

IN THE SUPREME COURT OF FLORIDA

ROBERT PAUL PATTERSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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CASE NO. 68,608

PETITIONER'S REPLY BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

ELLEN MORRIS
Assistant Public Defender

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner will rely upon the Preliminary Statement herein, except that the symbol "RB" will designate the brief filed by Respondent.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely upon the Statement of the Case and Facts as set forth in his Initial Brief herein.

SUMMARY OF ARGUMENT

Petitioner contends that the guidelines in effect on the date the offense was committed should be used to calculate his presumptive guideline sentence. The sentencing guidelines are substantive not procedural law. An amendment to the sentencing guidelines is likewise a matter of substantive law and not merely procedural law. In Weaver v. Graham, 450 U.S. 24 (1981), the United States Supreme Court set forth a twofold test to assess an ex post facto violation. Petitioner maintains that retrospective application of the amended guidelines in these circumstances results in a violation of the ex post facto clauses.

Petitioner contends that the retroactive application of enhanced amended sentencing guidelines in these circumstances not only violates the ex post facto clauses but also Article X, Section 9 of the Florida Constitution (1968), Florida law and public policy. Therefore on the grounds stated herein, this Honorable Court should reverse the decision on rehearing of the Fourth District Court of Appeal.

ARGUMENT

PETITIONER WHOSE OFFENSE WAS COMMITTED PRIOR TO
JULY 1, 1984 BUT WHO WAS SENTENCED AFTER THAT
DATE WAS IMPROPERLY SENTENCED UNDER THE AMENDED
GUIDELINES

Petitioner maintains that application of the amended guidelines to his case would result in a violation of the ex post facto clause, Article X, §9 of the Florida Constitution (1968) and established principles of Florida law. Respondent's reliance upon State v. Jackson, 10 FLW 564 (Fla. 1985) is misplaced (RB8-9). Jackson is distinguishable from the situation at bar and should not apply here.

Petitioner, unlike the probationer in Jackson, was charged with a substantive criminal offense. Thus, the retroactive application of the 1984 amended guidelines to the present facts fly in the face of constitutional considerations. See: Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

Two recent opinions reflect Petitioner's position. First, in Brown v. State, 11 FLW 961 (Fla. 1st DCA April 23, 1986), Judge Zehmer, dissenting, stated:

I dissent to extending the holding in State v. Jackson, 478 So.2d 1054 (Fla. 1985), to permit under the facts of this case, retroactive application of the 1984 amendment to rule 3.988, Florida Rules of Criminal Procedure (adopted and implemented in accordance with section 921.001, Florida Statutes (1984), by chapter 84-328, section 1, laws of Florida). Jackson is difficult, if not impossible, to reconcile with the principles espoused by the United States Supreme Court in Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), regarding the application of the ex post facto doctrine to changes in the law that increase the degree of punishment for crimes committed prior thereto; and, for the reasons discussed in Justice Ehrlich's dissent in Jackson, I would not extend that decision beyond the precise facts and issue there

involved. See Judge Barfield's concurring opinion in Wilkerson v. State, 480 So.2d 213 (Fla. 1st DCA 1985).

I respectfully submit that our Supreme Court should take jurisdiction of the question certified in this case and in Wilkerson, and address anew the ex post facto doctrine in regard to changes in the sentencing guidelines law. Even though changes in that law may be properly characterized as entirely procedural, such changes nevertheless can and often do disadvantage the substantial rights of an accused to be sentenced to a term of imprisonment substantially less than the maximum statutory limit for that offense. An accused must be sentenced within the guidelines presumptive range unless the record contains substantive proof beyond a reasonable doubt of the existence of clear and convincing reasons for deviation therefrom. State v. Mischler, 11 FLW 139 (Fla. April 3, 1986). Unless the accused's right to be sentenced within the guidelines presumptive sentence range is so substantial that imposition of sentence beyond the presumptive range can be said to disadvantage the accused within the meaning of Weaver v. Graham. I am at a complete loss to comprehend why the Florida district courts of appeal and the Supreme Court are required to expend so much judicial time and energy reviewing thousands of criminal cases involving deviating sentences to decide whether they exceed the bounds of judicial discretion and otherwise fail to conform to the requirements of the guidelines law. Unless the rights secured by the guidelines law are substantial enough to fall within Weaver v. Graham, it would seem appropriate to treat the failure of trial courts to comply with the law as harmless error in most cases. Yet, just the opposite result is the usual case under appellate decisions constraining the law.

11 FLW 962 (Emphasis added).

Second, Petitioner cites the dissenting opinion in Van Horn v. State, 11 FLW 829 (Fla. 3rd DCA April 8, 1986):

I cannot find that a change in the guidelines rules which directly results in more than doubling the time the defendant must serve in prison is a mere change in procedure which, consistent with the United States Constitution, may be retroactively applied. I therefore must

dissent. I do so with the greatest reluctance in the light of my all-too-painful awareness of the fact that in State v. Jackson, 478 So.2d 1054 (Fla. 1985), the Supreme Court of Florida has held to the contrary. Since the common, statutory, and constitutional law of Florida is what the highest court of our state says it is, I am bound, like every other lower court judge, to follow its determinations of such issues. But this case is controlled by the United States Constitution which we are bound by our oaths to uphold and which is authoritatively interpreted by the Supreme Court of the United States. Applying its decisions, and even giving the great deference to the opinion of the Florida Supreme Court which it must be accorded, I feel myself required in conscience to conclude that the length of a prison sentence which is not subject to parole and which is determined by the applicable guidelines is, in the most basic sense, a substantive matter which, under the ex post facto clause, may not be increased by an amendment adopted after the crime. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), King v. Missouri, 107 U.S. 221, 2 S.Ct. 443 27 L.Ed. 506 (1883). For the reasons stated by the Jackson minority, and by every pre-Jackson district court decision, I do not agree to the affirmance of the appellant's sentence.

11 FLW at 829-830. [Judge Schwartz, dissenting] (Footnotes omitted).

Petitioner acknowledges this Court's recent decision in State v. Taylor, 11 FLW 182 (Fla. April 10, 1986). The fact remains, however, that the Fourth District's certified question-whether the amended guidelines apply to all sentences without regard to the ex post facto doctrine (A-6)-is distinguishable from, and remains unanswered by, Jackson, supra, Taylor, supra and their progeny. Even if this Honorable Court rules that the retroactive application of the sentencing guidelines in these circumstances does not violate the ex post facto clause, Petitioner contends that alternative grounds support his position.

See: Article X, Section 9 of the Florida Constitution (1968); Castle v. State, 330 So.2d 10 (Fla. 1976); State v. Pizarro, 333 So.2d 762 (Fla. 4th DCA 1980). It is clear under Florida law that the statute in effect at the time an offense is committed controls the maximum penalty at the time of sentencing. An amendment to the sentencing guidelines is not merely procedural so as to give it immediate effect. The amendments to the sentencing guidelines are substantive. It clearly effects the ultimate punishment in the context of the presumptive guidelines mandated by the Rule 3.701 sentencing guidelines. The application of the amended guidelines indates at bar violates our state constitutional protection embodied in Article X, Section 9. In addition, Florida rules of court pertaining to criminal procedure have only prospective effect, absent an express statement to the contrary. See, Arnold v. State, 429 So.2d 819 (Fla. 2nd DCA 1983).

Accordingly, this Honorable Court should reverse the holding of the Fourth District Court of Appeal that the guidelines in effect on the date of the sentencing should control.

CONCLUSION

Petitioner's sentence is illegal.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura/13th Floor
West Palm Beach, FL 33401
(305) 837-2150

BY *Ellen Morris*
ELLEN MORRIS
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by courier to Carolyn V. McCann, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401, this 3rd day of June, 1986.

Ellen Morris
Of Counsel