

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,275

THE STATE OF FLORIDA

Petitioner,

vs.

ELLIS C. FLETCHER,


Respondent.

**FILED**

SID J. WHITE

NOV 27 1985

CLERK, SUPREME COURT

By   
Chief Deputy Clerk

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ON PETITION FOR DISCRETIONARY REVIEW

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INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the court below and the prosecution in the trial court. Respondent 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 Petitioner unless otherwise indicated. A copy of the district court opinion is attached to this brief and designated (Appendix I).

The following symbol will be used:

"R"                      Record on Appeal.

STATEMENT OF THE CASE AND FACTS

(Limited to issue before the Court)

Ellis C. Fletcher, Respondent, entered a plea of nolo contendere to possession of cocaine and grand theft on August 29, 1984 (R52). These crimes were committed on June 6, 1984, and May 19, 1984, respectively. On October 10, 1984, Respondent was adjudicated guilty on the grand theft charge (R39-40) and sentenced to serve four (4) year prison term, with a condition that he make restitution for the theft (R41-42). At the same hearing Respondent was adjudicated guilty of possession of cocaine (R46-47), and sentenced to four (4) years imprisonment to be served concurrent with the sentence imposed on the grand theft conviction (R48-49). These sentences were calculated in conformity with the amended sentencing guidelines which became effective July 1, 1984 (R44-45).

On Appeal, the Fourth District held that Respondent is entitled to be sentenced under the sentencing guidelines in effect at the time he committed the offense. Thus, the Fourth District vacated the sentences and remanded the case for sentencing in accordance with the sentencing guidelines in effect prior to July 1, 1984. Fletcher v. State, 468 So.2d 428 (Fla. 4th DCA 1985).

The State of Florida filed an Application seeking

discretionary review, and this Court accepted jurisdiction of the case by order entered November 8, 1985.

POINT INVOLVED

WHETHER APPLYING THE AMENDED SENTENCING GUIDELINES WHICH BECAME EFFECTIVE JULY 1, 1984, TO SENTENCE INDIVIDUALS WHO COMMITTED THE OFFENSE BETWEEN OCTOBER 1, 1983, AND JULY 1, 1984, BUT SENTENCED AFTER JULY 1, 1984, IS PERMISSIBLE SINCE MODIFICATION OF THE SENTENCING GUIDELINES IS A PROCEDURAL CHANGE NOT REQUIRING THE APPLICATION OF THE EX POST FACTO DOCTRINE?

SUMMARY OF THE ARGUMENT

This Court's decision in State v. Jackson, \_\_\_ So.2d \_\_\_, 10 SLW 564 (Fla. op. filed October 17, 1985) is dispositive of the instant case. Application of the amended sentencing guidelines to all sentencings after July 1, 1984, does not violate ex post facto principles because the amendments were merely procedural. Thus, the trial court's sentence was correct and the Court of Appeal erred in reversing it.

## ARGUMENT

THE DEFENDANT, WHOSE OFFENSES WERE COMMITTED PRIOR TO JULY 1, 1984, BUT WHO PLED NO CONTEST, AND WAS SENTENCED AFTER THAT DATE, WAS PROPERLY SENTENCED UNDER THE AMENDED GUIDELINES AND THIS WAS NOT IN CONTRAVENTION OF EX POST FACTO PRINCIPLES.

In Ch. 84-328, the Legislature adopted the May 8, 1984, Florida Supreme Court's proposed revision to the sentencing guidelines. See The Florida Bar: Amendment to Rules of Criminal Procedures, 451 So.2d 824 (Fla. 1984). Respondent committed the offense of grand theft on May 19, 1984 (R35). The offenses of possession of cannabis and possession of cocaine were committed by Respondent on June 6, 1984. Respondent while being represented by Assistant Public Defender Ann Goade plead no contest to the charges of possession of cocaine and grand theft on August 29, 1984 (R52). A presentence investigation was ordered, and Respondent was sentenced on October 10, 1984. On his appeal to the Fourth District, Respondent argued that application of the amended guidelines was a prohibited ex post facto application. The Fourth District agreed, vacated the sentences, and remanded to the trial court for sentencing.

The issue presented in the instant case -- whether the amended guidelines apply only to offenses committed after July 1, 1984, or to all sentencings after that date which the guidelines apply<sup>1</sup> -- has been answered contrary to the Court

<sup>1</sup>i.e., this case does not involve an offense committed before October 1, 1983, the effective date of the original guidelines.

of Appeal's holding below by this Court's decision in State v. Jackson, \_\_\_ So.2d \_\_\_, 10 FLW 564 (Fla. op. filed October 17, 1985). In Jackson, the 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, 432 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 Jackson's contention that Weaver v. Graham, 450 U.S. 24 (1981), should control in these circumstances.

Id., emphasis added.

This Court's holding in Jackson thus makes it clear that the court below erred in considering the October 10, 1984, sentencing of Respondent to which the amended guidelines were applied, to have violated ex post facto principles. Just as in Jackson, which involved a change in how a probation violation


is calculated into the presumptive sentence, the change here involved an increase in the presumptive sentence only. The amended guidelines, as well as the original rules, changed only the procedural form in which the trial court's inherent sentencing discretion is to be exercised. There was no increase in the statutory limits of the sentence to be imposed for this type of crime. Thus, the guidelines change was merely procedural and did not add to the quantum of punishment so its application to the Defendant did not violate the ex post facto clause. Jackson, Id., Paschal v. Wainwright, 738 F.2d 1173, 1176 (11th Cir. 1984).

#### CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Petitioner would respectfully request this Honorable Court to disapprove the opinion of the Fourth District Court of Appeal and remand the case with directions to affirm the sentence imposed by the trial court.

Respectfully yours,

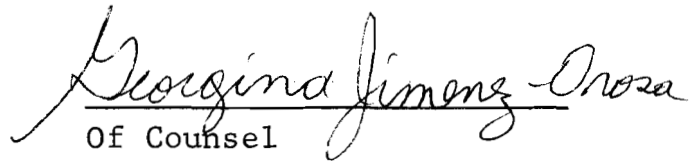
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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing  
Petitioner's Brief on the Merits has been sent by courier to:  
Tatjana Ostapoff, Assistant Public Defender, 224 Datura Street,  
13th Floor, West Palm Beach, Florida 33401, this 25th day  
of November, 1985.

  
Of Counsel