IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 71,718

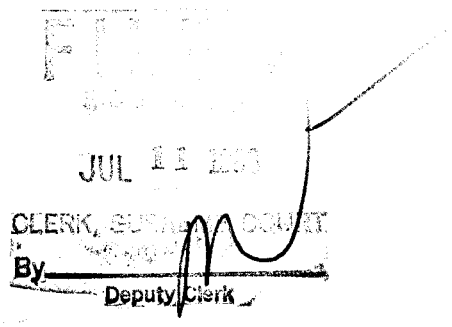
THE STATE OF FLORIDA,

Petitioner

vs.

PATRICK McGRIFF,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner will be referred to as the State. Respondent will be referred to as Respondent or his surname, Patrick McGriff. Reference to the record will be denoted as (R___).

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STATEMENT OF THE CASE AND FACTS

Respondent accepts and adopts the State's Statement of Case and Facts.

POINT INVOLVED ON APPEAL

WHETHER CHAPTER 87-110 LAWS OF FLORIDA WHICH AMENDS SECTION 921.001(5), FLORIDA STATUTES IS APPLICABLE TO APPELLATE REVIEW OF SENTENCES IMPOSED FOR OFFENSES WHICH WERE COMMITTED PRIOR TO JULY 1, 1987

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SUMMARY OF ARGUMENT

Respondent was convicted of Robbery and Battery. Respondent's recommended guideline sentence was 7-9 years. The Court deviated from the guidelines and pursuant to the Habitual Offender Statute sentenced Respondent to 30 years. The Third District Court of Appeals ruled that of the two reasons relied upon by the trial court to deviate from the guidelines one was valid and one was invalid. The court further held that it was not clear beyond a reasonable doubt whether the trial court would deviate from the guidelines absent the invalid reason. Therefore, the court remanded the case for resentencing.

The Third District Court of Appeals recognized that Chapter 87-110 amended Florida Statute 921.001(5) so that a new sentencing hearing is not required as long as there is one valid reason for departure. However, the court held that applying Chapter 87-110 to cases where the crime was committed prior to July 1, 1987 would violate the ex post facto clause of the Florida Constitution. The court certified to this court the question as to whether Chapter 87-110 should apply to cases prior to July 1, 1987.

In order for a law to be ex post facto it must be retrospective and it must disadvantage the offender affected by it. Applying Chapter 87-110 to crimes prior to July 1, 1987 is clearly retrospective. Applying Chapter 87-110 to Respondent would prevent him from having a resentencing before the trial judge wherein his sentence could be reduced from 30 years to 7-9

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years. Therefore, Respondent is disadvantaged by Chapter 87-110. Since application of Chapter 87-110 to Respondent would be retrospective and disadvantage him, The Third District Court of Appeals correctly ruled that Chapter 87-110 should not apply in this case. Therefore, this court should affirm the opinion of the Third District Court of Appeals and hold that Chapter 87-110 should not apply to cases where the crime was committed prior to July 1, 1987.

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ARGUMENT

WHETHER CHAPTER 87-110 LAWS OF FLORIDA WHICH AMENDS SECTION 921.001(5), FLORIDA STATUTES IS APPLICABLE TO APPELLATE REVIEW OF SENTENCES IMPOSED FOR OFFENSES WHICH WERE COMMITTED PRIOR TO JULY 1, 1987

On October 4, 1983 the State of Florida filed an Information charging Respondent with one count of Robbery and one count of Aggravated Battery. The Information alleged that the offenses occurred on September 17, 1983. After a jury trial Respondent was convicted of Robbery and Simple Battery. (R1-2a)

At Respondent's initial sentencing the trial court deviated from the 7-9 year recommended sentence and sentenced Respondent to 30 years pursuant to the Habitual Offender Statute. In McGriff v. State, 497 So.2d 1296 (Fla. 3rd DCA 1986) the Third District Court of Appeals reversed Respondent's sentence finding that the trial court failed to comply with the requirements of the Habitual Offender Statute.

On January 27, 1987 the trial court once again deviated from the sentencing guidelines and sentenced Respondent to 30 years pursuant to the Habitual Offender Statute. In deviating from the guidelines the court relied upon the following two factors:

1. escalating pattern of criminal activity;
2. excessive force.

The Third District Court of Appeals in the opinion which the State now seeks this Court to review held that excessive force was not a valid reason to depart from the guidelines

since the victim's injury was already calculated on the guideline scoresheet. See Mathis v. State, 515 So.2d 214 (Fla. 1987) and Hansbrough v. State, 509 so.2d 1081 (Fla. 1987). The Third District Court of Appeals went on to hold that escalating pattern of criminal activity was a valid reason to depart but since the Court was not convinced beyond a reasonable doubt that the sentence would have been the same absent consideration of the invalid reason a new sentencing hearing was required. Griffis v. State, 509 So.2d 1104 (Fla. 1987) and Albritton v. State, 476 So.2d 158 (Fla. 1985).

The Third District Court of Appeals recognized that Chapter 87-110 Laws of Florida amended Section 921.001(5) Florida Statute as follows:

> "...When multiple reasons exist to support a departure sentence, the departure shall be upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure."

The Third District Court of Appeals refused to apply the amended 921.001(5) to Respondent since Respondent's crime occurred prior to the passage of Chapter 87-110. The Court certified to this Court the question is to whether the ex post facto clause prohibited the application of Chapter 87-110 Laws of Florida to individuals who were arrested prior to July 1, 1987 which was the date of the passage of Chapter 87-110. See also, State v. Mesa, 520 So.2d 328 (Fla. 3rd DCA 1988).

In ruling that the application of Chapter 87-110 to

crimes committed prior to July 1, 1987 violated the ex post facto clause the Third District Court of Appeals held the following:

> Application of Chapter 87-110, section 2, to crimes committed prior to July 1, 1987, violates these provisions by preventing judicial review of a sentence which departs from the guidelines where there is at least one valid reason amongst multiple reasons given for the departure. This restriction is clearly disadvantageous to the offender who, prior to the amendment, might be eligible for a review of his departure sentence by the trial court where both valid and invalid reasons are given to support the sentence and it is not clear whether the sentence would be the same in the absence of the invalid reason. Albritton, 476 So.2d at 158. (Emphasis added)

This court and the Second District Court of Appeals have also decided not to apply Chapter 87-110 to cases where the crime was committed prior to July 1, 1988.[1]

In Hoyte v. State, 518 So.2d 975 (Fla. 2nd DCA 1988) the defendant received a departure sentence. The Second District Court of Appeals remanded the case for resentencing since the departure was based on one permissible and one impermissible reason and the Court was not convinced beyond a reasonable doubt that absent the invalid reason the trial court would still have departed from the guidelines. In a footnote the Court recognized that section 921.001(5) was not applicable since the crime was committed prior to July 1, 1987. Therefore, the Second District

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[1] The First District in Felts v. State, ____ So.2d ____, 13 FLW 205 (Fla. 1st DCA 1988) has held that application of Chapter 87-110 to offenses committed prior to July 1, 1987 does not violate the ex post facto clause. (Judge Zehmer filed a dissent and a rehearing en banc is pending.)

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Court of Appeals has agreed with the Third District Court of Appeals that the ex post facto clause prevents application of Section 921.001(5) to crimes committed prior to July 1, 1987.

In Griffis v. State, supra, (which was decided after the passage of Chapter 87-110) this Court held that a resentencing pursuant to Albritton is requried even if the judge states in the sentencing order that he would depart based on any one reason. In a footnote this Court recognized that the decision in Griffis, supra may not effect cases subsequent to July 1, 1987 due to Chapter 87-110. However, by requiring a resentencing in Griffis, supra, this Court has recognized that Chapter 87-110 should not apply to crimes committed prior to July 1, 1987.

As recently as April 22, 1988 this Court has once again recognized that Chapter 87-110 does not apply to crimes committed prior to July 1, 1987. In Tillman v. State, 13 FLW 275 (Fla. S.Ct. April 22, 1988) the defendant was arrested on February 14, 1984. At the sentencing hearing the Court deviated from the guidelines. This Court reviewed the reasons for departure and concluded that there were valid and invalid reasons for departure. Since the Court was not convinced beyond a reasonable doubt that the trial court would still have departed from guidelines, the case was remanded for resentencing. By remanding the case for resentencing despite Chapter 87-110 this Court has recognized that Chapter 87-110 does not apply to cases where the crime was committed prior to July 1, 1987. Therefore, this Court has already decided the question certified by the Third District

Court of Appeals and ruled that Chapter 87-110 does not apply to crimes committed prior to July 1, 1987.

Recent case law interpreting the ex post facto clause supports this Court's decision in Tillman, supra not to apply Chapter 87-110 to crimes committed prior to July 1, 1987. In Miller v. Florida, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) the United States Supreme Court held that application of amended guidelines to defendants who committed crimes prior to the enactment of the amended guidelines violated the ex post facto clause of the United States Constitution. In reaching this conclusion the United States Supreme Court relying on Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1987) held that in order for a criminal law to be ex post facto the following two elements must be present:

1. The law must be retrospective, that is it must apply to events occurring before its enactment, and

2. it must disadvantage the offender affected by it.

In its brief the State concedes that Chapter 87-110 would be retrospective as to Respondent. However, the State argues that Respondent was not disadvantaged by the passage of Chapter 87-110. An analysis of Albritton, Griffis, and Chapter 87-110 reveals that Respondent would be disadvantaged by the application Chapter 87-110.

In Albritton v. State, supra, this Court concluded the following at page 160:

> The standard recommended by petitioner is essentially that of Chapman v. California,

> 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), which places the burden on the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the verdict. We adopt this standard and hold that when a departure sentence is grounded on both valid and invalid reasons that the sentence should be reversed and the case remanded for resentencing unless the state is able to show beyond a reasonable doubt that the absence of the invalid reason would not have affected the departure sentence. (Emphasis added)

Therefore, in Albritton this Court concluded that a defendant has a right to be resentenced if a trial court relies on both valid and invalid reasons to depart from the guidelines and an appellate court is not convinced beyond a reasonable doubt that a departure sentence would have been given without reliance on an invalid reason.

In Griffis v. State, supra, this Court expanded its holding in Albritton and held the following at page 1105:

> We reiterate the principle of Albritton. Such a sentence can be affirmed only where the appellate court is satisfied by the entire record that the state has met its burden of proving beyond a reasonable doubt that the sentence would have been the same without the impermissible reasons. A statement by the trial court that it would depart for any of the reasons given, standing alone, is not enough to satisfy that burden. (Emphasis added)

Therefore, in Griffis this court has recognized that a defendant's right to be resentenced if invalid reasons are relied upon by the trial court is so important that a resentencing is required even if a trial judge states in its order that a

departure sentence would be given based on any one of the reasons listed in the order.

On July 1, 1987 the Florida Legislature through passage of Chapter 87-110 decided to take away a defendant's right to be resentenced when a trial court has relied on both valid and invalid reasons for a departure sentence. It is hard to imagine how a sentenced prisoner can be more disadvantaged by a law than one that prevents him from being entitled to a new sentencing hearing. Prior to July 1, 1987 Respondent pursuant to Albritton and Griffis was entitled to a resentencing wherein his sentence may have been reduced from 30 years to 7 to 9 years. If Chapter 87-110 applied to him he would lose this right to be resentenced. Therefore, Respondent would be disadvantaged if a Chapter 87-110 applied to him.

Initially the State's position is that Respondent has not been disadvantaged by the passage of Chapter 87-110 since he can not establish that his sentence would be reduced at a resentencing hearing. The State argues on page 12 of their brief that "they are not aware of a single case where a trial judge changed his mind about imposing a departure sentence as a result of an appellate court's finding that one or more of the reasons given for the departure was invalid" and therefore the ex post facto clause should not apply.[2]

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[2] The State has supplied no evidence to support this accusation.

Next the State argues on page 16 of their brief that since the trial judge stated that she would depart from the guidelines based on any of the reasons stated in the sentencing order "it defies logic and reason for the appellate court to conclude that it is not convinced beyond a reasonable doubt that the sentence would be the same absent consideration of the invalid reason."

An analysis of this Court's opinion in Griffis v. State, supra reveals that the Third District's opinion did not "defy logic" but instead followed this Court's holding in Griffis which stated the following on page 1105:

> Moreover, in Albritton v. States, 476 so.2d 158 (Fla. 1985), we held that where the appellate court finds some reasons for departure to be invalid, it must reverse unless the state can show beyond a reasonable doubt that the sentence would have been the same without the invalid reasons. We cannot in good conscience say that such a standard can be met through the anticipatory language of the trial judge rather than the reweighing of only the appropriate departure factors. The trial judge should have the opportunity to review and weigh the appropriate factors under the guidance of the appellate court's review of the reasons given. We see no reason to recede from our position of December 1987. (Emphasis added)

The fact the State is unaware of any sentences that have been changed pursuant to Albritton, supra and that the State believes the Third District's conclusion that a resentencing may result in a lesser sentence defies logic is completely irrelevant to the issue that must be decided by this Court. Obviously, the State is attempting to argue that since there is a great lik-

lihood that Respondent's sentence will not be changed the ex post facto clause does not apply.

In Miller v. Florida at 107 S.Ct. 2452 the United States Supreme Court rejected the exact same argument made by the State when the Court held the following:

> Respondent maintains that the change in guidelines laws is not disadvantageous because petitioner "cannot show definitively that he would have gotten a lesser sentence." Tr. of Oral Arg. 29. This argument however, is foreclosed by our decision in Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937). In Lindsey, the law in effect at the time the crime was committed provided for a maximum sentence of 15 years, and a minimum sentence of not less than six months. At the time Lindsey was sentenced, the law had been changed to provide for a mandatory 15-year sentence. Finding the retrospective application of this change was ex post facto, the Court determined that "we need not inquire whether this is technically an increase in the punishment annexed to the crimes," because "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term." Id.,at 401-402, 57 S.Ct., at 799. Thus, Lindsey establishes "that one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old." Dobbert, supra, at 300, 92 S.Ct. at 2302. (Emphasis added)

In Booker v. State, 514 So.2d 1079 (Fla. 1987) this Court has also ruled that the ex post facto clause applies even if a defendant can not definitely establish that he would receive a lesser sentence under the old law. In Booker, supra this Court held that Chapter 86-273, which prevents an appellate court

from reviewing the extent of a departure sentence, could not be applied to crimes committed prior to the passage of the statute. In reaching this conclusion the court held:

> The focus of an ex post facto analysis is not, in this context, based on a defendant's personal or vested right to have his sentence reduced, Weaver, 450 U.S. at 29 n.13, 101 S.Ct. at 964 n.13;rather, "[t]he inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual." Id. at 33, 101 S.Ct. at 966. (Emphasis added). Under the provisions of chapter 86-273, section 1, a person validly sentenced outside the guidelines may not have his departure sentence reviewed or reduced even though by definition, as set forth in Albritton, virtually no reasonable judge would have imposed such a sentence. Therefore, chapter 86-273 clearly operated to the detriment of those whose crimes were committed prior to July 9, 1986. We hold that chapter 86-273 may not constitutionally be applied to those whose crimes were not committed prior to its effective date. (Emphasis added)

It is respondents position that the same rationale that this Court applied in Booker should apply to this case. Both Chapters 86-273 and 87-110 take away a defendant's right to have his sentence reviewed by a court. Both statutes disadvantage a defendant and therefore should not be applied to crimes committed prior to the passage of the statute.

The State also argues that Respondent has not been disadvantaged by the passage of 87-110 since he has the right to file a Motion to Mitigate pursuant to Rule 3.800. Rule 3.800 gives the court the discretion to reduce a legal sentence within 60 days of entry of that sentence or affirmance of the sentence

by an appellate court. Rule 3.800 does not require the judge to conduct a hearing and it presumes that the initial sentence was valid.

Under Albritton and Griffis a departure sentence based on valid and invalid reasons is presumed invalid and resentencing is required if the appellate court is not convinced beyond a reasonable doubt that the trial court would give a departure sentence without the invalid reasons. Judge Zehmer in his dissent in Felts correctly analyzed why Rule 3.800 does not alleviate the disadvantage that inures to a defendant pursuant to Chapter 87-110 when he stated the following:

> Moreover, I strongly disagree with the majority's reliance on rule 3.800 as the appropriate mechanism through which the trial court may reconsider and change the departure sentence after the appellate court has disapproved four or five reasons for departure. The Albritton rules makes such departure sentence presumptively invalid and requires a remand for resentencing, while reliance on rule 3.800 and chapter 87-110 would make such departure sentence presumptively valid until the defendant establishes sufficient grounds to revise it. Such a significant change appears to be clearly substantive in nature. (Emphasis added)

Therefore, the States position that Respondent is not disadvantaged by Chapter 87-110 due to Rule 3.800 should be rejected by this court.

The State next argues in its brief that Chapter 87-110 was merely a "procedural clarification" and therefore the ex post facto clause does not apply. The State seems to adopt the argument made by the First District Court of Appeals in Felts

that Chapter 87-110 does not change the law but instead only clarifies it. This Court in Albritton, supra has held that a resentencing is required when a court relies on both valid and invalid reasons to deviate from the guidelines and an Appellate court is not convinced beyond a reasonable doubt that the trial court would deviate from the guidelines absent the invalid reason. Once this Court interprets a statute, that interpretation becomes the law until such time as this court or the legislature decides to change the law. Therefore, the legislature's enactment of Chapter 87-110 which takes away the right to resentencing granted in Albritton was not a clarification but instead a change in the law. Judge Zehmer in his dissent recognized this when he stated the following:

> Without unduly belaboring our points of difference, it is my view that the 1987 legislative amendment to the sentencing guidelines cannot be construed as a declaration of original legislative intent that simply clarifies rather than changes its prior statutory language. The supreme court decisions rendered prior to enactment of this amendment have given the original statutory language a different construction which has been applied in thousands of cases, some still pending but many now closed. Unless we intend to abandon all stability in determining the meaning and effect of statutory law, see Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987). rev. pending, No. 71,078 (fla.), at least the supreme court's construction of a statute must be treated as the final declaration of what the statute means.

Judge Zehmer went on to state:

> Once the highest court of this state has said what the statute means, that must be law until it is changed, not retroactively clarified, by the legislature, or until the

> supreme court is subsequently confronted with substantial grounds not originally considered that require it to confess error and overrule or recede from its prior opinion. The changes wrought by chapter 87-110 significantly alter the defendant's right to receive the guidelines presumptive sentence to such an extent that, in my view, the constitutional prohibition against ex post facto laws may well operate to bar the chapter's retroactive application to cases in which the offense occurred before its enactment. Applying some, but not all, of the principles of statutory construction recited in the majority opinion, I would construe the 1987 amendment as setting forth new not clarifying substantive guidelines provisions and hold the amendment inapplicable to this case.

It is Respondent's position that Chapter 87-110 did not clarify but instead changed the law to the disadvantage of Respondent.

Chapter 87-110 specifically denies Respondent the right to challenge the imposition of a sentence longer than his presumptive guideline sentence. The United States Supreme Court in Miller has recognized that this results in Respondent being substantially disadvantaged. Therefore, the ex post facto clause prevents application of Chapter 87-110 to his crime since it was committed prior to July 1, 1987.

In conclusion it is Respondent's position that the Third District Court of Appeals correctly concluded that the ex post facto clause prevented application of Chapter 87-110 to this case since the crime was committed prior to July 1, 1987. Therefore this court should answer the certified question in the negative.

CONCLUSION

Based on the foregoing arguments and authorities this court should answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128 on this 8th day of July, 1988.

By: _____
ROBERT KALTER