

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

FEB 5 1986

CLERK, SUPREME COURT

By [Signature]

CASE NO. 67,560

STATE OF FLORIDA,

Petitioner,

v.

LUKE RICHARDSON,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

MICHAEL E. ALLEN  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I PRELIMINARY STATEMENT	1
II STATEMENT OF THE CASE AND FACTS	2
III SUMMARY OF ARGUMENT	3
IV ARGUMENT	4
<u>ISSUE PRESENTED</u>	
THE SENTENCING GUIDELINES IN EFFECT AT THE TIME THE OFFENSE WAS COMMITTED ARE THE PROPER GUIDELINES RULES TO USE; TO RULE OTHERWISE VIOLATES ARTICLE X, SECTION 9, FLORIDA CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 10, UNITED STATES CONSTITUTION.	4
V CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
Castle v. State, 305 So.2d 794 (Fla. 4th DCA 1974)	6
Dobbert v. Florida, 432 U.S. 282 (1977)	6,8
Kring v. Missouri, 107 U.S. 221 (1883)	7
Lee v. State, 294 So.2d 305 (Fla. 1974)	7
Lindsey v. Washington, 301 U.S. 397 (1937)	7
Richardson v. State, 472 So.2d 1278 (Fla. 1st DCA 1985)	1,2,4,12
State v. Jackson, 478 So.2d 1054 (Fla. 1985)	3-7,10,11
State v. Pizzaro, 383 So.2d 762 (Fla. 4th DCA 1980)	6
State v. Smith, 260 So.2d 489 (Fla. 1972)	10
State v. Stacey, No. 66,447 (Fla. Oct. 17, 1985) (10 FLW 563)	8
State v. Williams, 397 So.2d 663 (Fla. 1981)	8
Thompson v. Utah, 170 U.S. 343 (1898)	7
Vaught v. State, 410 So.2d 147 (1982)	7
Weaver v. Graham, 450 U.S. 24 (1981)	7,8
 <u>CONSTITUTIONS AND STATUTES</u>	
Article X, Section 9, Florida Constitution	3,4,5
Article I, Sections 9 and 10, United States Constitution	4
Section 921.001, Florida Statutes (1985)	6



## II STATEMENT OF THE CASE AND FACTS

Respondent relies upon the facts as set forth in the opinion issued by the District Court of Appeal, First District, in Richardson v. State, supra.

### III SUMMARY OF ARGUMENT

Respondent asserts that the decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985) is inapplicable to the instant case. The language in Jackson relied upon by the state is dicta, it failed to consider the effect of Article X, Section 9, Florida Constitution, it overlooked several ex post facto considerations, and the instant case is factually distinguishable from Jackson.

#### IV ARGUMENT

##### ISSUE PRESENTED

THE SENTENCING GUIDELINES IN EFFECT AT THE TIME THE OFFENSE WAS COMMITTED ARE THE PROPER GUIDELINES RULES TO USE; TO RULE OTHERWISE VIOLATES ARTICLE X, SECTION 9, FLORIDA CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 10, UNITED STATES CONSTITUTION.

In this case the district court below held that the guidelines rules in effect at the time the offense was committed, as opposed to the time of trial, plea, or sentencing, are the correct set of rules to apply to one receiving a guidelines sentence. Richardson v. State, supra. Since that time, as noted by petitioner (PB-3,9), this Court has expressed the view that the guidelines rules in effect at the time of sentencing, or resentencing, are the proper set of rules to apply. State v. Jackson, supra.

Respondent respectfully requests this Court to revisit the Jackson decision for several reasons. First, the language in Jackson is not a holding but is rather dicta; it is submitted that Jackson was an improper vehicle to utilize in ruling on the issue. Second, Jackson completely seems to overlook the effect of Article X, Section 9, Florida Constitution. Third, respondent asserts that Jackson runs afoul of constitutional principles relating to ex post facto laws. Fourth, respondent argues his case is factually distinguishable from Jackson.

The issue in Jackson was whether he would even be allowed to elect a guidelines sentence since the offense occurred prior to the adoption of the guidelines. The trial court would not allow the defendant to even so elect, and both the district court and this Court recognize this error. Quite clearly, on resentencing Jackson had the opportunity to opt or not opt for a pre-guidelines sentence, and his decision in this regard could not of course be predicted at the time this Court issued the opinion in his case. Totally unnecessary to a disposition of the Jackson case was a determination as to which set of guidelines were applicable in the event he opted for a guidelines sentence on resentencing, and consequently the language in Jackson to the effect that the sentencing court may properly apply the current guidelines is a classic example of dicta.

Seemingly overlooked in Jackson is the effect of Article X, Section 9, Florida Constitution, which provides:

SECTION 9. Repeal of criminal statutes.--Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

It is clear that the guidelines revisions that occurred after respondent's offense was committed adversely affected his punishment; the original guidelines recommended a sentence of 12 to 30 months whereas

the revised guidelines recommended a sentence of 5 1/2 to 7 years. Quite apart from any ex post facto considerations, the plain and clear language of the Florida Constitution indicate that, in this case, revisions of the guidelines, statutorily directed by Section 921.001, Florida Statutes (1985) are not applicable to crimes occurring before the revision. See generally State v. Pizzaro, 383 So.2d 762 (Fla. 4th DCA 1980) and Castle v. State, 305 So.2d 794 (Fla. 4th DCA 1974).

Respondent next takes the position that this Court's ex post facto ruling in Jackson should receive a second look. In Jackson, the majority said that changes in the sentencing guidelines enacted after the commission of an offense may be applied at the time of sentencing without being an ex post facto application of the law. The Court relied upon Dobbert v. Florida, 432 U.S. 282 (1977) for the proposition that changes to the sentencing guidelines are procedural and are not subject to ex post facto restrictions.

In deciding this issue the court overlooked the principle that the mere label of "procedure" is not determinative of ex post facto claims. What is required is an analysis of the actual effect of the changes to determine if the consequences are detrimental to the defendant. If the law (or rule) alters the situation to

the detriment of a defendant it is ex post facto when applied retroactively even if it takes a procedural form. Kring v. Missouri, 107 U.S. 221 (1883) (substantial right cannot be taken away retroactively just by labeling change procedural); Thompson v. Utah, 170 U.S. 343 (1898) (even though accused lacks vested right in a particular procedure, vital rights cannot be taken away retroactively). This Court made a similar pronouncement in Vaught v. State, 410 So.2d 147, 149 (1982) (earlier rulings that capital sentencing statute was procedural not shibboleths to be used to decide substantial issues).

In its opinion, this Court failed to analyze the substantive effect of changes to the guidelines. The determination that the guidelines were procedural does not answer the vital question whether the changes were "disadvantageous," which is the required ex post facto test. Weaver v. Graham, 450 U.S. 24 (1981).

The Court's decision in Jackson seems to turn on the fact that the guidelines did not change the statutory maximum penalty. That is not the only determinate of an ex post facto law. Statutes which change minimize sentences can also be ex post facto laws even if the maximum permissible sentence is unaltered. Lindsey v. Washington, 301 U.S. 397 (1937); Lee v. State, 294 So.2d 305 (Fla. 1974). Retroactive restriction of parole

eligibility is an ex post facto law, State v. Williams, 397 So.2d 663 (Fla. 1981); State v. Stacey, No. 66,447 (Fla. Oct. 17, 1985) (10 FLW 563). Thus the retention of jurisdiction laws could not be applied to crimes committed before their enactment even though the maximum penalty remain the same. Likewise, as the United States Supreme Court held in Weaver v. Graham, supra, changes in the gain time law which reduce credits against a sentence were "disadvantageous" to the offender and therefore could not be applied retroactively. The Court expressly rejected the argument that gain time provisions were not part of the sentence and, for that reason, could not be ex post facto laws. Instead, the Court said the proper inquiry was whether the law produced unfavorable consequences to the defendant.

This Court apparently did not take into consideration the disadvantageous effect of guideline changes in determining whether retroactive application would violate ex post facto prohibitions. Dobbert v. Florida, supra, relied upon by the majority, held that changes to Florida's capital sentencing statute were not violative of the Ex Post Facto Clause because the differences related only to apportioning responsibility for deciding whether death or life was the appropriate punishment. The sentencing guidelines are entirely different. They

do more than just apportion responsibility for deciding which of two sentences will be given. The guidelines limit judicial discretion by prescribing a presumptive sentence. If a sentencing judge imposes a different sentence he must justify it in writing with sufficient clear and convincing reasons to satisfy an appellate court that the departure and its extent were justified. Any change in the guidelines which increases a presumptive sentence, the situation sub judice, is undeniably disadvantageous to a defendant because it takes away the requirement that the judge support the harsher sentence with clear and convincing reasons. Increasing the presumptive sentence makes it easier, therefore, to impose a longer sentence. This effect changes the law to the defendant's detriment and is ex post facto when applied retroactively; it is simply irrelevant that the maximum sentence has not been increased.

Moreover, by increasing the presumptive sentence it is also more difficult for a defendant to receive a sentence less than that prescribed by the guidelines. Written reasons must be given for downward as well as for upward departures. Thus, an increase in the presumptive sentence will require a trial judge to find and articulate in writing clear and convincing reasons

to give a lesser sentence after the change whereas before the change an explanation would not have been required.

Increasing presumptive sentences has another disadvantageous effect, loss of the right to appeal, which is no doubt substantive. State v. Smith, 260 So.2d 489 (Fla. 1972). A defendant loses the right to appeal a harsher sentence which, before the change, required written justification but after the change did not. Conversely, the state gains the right to appeal if, by the change, the sentence imposed was formerly within the guidelines but afterwards less than the guidelines range. Both the loss of the defendant's right to appeal a higher sentence and the state's gain of an appeal of a lesser sentence are consequences which are disadvantageous to the defendant and violate the Ex Post Facto Clause.

Respondent's next, and last, argument, is directed toward distinguishing Jackson. In Jackson, unlike here, the Court was reviewing a sentence based upon a revocation of probation, and this Court opined "...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." 478 So.2d at 1056 (emphasis supplied by respondent). The revision drawn into question here, involving which scoresheet to use when sentencing for multiple offenses of

the same degree, is a different one. It is submitted that the court below correctly determined that ex post facto principles applied to the type of revision involved sub judice, and wisely pointed out, in footnote 2, that its decision did "...not foreclose the possibility that some guidelines changes may be considered procedural in nature, affecting only the manner in which the prisoner is sentenced, and thus would not be considered in ex post facto law." 472 So.2d at 1280.

For the reasons expressed here and by Judge Smith in the opinion below, respondent argues that the revision here is subject to ex post facto considerations, even though the revision under review in Jackson was not.

V CONCLUSION

Based upon the preceding analysis and authorities respondent requests this Court to approve the decision issued below by the District Court of Appeal, First District, in Richardson v. State, supra.

Respectfully submitted,

MICHAEL E. ALLEN  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Petitioner; and a copy has been mailed to respondent, Mr. Luke Richardson, #389086, Marion Correctional Institution, Post Office Box 158, Lowell, Florida, 32663, this 5<sup>th</sup> day of February, 1986.

  
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CARL S. MCGINNES