sentence, reasoning that an intervening amendment to the guidelines would permit the sentence that had been illegal at the time it was entered. The affirmance of the sentence thus violated the Ex Post Facto Clause because it retrospectively applied an amendment to the guidelines that disadvantaged Mr. Patterson because "it foreclosed his ability to challenge the imposition of a sentence longer than^N his presumptive sentence under the old law." 107 S.Ct. at 2452. The affirmance of Mr. Patterson's sentence is "void," id. at 2454, and must be vacated, and the cause remanded for resentencing.

⁵ Manslaughter is a second degree felony, §782.07, Fla.Stat. punishable by a term of years not to exceed fifteen years imprisonment, §775.082 (3)(c).

ARGUMENT

**THE APPLICATION OF CHANGES TO THE SENTENCING
GUIDELINE LAW TO AN OFFENSE PREDATING THE
EFFECTIVE DATE OF THOSE CHANGES VIOLATES THE
EX POST FACTO CLAUSE WHERE THOSE CHANGES
OPERATED TO INCREASE THE SANCTION IMPOSED UPON
MR. PATTERSON**

In this case the amended guideline provision was retrospectively applied to Mr. Patterson by the appellate court rather than the trial court. That difference in courts is the only distinction between this case and Miller v. Florida, 107 S.Ct. 2446 (1987). It is not, however, a difference that distinguishes the result in Miller.

The unanimous Miller decision reaffirms the established two-part test for determining whether a law violates the Ex Post Facto Clause. "[F]irst, the law 'must be retrospective, that is it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" 107 S.Ct. at 2451 (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)). "A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" Id. The Miller Court held that retroactively applying changes to the guidelines to offenses occurring before the effective date of those changes violates ex post facto proscriptions. The resulting sentence is "void." Id. at 2454.

In reaching its decision the Miller Court rejected the prior reasoning of a majority of this Court that changes the guidelines were "procedural" since they did not affect the maximum statutory

penalty. Although departures from the guideline sentence are permitted and therefore "petitioner 'cannot show definitively that he would have gotten a lesser sentence,'" retrospective application of the amended provisions violates ex post facto principles because "it foreclosed his ability to challenge the imposition of a sentence longer than his presumptive sentence under the old law." Id. at 2452.

The Miller holding controls the resolution of this case, for Mr. Patterson's "ability to challenge the imposition" of his departure sentence was not only "foreclosed" but it was actually given then taken away. The increase in his punishment is plain on the face of the appellate decisions in this case. Before the post-enacted guideline amendment was considered by the court, Mr. Patterson's sentence was held to be unlawfully excessive by three years. 11 FLW at 239. After the later-enacted law was considered, it was found that the added three year sanction was permissible. 486 So.2d at 76. There are thus specific holdings in this case that expressly find that Mr. Patterson's sentence was retrospectively increased by a three year term not permitted under the guidelines in effect at the time of his offense.⁶

⁶ The combined sanction of ten years, consisting of seven years imprisonment and three years probation, is what is unlawful under the law at the time of Mr. Patterson's offense. It was excessive by three years. It would be sheer speculation to say that only the probationary term, rather than the incarcerative term is unlawful. It is equally true to say that the sanction was excessive by three years of incarceration. Indeed, the prosecutor recommended a sanction of three years imprisonment followed by four years probation. It is the total combined sentence, not merely the probationary term, that is illegal.

We will not burden the Court with an extended discussion of the constitutional principles governing resolution of this case, for they have been fully resolved by Miller. Its principles apply directly to Mr. Patterson's case. He received a greater punishment because a new sentencing provision was applied retroactively. The holdings of the courts below reveal that increase with unmistakable clarity. The law in effect at the time of Mr. Patterson's offense limited the total sanction that could be imposed on him to seven years. The ten year sanction was therefore unlawfully excessive. See also Whiteman v. State, 465 So.2d 591 (Fla. 2d DCA 1985) (holding illegal a split sentence that exceeded the guideline range and finding that the change in the guideline law could not be retroactively applied).⁷

There is thus no guesswork needed in order to see both the restrospective application of the new sentencing law and its disadvantageous effect upon Mr. Patterson. Miller controls. The retrospective affirmance of the improper departure sentence based upon later-enacted guidelines is void. The certified question

⁷ See also Warden v. Marrero, 417 U.S. 653, 662-63, (1974) recognizing that loss of eligibility for parole is part of the "punishment" for purposes of the Ex Post Facto Clause); Greenfield v. Scafati, 277 F.Supp. 644 (D.Mass. 1967), aff'd without opinion, 390 U.S. 713 (1968) (striking a statute depriving parole violators of accumulated good time upon their return to prison, as applied to a prisoner who had been sentenced before the law went into effect, since the possible loss of good time for parole violation was in effect a potential lengthening of the sentence).

must be answered in the negative. Mr. Patterson's sentence must be vacated and remanded to the trial court for resentencing within the guidelines.

CONCLUSION

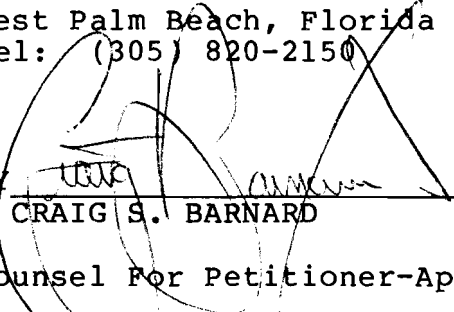
Mr. Patterson's sentence must be vacated and the cause remanded for resentencing within the presumptive guideline sentence in effect at the time of his offense.

Respectfully submitted,

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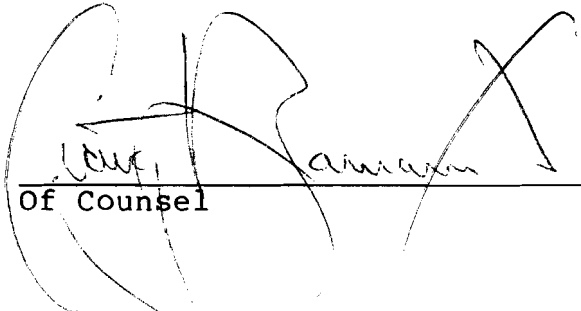
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief on Remand has been furnished by courier to Carolyn V. McCann, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 19th day of August, 1987.


Of Counsel