

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

v.

GARY MOORE

Respondent.

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CASE NO. 67,281

FILED

SID J. WHITE

JUL 12 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Att. neg

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

As appearing in the decision sought to be reviewed, Moore pled guilty to the offense of lewd, lascivious, or indecent assault or act upon or in the presence of a child, said offense occurring in April, 1984. He was sentenced in September, 1984, to three and one-half years imprisonment. The Fifth District Court of Appeal reversed and remanded holding that the ex post facto clause of Article I, Section 10 of the United States Constitution and Article I, Section 10 of the Florida Constitution prohibited application of the sentencing guidelines in effect at the time of sentencing and thus restricted application to those in existence at the time the offense was committed.

SUMMARY OF ARGUMENT

The district court of appeal expressly construed a provision of both the federal and state constitutions and created express and direct conflict with another district court of appeal on the same point of law.

QUESTION PRESENTED

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL WHICH EXPRESSLY CONSTRUES A PROVISION OF BOTH STATE AND FEDERAL CONSTITUTIONS AND AD- DITIONALLY CREATES DIRECT AND EXPRESS CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

ARGUMENT

The Fifth District Court of Appeal has construed the ex post facto doctrines contained in Article I, Section 10, United States Constitution and Article I, Section 10, Florida Constitution so as to prohibit the application of sentencing guideline provisions in effect at the time of sentencing.

This is an issue which is subject to divergent views among the district courts of appeal. The First District Court of Appeal in Saunders v. State, 459 So.2d 1119 (Fla. 1st DCA 1984), Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984), Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984), and Dubose v. State, 468 So.2d 517 (Fla. 1st DCA 1985), has held that the sentencing guidelines in effect at the time of sentencing are those that should apply. The Fourth District Court of Appeal in Miller v. State, 10 F.L.W. 989 (Fla. 4th DCA April 17, 1985), relied upon by the Fifth District Court of Appeal, has held that the sentencing guidelines in effect at the time the crime was committed are to be applied at the time of sentencing.

In a different context, this court has announced its view of the application of the above cited constitutional provisions in Lee v. State, 294 SO.2d 305 (Fla. 1974), holding that

if the subsequent statute only re-enacts previous penalty provisions without increasing any penalty provision which could have been imposed under the statute in effect at the time of the commission of the offense, then there is no violation of the ex post facto doctrine. Clearly, the implementation of sentencing guidelines, whether amended or otherwise, did in no way increase previous penalties for criminal offenses. The amended guidelines as well as the original ones changed only the procedural form in which the trial court's inherent sentencing discretion is to be exercised. The exercise of the discretion as guided by the amendments should and must be applied at the time an individual is sentenced without any regard to the date the crime was committed.

Since the decision of the Fifth District Court of Appeal has construed a provision of both the United States and Florida Constitutions and since there exists different interpretation of that constitutional provision, the court should exercise its jurisdiction favorably and review the decision of the Fifth District Court of Appeal.*

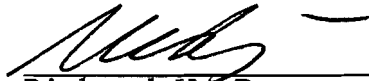
*To the writer's knowledge, this issue is present in the pending petitions for discretionary review in the cases of State v. James Ernest Miller, Case No. 67,276, State v. Ellis C. Fletcher, Case No. 67,275, State v. Theodore J. Mott, Case No. 67,278.

CONCLUSION

Based on the above and foregoing, the court should exercise its jurisdiction favorably and review the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished by mail to Christopher S. Quarles, Assistant Public Defender for respondent, at 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32014, this 11th day of July, 1985.



Richard W. Prospect
Counsel for Petitioner