

IN THE SUPREME COURT OF FLORIDA

ROBERT PAUL PATTERSON,)

Appellant,)

vs.)

STATE OF FLORIDA,)

Appellee.)

FILED
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CASE NO. 68,608

Deputy Clerk

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellee in the court below and the prosecution in the trial court. Petitioner was the Appellant in the court below and the defendant in the trial court. In this brief the parties will be referred to as they appear before this Honorable Court. All emphasis in this brief is supplied by Respondent unless otherwise indicated.

The following symbol will be used:

"R" Record on Appeal

"PB" Petitioner's Brief on the Merits

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as found on page two (2) of Petitioner's Brief on the Merits.

POINT INVOLVED

WHETHER THE SENTENCING
GUIDELINE AMENDMENTS ARE
TO BE CONSIDERED PROCEDURAL
IN NATURE SO THAT THE GUIDE-
LINES AS MOST RECENTLY AMENDED
SHALL BE APPLIED AT THE TIME
OF SENTENCING, AND SUCH APPLI-
CATION IS NOT IN CONTRAVENTION
OF EX POST FACTO PRINCIPLES?
(RESTATED)

SUMMARY OF THE ARGUMENT

This Court's decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985), is controlling. Application of the amended guidelines to sentencing after their effective date does not violate federal or Florida constitutional ex post facto principles. Likewise, application of the amended guidelines in this manner conforms to the principle that charges in procedural rules operate prospectively.

ARGUMENT

THE SENTENCING GUIDELINE
AMENDMENTS ARE TO BE CON-
SIDERED PROCEDURAL IN NATURE
SO THAT THE GUIDELINES AS
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BE APPLIED AT THE TIME OF
SENTENCING, AND SUCH APPLI-
CATION IS NOT IN CONTRAVEN-
TION OF EX POST FACTO PRINCI-
PLES. (RESTATED)

The question certified by the Fourth District in the instant case -- whether the amended guidelines in effect at the time of resentencing should be applied without regard to the ex post facto doctrine -- has been already answered by this Court's decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985). In Jackson, this Court stated:

The second issue in this case concerns the guidelines to be used in resentencing. Citing the Fifth District Court of Appeal decision in Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984), for the proposition that an amendment to the guidelines cannot be applied retroactively, the district court concluded that Jackson was entitled to be sentenced under the guidelines in effect at the time the sentence was imposed. The state argues that the district court erred in so holding and contends that the current guidelines must be used in the resentencing process.

We agree with the state that the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense. We conclude that a modification in the sentencing guidelines procedure, which changes how a probation violation should be counted in determining

a presumptive sentence, is merely a procedural change, not requiring the application of the ex post facto doctrine. In Dobbert v. Florida, 1977 U.S. 282 (1977), the United States Supreme Court upheld the imposition of a death sentence under a procedure adopted after the defendant committed the crime, reasoning that the procedure by which the penalty was being implemented, not the penalty itself, was changed. We reject Weaver v. Graham, 450 U.S. 24 (1981), should control in these circumstances.

Id., emphasis added.

It is thus clear, that pursuant to Jackson, it is the guidelines currently in effect which are applicable in sentencing or resentencing a defendant and not those in effect at the time of the offense and such application does not violate ex post facto principles. State v. Arnett, 11 F.L.W. 214 (Fla. May 8, 1986); State v. Hurst, 11 F.L.W. 214 (Fla. May 8, 1986); State v. Miller, 11 F.L.W. 213 (Fla. May 8, 1986); State v. Sueno, 11 F.L.W. 213 (Fla. May 8, 1986); State v. Taft, 11 F.L.W. 213 (Fla. May 8, 1986). Respondent maintains the correctness of this Court's holding in Jackson and submits that it is dispositive of the instant case.

In the case sub judice, Petitioner was convicted of manslaughter - D.W.I. and was sentenced to seven (7) years imprisonment, followed by three (3) years probation. Petitioner's guideline score fell within the recommended

guidelines range of three (3) to seven (7) years imprisonment. In February, 1984, the date the Petitioner committed the crime, the guidelines proscribed the imposition of a split sentence the total sanction of which exceeded the maximum guideline range. See Committee Note to Florida Rule of Criminal Procedure 3.701 (d)(12). However, on the date Petitioner was sentenced, March, 1985, the guidelines as amended provided that when a split sentence is imposed "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." Committee Note, Fla.R.Crim.P. 3.701 (d)(12); See The Florida Bar Amendment to Rules of Criminal Procedure (3.701-3.988--Sentencing Guidelines). 451 So.2d 824 (Fla. 1984). Based on these facts, the Fourth District held on rehearing that pursuant to Hurst v. State, 474 So.2d 288 (Fla. 5th DCA 1985), Petitioner should have been sentenced under the original, not amended, guidelines in effect at the time the offense was committed. The Fourth District stated however, that under Jackson, this error would be harmless since any resentencing would be according to the amended guidelines currently in effect. Therefore, the court held under the current guidelines, Petitioner's combined sentence of ten (10) years is entirely permissible since the maximum sentence under gen-

eral law for the instant offense is fifteen (15) years.
See 775.082 (3)(c), Fla. Stat. (1983).

Respondent agrees with the Fourth District that Petitioner's sentence was proper under Jackson, but would also point out that the case upon which it relied in holding that error was committed, was quashed and remanded for proceedings pursuant to Jackson. State v. Hurst, 11 F.L.W. 214 (Fla. May 8, 1986). Therefore, no error at all occurred when Petitioner was sentenced by the trial court according to Jackson.

Respondent would also point out that the District Court decisions which Petitioner cites in support of his position that application of the amended guidelines violates ex post facto principles, Moore v. State, 469 So.2d 947 (Fla. 5th DCA 1985) and Miller v. State, 468 So.2d 1018 (Fla. 4th DCA 1985), have been disapproved by this Court. State v. Taylor, 11 F.L.W. 182 (Fla. April 10, 1986).

Respondent thus maintains the correctness of this Court's decision in Jackson as well as the correctness of Petitioner's sentence. No ex post facto violation occurred because retroactive application of procedural rules to offenses committed prior to their effected date is permissible, provided the rules are not more onerous than the law in existence at the time the offense was committed. Dobbert v. Florida, 432 U.S. 282 (1977); Paschal v. Wainwright, 738

F.2d 1173 (11th Cir. 1984).

In Paschal v. Wainwright supra, the petitioner challenged the retroactive application of parole guidelines promulgated by the Florida Parole and Probation Commission pursuant to Fla. Stats. §947.001, et seq., claiming an ex post facto violation. The court held that since the commissioners' parole decision, both at the time of the petitioner's conviction and under the new guidelines, involved discretion and judgment, and only the form by which that discretion was exercised had been changed, there was no ex post facto violation. As in Paschall, the promulgation of the guidelines does not alter the fact that trial judges may continue to have discretion in sentencing. The amended as well as the original guidelines changed only the procedural form in which the trial courts' inherent sentencing discretion is to be exercised.

The State therefore maintains, pursuant to Jackson and Dobbert v. Florida, supra, that application of the amended guidelines to the Petitioner who was sentenced after their effective date was not ex post facto. The court in Dobbert rejected the claim that application of the new capital sentencing procedure (Fla. Stat. §921.141), enacted after the commission of the petitioner's crimes but prior to his trial, constituted an ex post facto violation. If retroactive application of capital sentencing procedures is not an ex post facto violation, then clearly neither is the application of

the amended guidelines to an offense committed prior to their effective date.

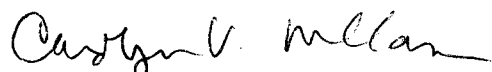
In conclusion, the State maintains that since the amendments are to sentencing guidelines, it is reasonable that they be applied to all sentencings after their effective date. Thus, anyone sentenced up to and including June 30, 1984, would be sentenced pursuant to the original guidelines. From July 1, 1984, onward, the amended version of the guidelines applies and the amended guidelines have been applied prospectively. There is a clear date, July 1, 1984, and all sentencings after it should be imposed pursuant to the amended guidelines according to this Court's decision in Jackson, which is dispositive of the instant case.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited herein, Respondent respectfully requests this Honorable Court to answer the question certified by the Fourth District in the affirmative and to affirm the decision of the Fourth District Court.

Respectfully submitted,

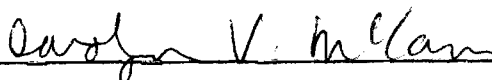
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished by courier to: ELLEN MORRIS, Assistant Public Defender, 224 Datura/13th Floor, West Palm Beach, FL 33401, on this 23rd day of May, 1986.



Of Counsel