

67787

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 JESSE JAMES TISDALE,)
)
 Respondent.)

FILED
 OCT 28 1985
 CLERK, SUPREME COURT
 By [Signature]
 Chief Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

KEVIN KITPATRICK CARSON
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue, 4th Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR PETITIONER

TOPICAL INDEX

	<u>Pages</u>
AUTHORITIES CITED -----	ii
STATEMENT OF CASE AND FACTS -----	1
SUMMARY OF ARGUMENT -----	2
POINT I:	
THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL WHICH EXPRESSLY CONSTRUES PROVISIONS OF THE FLORIDA AND UNITED STATES CONSTITUTION. -----	3
POINT II:	
THIS COURT SHOULD EXERCISE ITS DISCRE- TIONARY JURISDICTION TO REVIEW THE DE- CISION OF THE DISTRICT COURT OF APPEAL WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT ON THE SAME QUESTION OF LAW. -----	4-6
CONCLUSION -----	7
CERTIFICATE OF SERVICE -----	7

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE(S)</u>
<u>Dobbert v. Florida,</u> 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977).....	6
<u>Hopt v. Utah,</u> 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262, n.12 (1884).....	6
<u>Lee v. State,</u> 294 So.2d 305 (Fla. 1974).....	4,6
<u>May v. Florida Parole and Probation Commission,</u> 435 So.2d 834 (Fla. 1983).....	4,6
<u>Mincey v. State,</u> 460 So.2d 396 (Fla. 1st DCA 1984).....	5
<u>State v. Fletcher,</u> Case No. 67,275.....	6
<u>State v. Griffin,</u> Case No. 67,713.....	6
<u>State v. Miller,</u> Case No. 67,276.....	6
<u>State v. Moore,</u> Case No. 67,281.....	6
<u>State v. Mott,</u> Case No. 67,278.....	6
<u>State v. Taylor,</u> Case No. 67,605.....	6
<u>The Florida Bar Amendment to Rule of Criminal Procedure - (3.701, 9.988 - Sentencing Guidelines,</u> 451 So.2d 824 (Fla. 1984).....	3

OTHER AUTHORITIES

§921.001(4)(b), Fla. Stat. (1984).....	5
Ch. 84-328, Laws of Fla.....	3
Fla. R. App. P. 9.030(a)(2)(A)(ii).....	3
Art. I, §10, Fla. Const.....	3
Art. V, §3(b)(3), Fla. Const.....	3
Art. I, §10, U.S. Const.....	3

STATEMENT OF CASE AND FACTS

Respondent was charged by a two count information with burglary of a dwelling and petit theft. The alleged offenses occurred on June 6, 1984. At trial on October 22, 1984, a jury found respondent guilty of burglary of a dwelling and acquitted respondent of grand theft. Amendments to the sentencing guidelines took effect on July 1, 1984. Respondent was sentenced on November 30, 1984. The trial court sentenced respondent pursuant to the amended guidelines which were in effect on the date of sentencing.

Respondent appealed his sentence to the Fifth District Court of Appeal. The district court of appeal reversed the sentencing order of the trial court holding that the sentencing guidelines in effect at the time the crime was committed controlled respondent's sentencing and relying upon cases suggesting that application of the amended guidelines to offenses occurring prior to their effective date is a violation of the ex post facto doctrine of the Florida and United States constitutions.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal expressly construes a provision of the federal and state constitution and is in express and direct conflict with other decisions of this honorable court. As such, this court should exercise its discretionary jurisdiction to review that decision.

POINT I

THIS COURT SHOULD EXERCISE ITS
DISCRETIONARY JURISDICTION TO
REVIEW THE DECISION OF THE DISTRICT
COURT OF APPEAL WHICH EXPRESSLY
CONSTRUES PROVISIONS OF THE FLORIDA
AND UNITED STATES CONSTITUTION.

ARGUMENT

On November 30, 1984, the trial court sentenced the respondent pursuant to the amended sentencing guidelines which were in effect at the time of sentencing. See, The Florida Bar: Amendment to Rule of Criminal Procedure - (3.701, 9.988 - Sentencing Guidelines, 451 So.2d 824 (Fla. 1984). The offense for which respondent was convicted occurred on June 6, 1984. The amended sentencing guidelines became effective July 1, 1984. See, Ch. 84-328, Laws of Fla. The Fifth District Court of Appeal reversed the sentence, holding that the sentencing guidelines in effect at the time the crime was committed controlled and relying upon cases suggesting to an offense which occurred prior to the amendment is a violation of the ex post facto doctrine of the United States and Florida Constitutions. See, Art. I, §10, U.S. Const. and Art. I, §10, Fla. Const.

Petitioner contends that the Fifth District Court of Appeal, in reversing the sentence imposed by the trial court, erroneously construed provisions of the Florida and United States Constitutions. This court has jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii).

POINT II

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT ON THE SAME QUESTION OF LAW.

ARGUMENT

In reversing the sentence imposed by the trial court below, the Fifth District Court of Appeal held that sentencing guidelines adopted after the commission of respondent's offenses could not be used to calculate the recommended range for sentencing and sentenced respondent. The decision of the district court of appeal conflicts with the same point of law decided by this court in May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983), and the decision of this court in Lee v. State, 294 So.2d 305 (Fla. 1974).

In May, May was serving a prison sentence for several felony convictions. His parole release date (PPRD) was originally set for July 31, 1984. On May 30, 1981, May was convicted of an offense while still in prison. Based upon this conviction, the Parole Commission using his present and previous convictions recalculated his PPRD based upon new parole guidelines adopted September 10, 1981. His new PPRD was October 4, 1994, an extension of almost ten (10) years beyond his original PPRD.

On appeal to this court, May contended that the parole date guideline adopted after the commission of his inprison offense could not be used to recalculate his PPRD for that offense and that doing so was an unconstitutional application of more

stringent guidelines. This court disagreed and approved application of the new guidelines saying:

...[W]here a prisoner can establish no more than a tenuous expectancy regarding probable punishment under the law existing at the time of his offense it becomes difficult or impossible to establish (a critical ex post facto element)... that the retrospectively applied law disadvantages the offender affected by it.

435 So.2d at 836.

Similarly, in the instant case, respondent has at best nothing more than a tenuous expectancy regarding his punishment under the sentencing guidelines. The sentencing guidelines are subject to amendment from year to year, section 921.001(4)(b), Florida Statutes (9184), and a trial court is not required to inform a defendant prior to sentencing that it intends to depart from the recommended sentence and the reasons therefore. Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984). The decision of the district court of appeal directly conflicts with this principle of law.

In Lee, supra, this court stated:

If the subsequent statute merely re-enacted the previous penalty provision 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 could be no application of a subsequent penalty provision which would do violence to the concept of an ex post facto law. (Emphasis in the original), 294 So.2d at 307.

The amendments to the sentencing guidelines merely change the procedure for arriving at a recommended guidelines sentence. Thus, there is no ex post facto application of the amended guidelines to the respondent, since the penalty pro-

visions for offenses proscribed by general law have not increased. Additionally, even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977); Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262, n.12 (1884).

Since the decision in the instant case conflicts with the rules of law set forth in May, supra, and Lee, supra, this court has jurisdiction.¹


¹To this writer's knowledge, this issue is present in pending petitions for discretionary review in the cases of State v. Miller, Case No. 67,276; State v. Mott, Case No. 67,278; State v. Fletcher, Case No. 67,275; State v. Moore, Case No. 67,281; State v. Taylor, Case No. 67,605; State v. Griffin, Case No. 67,713.

CONCLUSION

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

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL


KEVIN KITPATRICK CARSON
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing petitioner's brief on jurisdiction has been furnished, by mail, to: Daniel J. Schafer, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32014, this 22nd day of October, 1984.


KEVIN KITPATRICK CARSON
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR PETITIONER