

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-5344

TITLE JAMES ERNEST MILLER, Petitioner V. FLORIDA

PLACE Washington, D. C.

DATE April 21, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES ERNEST MILLER, :

Petitioner, :

v. : No. 86-5344

FLORIDA :

- - - - -x

Washington, D.C.

Tuesday, April 21, 1987

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:01 o'clock a.m.

APPEARANCES:

ANTHONY CALVELLO, ESQ., West Palm Beach,

Florida; on behalf of Petitioner.

MS. JOY B. SHEARER, ESQ., Assistant Attorney

General of Florida, West Palm Beach,

Florida; on behalf of Respondent.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

ANTHONY CALVELLO, ESQ.,

on behalf of the Petitioner

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MS. JOY B. SHEARER, ESQ.,

on behalf of the Respondent

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1 imposed upon Mr. Miller is invalid under the ex post
2 facto clause.

3 QUESTION: Mr. Calvello, as a preliminary
4 matter, would you explain something to me about the
5 effect of the concurrent sentences we see by Mr. Miller?

6 He received a sentence on the burglary and
7 theft counts as well?

8 MR. CALVELLO: Yes, Your Honor.

9 QUESTION: And did he receive a concurrent
10 sentence of seven years on the burglary county?

11 MR. CALVELLO: Yes, Your Honor.

12 QUESTION: And the guidelines were not changed
13 as to the burglary?

14 MR. CALVELLO: Well, Your Honor, as far as the
15 amended guidelines are concerned.

16 QUESTION: So what effect would a decision in
17 your favor on the sex offense have? Presumably the
18 seven years would still stand on the burglary count?

19 MR. CALVELLO: Oh, no, no. Let me explain
20 that point. Under Florida law, the way the guidelines
21 work is that there is a primary offense, which is the
22 most serious offense at the time of the offense -- at
23 the time, under the amended guidelines which we say
24 shouldn't apply, but anyway, under the amended
25 guidelines the sexual offense would be the primary

1 offense.

2 The burglary would be an additional offense,
3 and it's scored and calculated as part of the total
4 picture.

5 QUESTION: Well, but if the amendment did not
6 affect the burglary offense, and the guideline was not
7 changed for that, then even if you are correct, would
8 you not look back to the law at the time he was
9 sentenced for burglary, and would that become the
10 primary offense?

11 MR. CALVELLO: Under the original guidelines?

12 QUESTION: Yes.

13 MR. CALVELLO: That's a possibility, Your
14 Honor.

15 QUESTION: And if that were the case, then the
16 sentence wouldn't change?

17 MR. CALVELLO: Oh, yes, the sentence would be
18 changed dramatically, because, see, the primary offense
19 would be the most serious offense at the time. And
20 therefore the burglary would become --

21 QUESTION: So even if you're right, the
22 burglary would then be the most important offense?

23 MR. CALVELLO: But the sentence would go down
24 to 3-1/2 to 4-1/2 years; the 7 years would be gone.

25 QUESTION: So it's your position that it will

1 have an effect on the burglary sentence as well?

2 MR. CALVELLO: An enormous effect. An
3 enormous effect, Your Honor.

4 QUESTION: So the guideline was changed for
5 burglary as well?

6 MR. CALVELLO: No, Your Honor, the only --

7 QUESTION: Burglary was 4-1/2 before and is
8 4-1/2 now?

9 MR. CALVELLO: No, the -- we're talking about
10 under the guidelines in effect at the time of the
11 offense, at the time of the sexual offense, if you would
12 score the sexual offense, and the burglary as an
13 additional offense, it would be 3-1/2 to 4-1/2 years.

14 If you score the burglary as the most serious
15 offense, it's still 3-1/2 to 4-1/2 years.

16 But what happens here is that they changed the
17 guidelines, and then sexual offense became the primary
18 offense, and they changed the points for sexual
19 offenders, they added 26 points for that. There's where
20 the 7 years came in.

21 So it wouldn't matter whether it was sex or
22 burglary under the old laws, he'd still get 3-1/2 to
23 4-1/2. But under the new guidelines, he had -- the sex
24 became the primary offense, and he got the increased
25 sentence of 7 years.

1 Basically, under the guidelines, the Florida
2 sentencing guidelines which came in effect in 1983
3 abolished parole. And the Florida criminal code was
4 divided into nine categories, one of which was sexual
5 offenses.

6 Now, people are given points, as I pointed
7 out, based on the severity of the offense. They're
8 added together and totalled, and you get a range. And
9 your sentence would fit into that range, as I mentioned
10 earlier.

11 And the judge's only discretion would be
12 within that range, that 3-1/2 to 4-1/2, 5-1/2 to 7. And
13 this sentence is presumptive under Florida law. And it
14 is assumed to be correct for the offender.

15 The operation of the Florida guideline system
16 demonstrates that there are meant to be precise and
17 narrow punishments. The guidelines do not guide
18 discretion; rather, they operate like a computer. You
19 put in the offender characteristics, you put in the
20 offense, et cetera, and you add it up and you come out
21 with a narrow, mechanically determined, presumptive
22 guideline range.

23 And the sentence must fall within that range,
24 this presumptive range. Moreover, th law adopted in
25 conjunction with the guidelines, and the practice of the

1 courts, the Florida Supreme Court and the lower court,
2 as detailed in the brief, make clear that a trial
3 judge's authority to go outside these -- this
4 presumptive guideline sentence is meant to be, and is,
5 extremely limited.

6 Now, there is a departure. But a departure up
7 or down, even to go below that, is not discretionary.
8 And that is one of the main points I want to make
9 today. It is not discretionary.

10 QUESTION: Well, Mr. Calvello, what if under
11 the law a judge could go outside the guidelines, for
12 good cause, for example. Some looser standard.

13 Would that then become a procedural sort of a
14 change?

15 MR. CALVELLO: Your Honor, I would have to say
16 no. Because once you implement these guidelines, and if
17 you make like Florida, if you make it presumptive, an
18 enforceable right, like here, because you can appeal if
19 there's a departure. There'd have to be clear and
20 convincing reasons --

21 QUESTION: Even if the standard for departure
22 is something different that Florida would have?

23 MR. CALVELLO: I would have --

24 QUESTION: Than Florida has now? Just a good
25 cause, say.

1 MR. CALVELLO: If it's very, very low, then
2 there's a possibility that might be something that might
3 not implicate the ex post facto law.

4 Whether procedural or not, I'm not certain,
5 because I'd hate to get into that label when we're
6 dealing with people's sentences. Because you get into
7 what I would consider to be the most substantive matter
8 there could be.

9 QUESTION: What about the Federal guidelines?

10 MR. CALVELLO: The Federal parole -- the
11 Federal sentencing?

12 QUESTION: Or parole.

13 MR. CALVELLO: The Federal parole guidelines.
14 That is an example where you have total discretion --

15 QUESTION: It's not total discretion. There's
16 some guidelines, but they can change it for good cause.

17 MR. CALVELLO: They can change the guidelines
18 --

19 QUESTION: The sentence, the parole guide.

20 MR. CALVELLO: The parole commissioners can.

21 QUESTION: Right.

22 MR. CALVELLO: But here the judge right.

23 QUESTION: Well, is that procedural under the
24 Federal?

25 MR. CALVELLO: The parole guidelines?

1 QUESTION: Yes.

2 MR. CALVELLO: The courts have held that there
3 is no -- Ninth Circuit and Justice Rehnquist has held
4 that there's no ex post facto implication with the
5 parole guidelines.

6 QUESTION: Right. And for the most part
7 because they treat it as a procedural matter.

8 MR. CALVELLO: Well, what they say is, they're
9 discretionary. They're not laws. There's no right to
10 an appeal. It doesn't have any of those --

11 QUESTION: Do you agree with that?

12 MR. CALVELLO: I don't disagree with that,
13 with the -- and I don't think that --

14 QUESTION: Well, you agree with it, then?

15 MR. CALVELLO: I can understand the rationale
16 of the circuit courts. But again, that only points out
17 how different we are in Florida.

18 We have something that, to depart, you have to
19 have a written reason that's clear and convincing, based
20 on facts that are proven beyond a reasonable doubt, and
21 that -- and these factors can't -- are not inherent or
22 otherwise scored under the guidelines.

23 There's an extremely heavy burden under
24 Florida law for departure from a persuasive and an
25 evidentiary point of view. And even if there is a

1 departure --

2 QUESTION: So does our decision turn on just
3 how strict the standard is? Is that what's going to
4 determine whether it's ex post facto or not?

5 MR. CALVELLO: It's --

6 QUESTION: Just the degree, the difference in
7 degree, as to how strict the standard is?

8 MR. CALVELLO: I don't think so, Your Honor.

9 QUESTION: Well, it sounds like that's what
10 we're getting to.

11 MR. CALVELLO: No, because what we have here
12 with these guidelines is what would be an affirmative,
13 enforceable right to receive these guidelines. And it
14 is the punishment, it is the quantum of punishment for
15 this crime.

16 And once there's a change in this quantum of
17 punishment, then you have an ex post facto violation.
18 It's retroactive. The state doesn't dispute that. And
19 it's disadvantageous. The sentence went up 2-1/2 years,
20 and there was no departure in this particular case, that
21 he was disadvantaged.

22 So applying the two prong Weaver test, we have
23 an ex post facto violation in this case.

24 Not only is it difficult to depart, but very
25 important, under Florida law, there is a right to an

1 appeal, an appellate review of this departure, for the
2 validity and propriety of the stated grounds.

3 And if one of the judge's reasons -- say he
4 gives two good ones, and a number of incorrect or
5 invalid reasons -- the court would still reverse,
6 applying a harmless error test.

7 These guidelines and departures have been
8 reversed under numerous grounds, as I indicated in my
9 brief. Over 60 grounds have been found to be invalid,
10 just to point out to this Court that they are not
11 discretionary, that a judge could deviate from them at
12 will.

13 Now under the guidelines in effect in April of
14 '84, Mr. Miller's presumptive sentence would have been
15 the 3-1/2 to 4-1/2 years, but he received a 7 year
16 sentence.

17 And the reason for that, which I wanted to get
18 to, was that the Florida legislature wanted to increase
19 the punishment for sex offenders by increasing the point
20 total for the sexual offense category.

21 The more points scored, the higher the
22 presumptive sentence, or the quantum of punishment for
23 this crime. The quantum of punishment was increased.

24 And in approving this amendment, the Florida
25 Supreme Court explained that this amendment to the

1 sexual offense categories will, quote, increase the
2 primary offense points by 20 percent, resulting in both
3 increased rates and length of incarceration for sexual
4 offenders.

5 Thus, not only the effect but the intent was
6 substantive; to increase punishment, to increase the
7 quantum of punishment.

8 Simply put, more people will go to jail under
9 the amended guidelines than under the original
10 guidelines which were in effect; ex post facto violation.

11 And this switch was substantial for Mr.
12 Miller. Because since these guidelines points
13 correspond to a predetermined sentencing range, the base
14 sentence for sexual offenses was effectively increased.
15 The effect, as predicted, was to boost the point score.
16 And he received a sentence of 7 years.

17 There was absolutely no departure.

18 This was disadvantageous. It materially
19 altered the situation. And it meets every test of this
20 Court as articulated since 1798 in *Calder v. Bull*. It
21 was additional punishment for the offense.

22 And it was precisely what the ex post facto
23 clause was intended to prevent.

24 The claim has been made by the state that
25 these guidelines are procedural, but they are not under

1 Florida law. Because the legislature, in creating the
2 guidelines, recognized that developing sentencing
3 criteria was primarily a matter of substantive law.

4 In Section 921.001 the court -- the Florida
5 legislature declared, criminal penalties and limitations
6 on the applications of such penalties is a matter of
7 predominantly substantive law, and as such, is a matter
8 properly addressed by the legislature.

9 In this context, under the Florida
10 constitution, the legislature has the sole
11 responsibility for substantive law, and the court for
12 procedures.

13 So here the legislature has declared that
14 these guidelines, the whole guidelines law, is a matter
15 of substantive law.

16 QUESTION: Before the guidelines were amended,
17 and before your client committed this crime, could he
18 have been sure that he would get no more than 4-1/2
19 years?

20 MR. CALVELLO: Yes, Your Honor, because the
21 only way --

22 QUESTION: It depends on whether there were
23 any aggravating circumstances which a trial judge would
24 say justifies kicking it over to the maximum, 7,
25 wouldn't it?

1 MR. CALVELLO: Well, not really. Because if
2 there were these factors, then he would have a right to
3 an appeal. That's lost by this retroactive increase.

4 QUESTION: Well, that's --

5 MR. CALVELLO: That's what -- see, that's the
6 disadvantage to him, that if -- say he would have got
7 4-1/2 under the original guidelines. And the judge
8 says, well, maybe -- again, this is speculation, because
9 there wasn't any in this particular case -- but if there
10 were grounds to depart, that he would have a right to
11 appeal. He'd have the right to get written reasons from
12 the trial judge that are clear and convincing, that are
13 based on facts that are beyond a reasonable doubt.

14 QUESTION: Well, that may well be. But the
15 fact is, he knew, in committing this crime, that he was
16 exposed to seven years' worth of liability. Now, to be
17 sure, that exposure depended to some extent on whether
18 -- depended, if you will, entirely on whether a trial
19 judge could find one of those aggravating factors.

20 But could the aggravating factor have included
21 lack of remorse, lack of repentance?

22 MR. CALVELLO: No, Your Honor. No.

23 QUESTION: Persistence in believing that what
24 he did was okay, and he'd do it again?

25 MR. CALVELLO: No, none of -- all of those

1 grounds have been found to be invalid under Florida law.

2 QUESTION: What kind of grounds are there that
3 are valid?

4 MR. CALVELLO: There are extreme psychological
5 trauma to the victim is one, in certain cases, if it's
6 not an element of a crime, can possible be a ground to
7 depart, if the facts are proven beyond a reasonable
8 doubt.

9 What Mr. Miller lost, going back --

10 QUESTION: You know, it seems to me the ex
11 post facto protection is meant to prevent somebody from
12 being surprised, thinking he'd committed a minor
13 offense, and it's suddenly an aggravated offense.

14 And it seems to me that the books here said
15 seven years. I doubt whether anybody goes ahead and
16 commits it saying, well, there won't be any aggravating
17 circumstance?

18 MR. CALVELLO: See -- well -- the -- fair
19 warning is one element of the ex post facto clause. But
20 so is -- and since the main one, I would think, is to
21 prevent arbitrary and potentially vindictive
22 legislation.

23 And here, at the time, you have a sentence, at
24 the time he committed the offense, where it would be
25 3-1/2 to 4-1/2 years. And then after he commits the

1 offense, you're increasing his sentence. Because the
2 presumptive guideline sentence is the sentence under
3 Florida law.

4 It is not the 7 years. It's not the max.
5 They changed the quantum of punishment. For example, it
6 would be like if they took away parole, or took away
7 gain time from somebody, you are effectively changing
8 the sentence.

9 And I think that's what's happening here. You
10 are effectively changing the sentence. And it had a
11 substantial, a material impact, on Mr. Miller.

12 QUESTION: Well, what if after the crime was
13 committed, there were a series of new judges appointed,
14 and all of them were -- they were known as hanging
15 judges, they always gave the maximum. Would that be ex
16 post facto? Would he have a right to be sentenced by a
17 judge as lenient as the judge would have been at the
18 time of the crime?

19 MR. CALVELLO: Oh, well as far as the
20 composition of the bench, no, because we're not dealing
21 with laws. Here you are dealing with a particular law.

22 See, the Florida guidelines stepped in to take
23 away the discretion of judges, if I may add. So the
24 hanging judges, quote unquote, hanging judges are in
25 theory, are supposed to be eliminated. But we have

1 these guidelines, and you're supposed to sentence in
2 these guidelines.

3 That was the whole idea of these guidelines,
4 was to channel the discretion and get away from this
5 concept of one judge giving the max to everybody, and
6 the judge next door, who's more lenient. You have a law
7 that clarifies this and has uniformity.

8 But what happens here is that once you have
9 this range, you have an enforceable right to this range.

10 QUESTION: So you were -- what your really
11 claim is -- claim is, is that you were deprived of
12 leniency?

13 MR. CALVELLO: No. No, leniency could have
14 come into play, Your Honor, if -- if Mr. Miller wanted
15 probation, or one or two years in jail. His presumptive
16 guideline sentence was 3-1/2 to 4-1/2 years in prison
17 for the offense, which the Florida legislature and under
18 the guidelines all said is appropriate for this
19 offender.

20 It's not like he came in and said, give me
21 4-1/2 years. They said that was appropriate, and they
22 put it in the law through this guideline system.

23 QUESTION: It's still not like the ordinary ex
24 post facto case where the individual at the the time he
25 commits the crime does not think there's a chance of his

1 getting any more than 4-1/2 years.

2 Here the statute said, on the books, he could
3 get 7 years. Now, to be sure, the state, in trying to
4 be equitable, out of equal protection concerns, tried to
5 channel the discretion of the judges.

6 But on the books, he knew he was committing a
7 possible seven year offense. It's not the kind of
8 unfairness that exists in most of our ex post facto
9 cases?

10 MR. CALVELLO: I think it's exactly the type
11 of unfairness. It fits right in, just like with Weaver,
12 where they change -- where they change, after they go to
13 prison. What did Mr. Weaver do when he committed his
14 murder? He got 15 years, and then they changed the gain
15 time.

16 You've got to look at what's happening. Here
17 you're changing the sentence. Just like in the main
18 decision is Greenfield v. Scafati. In that particular
19 case, people go to prison, Your Honor. They got
20 released. And after they got released, there was this
21 provision that said if you violate parole, you would
22 lose gain time.

23 And Scafati knew about it when he walked about
24 the door. He violates his parole, and he comes back in,
25 and they take away six months of his gain time from his

1 Oentence. And the Court held, this Court held, that
2 that was ex post facto, because it effectively increased
3 his sentence.

4 QUESTION: Well, did the Court -- did our
5 Court hold anything in that case? Wasn't it a summary
6 affirmance?

7 MR. CALVELLO: Yes, it was, Your Honor.

8 QUESTION: Did we write an opinion?

9 MR. CALVELLO: It was a summary affirmance,
10 Your Honor. But in Weaver, the Court relies heavily on
11 Greenfield v. Scafati. And so do we.

12 QUESTION: Well, what I asked you was whether
13 our Court held anything in Greenfield?

14 MR. CALVELLO: It was a summary affirmance?

15 QUESTION: Without opinion?

16 MR. CALVELLO: Yes, Your Honor.

17 The state hasn't really disputed that there
18 was not a -- retroactivity is not a question. And there
19 wasn't a real dispute as to quantum of punishment.

20 The quantum of punishment changed. Under
21 Florida law, the presumptive guideline sentence is the
22 sentence. And when you change that sentence, you are
23 changing the punishment, and this is an ex post facto
24 violation.

25 I just want to quote one thing from Weaver

1 which may crystallize our position. In there, the state
2 argued that the gain time that Mr. Weaver complained
3 about wasn't part of the sentence. They seemed to
4 indicate that that wasn't part of the sentence.

5 And this Court held, and I briefly quote, we
6 need not determine whether the prospect of gain time was
7 in some technical sense part of the sentence to conclude
8 that it, in fact, is one determinate of petitioner's
9 prison term, and that his effective sentence once this
10 determinate is changed.

11 And I think that's what we have here. If it's
12 not the sentence, it's a determinate. It has bee
13 changed. And it would materially alter the situation to
14 th accused, an resulted in an ex post facto violation.

15 The length of a prison sentence, which is not
16 subject to parole in this particular case, and which is
17 determined by the applicable guidelines, is in the most
18 basic and fundamental sense, a substantive matter, which
19 under the ex post facto clause, cannot be retroactively
20 increased.

21 If there'n't any further questions from the
22 Court, I have some time for rebuttal which I'd like to
23 reserve.

24 Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Calvello.

2 Ms. Shearer, we'll hear now from you.

3 ORAL ARGUMENT OF MS. JOY B. SHEARER, ESQ.,

4 ON BEHALF OF THE RESPONDENT

5 MS. SHEARER: Mr. Chief Justice, and may it
6 please the Court:

7 The Florida Supreme Court correctly held, in
8 reliance on this Court's decision in *Dobbert v. Florida*,
9 that the application of the amended sentencing
10 guidelines to all persons sentenced after their
11 effective date was not an ex post facto violation.

12 There are three reasons which support the
13 ruling below. First, the guidelines are procedural and
14 ameliorative when viewed as a whole.

15 Second, that there is continued judicial
16 discretion so the defendant cannot show he was
17 disadvantaged.

18 And thirdly, that the legislature has given
19 offenders fair warning that the guidelines are subject
20 to change.

21 Going first to the ameliorative purpose of the
22 guidelines, the guidelines were drafted in order to
23 guide judicial discretion and reduce disparity in
24 sentencing, and to prevent arbitrariness.

25 However, the punishment for offenses remains

1 the statutory maximum for the crime. The statutory
2 maximum sentences have not been abolished or altered in
3 any way.

4 The effect on the particular --

5 QUESTION: But you can't give them?

6 MS. SHEARER: They can -- the --

7 QUESTION: You can't give them unless you have
8 some special factor, right?

9 MS. SHEARER: The trial judge may depart up to
10 the statutory maximum if there are clear and convincing
11 reasons for doing so, which must be set forth in writing.

12 QUESTION: So in fact you can't get seven
13 years?

14 MS. SHEARER: Well, in --

15 QUESTION: Any trial judge can't give you
16 seven years just because he wants to give you seven
17 years.

18 MS. SHEARER: Actually, it's 15 years for
19 sexual battery. But the trial judge can give 15 years,
20 provided there are reasons for doing so.

21 And therefore --

22 QUESTION: Clear and convincing reasons that
23 are reviewable by other courts.

24 MS. SHEARER: That are reviewable.

25 QUESTION: What are those reasons? What are

1 some examples of them?

2 MS. SHEARER: Well, the court -- in my brief,
3 I've listed about 25 reasons. They include careful
4 planning of the crime, if that's not a particular
5 element of the offense; premeditation; traumatic effect
6 on the victim; traumatic effect on the victim's family;
7 an escalating course of criminal conduct by the
8 defendant, in other words, going from crimes against
9 property to crimes against persons.

10 QUESTION: I'm trying to figure out how many
11 of those are foreseeable by the defendant. Traumatic
12 effect on the victim's family probably isn't.

13 MS. SHEARER: No. And I suppose, careful
14 planning, maybe not. An escalating -- a crime binge
15 behavior, like robbing six 7-11s in two days, that sort
16 of thing.

17 They've also upheld -- I've actually set forth
18 in my brief about 25 reasons that have been approved.

19 QUESTION: Reading a list --

20 MS. SHEARER: Threats to the victims and the
21 witnesses. Presence of drugs in a house where children
22 live. Violating probation. Excessive brutality. Using
23 employees -- I mean they're really --

24 QUESTION: It's only the effects on the
25 victim's family that I recall that is something that I

1 would say is not clearly predictable by the criminal.
2 So that for all the rest you could say he carefully
3 planned the crime so that he'd only get the lesser
4 sentence, right.

5 QUESTION: But here, Ms. Shearer, the effect
6 of the change of guidelines on this particular
7 individual, as I understand it, was, at the time he
8 committed the crime, the guidelines then in effect said
9 3-1/2 to 4-1/2 years, and when he was sentenced, it said
10 5-1/2 to 7 years.

11 So there's no overlap there, is there?

12 MS. SHEARER: No, that's true. The effect of
13 it on this individual was that the judge could give him
14 seven years without having reasons to depart, whereas
15 under the original version of the guidelines, the judge
16 could have give him seven years, but would have had to
17 set out some reasons for doing so.

18 In fact, the prosecutor at the sentencing,
19 this issue came up, and the defense attorney argued that
20 the original guidelines were in effect. And the
21 prosecutor said, well, if, Judge, you decide to use the
22 original guidelines, then you should consider departing,
23 because there are aggravating circumstances here, and
24 this man deserves seven years. However, I think the '84
25 guidelines apply.

1 The judge said, well, I agree, because the
2 statutory is sustained. I'm going to use the '84
3 guidelines. Therefore, the seven years is an authorized
4 sentence, and I don't have to consider the departure
5 question any further.

6 The appellate court, the intermediate court,
7 the Fourth District Court of Appeal in Florida, did
8 reverse, and felt that it was ex post facto, but
9 specifically noted in its opinion that the very same
10 sentence could be imposed on this defendant if the judge
11 had clear and convincing reasons, and set them out in
12 writing.

13 QUESTION: And if this Court were to reverse
14 the Supreme Court of Florida, I suppose a seven year
15 sentence could be imposed under the later guidelines,
16 with the finding of reasons on the appellate review.

17 MS. SHEARER: That's exactly correct. And
18 that's why we're relying so strongly on Dobbert v. k
19 Florida. Because in Dobbert, this Court specifically
20 held that when you can only speculate that you've been
21 disadvantaged, but you cannot show an ex post facto
22 violation.

23 Mr. Miller can only speculate that he would
24 have received a lower sentence. He cannot show that his
25 sentence would have in fact been lower, because the

1 Court had continued discretion to depart.

2 Now, Mr. Dobbert, as you recall, had a jury
3 recommend life for him. And under the prior death
4 penalty statute, the life recommendation would have
5 bound the trial court.

6 Under the new statute, it didn't bind the
7 court, and the court could override the recommendation
8 and did so.

9 However, this Court said that Mr. Dobbert had
10 in no way established that in fact the jury would have
11 recommended life under the old statute, and speculation
12 was not enough to show that this had disadvantageous
13 effect on the defendant.

14 We submit here that it's clear that the
15 defendant was not subject to more onerous treatment
16 because he certainly could have gotten the same sentence.

17 The prosecutor urged the court to do it. The
18 Fourth District Court intermediate specifically told the
19 judge, if you want to, you can go ahead and sentence him
20 to seven years again, but just state your reasons; that
21 this clearly shows that there was not a disadvantage,
22 and does not show ex post facto violation.

23 QUESTION: It would be difference in the next
24 case, if indeed, the prosecutor hadn't said, I have
25 aggravating circumstances here?

1 MS. SHEARER: Well, I think --

2 QUESTION: I mean, is that what you're relying
3 on, the fact that the prosecutor here said there were
4 aggravating circumstances, so that he might have gotten
5 the longer sentence anyway?

6 MS. SHEARER: Well, in any case, that there's
7 aggravating circumstances, whether the prosecutor says
8 it or whether the judge finds it to be so.

9 It's clear that in order to depart, there has
10 to be some -- a finding of some clear and convincing
11 reasons. But --

12 QUESTION: Why didn't the judge just do that,
13 and avoid this whole -- just use the old guidelines and
14 find the aggravated circumstances?

15 MS. SHEARER: Because the judge accepted the
16 prosecutor's argument which we're arguing today, that
17 these were procedural changes, and because the statutory
18 maximum was unaltered, that you could simply use the
19 guidelines in effect on the date of sentencing.

20 I think it's --

21 QUESTION: Do you think -- I mean, just for
22 purposes of deciding the case, should we assume there
23 are aggravating circumstances or not?

24 Don't we have to assume there are none,
25 because he didn't rely on them? The legal question is

1 whether he needs them.

2 MS. SHEARER: I don't think we can assume
3 there are none, because the prosecutor urged that there
4 were. The judge said, well, I don't have to get to
5 that, because I'm using the new guidelines.

6 QUESTION: But the legal question is whether
7 the seven year sentence is adequate on the assumption
8 that he might have found no aggravating circumstances.

9 MS. SHEARER: But I think we never have really
10 decided ex post facto cases based on what might have
11 been or speculation.

12 He -- Mr. Miller cannot show definitively that
13 he would have gotten a lesser sentence. This case is
14 clearly distinguished was Weaver v. Graham, because that
15 involved a mandatory entitlement to gain time that was
16 reduced.

17 Mr. Weaver, when he went to prison, all he had
18 to do was sit there and behave himself and we was going
19 to get 5, 10, 15 formula gain time. This legislature
20 then altered it and reduced it to 3, 6 and 9. So the
21 mandatory entitlement having been reduced changed the
22 quantum of punishment.

23 However, here Florida complied with Weaver.
24 Because when the initial guidelines were adopted October
25 1st of '83, everybody sentenced after that date who

1 committed offenses beforehand, elected the guidelines or
2 went under the old system, because Florida was
3 recognizing it was abolished parole, and therefore
4 offenders who committed their crimes when parole was
5 available were entitled to not lose that, that that
6 would have been ex post facto.

7 But this situation, this defendant was aware
8 of continued judicial discretion --

9 QUESTION: Why is that? Couldn't you have
10 said the same thing about parole? They couldn't be sure
11 that they'd get parole?

12 MS. SHEARER: Well, they had it for the whole
13 system. And he was entitled to --

14 QUESTION: Well, you gave that away needlessly
15 in that case. They had a parole system, but he couldn't
16 be sure he'd be the beneficiary of it.

17 MS. SHEARER: Well, this defendant committed
18 the defense after.

19 QUESTION: No, I understand. But your
20 description of why Florida gave people the option to
21 come into the new system or not --

22 MS. SHEARER: Right.

23 QUESTION: -- was based on the fact that,
24 after all, Florida was abolishing parole and it felt
25 that the ex post facto laws required -- guarantee

1 required that this adjustment be made.

2 MS. SHEARER: That's correct.

3 QUESTION: But you could say the same thing
4 about parole that you've told us for this new sentencing
5 system. Parole was available, but he couldn't prove
6 that he would gotten it. So really --

7 MS. SHEARER: But he was entitled to be
8 considered for parole. I mean, defendants under the old
9 system were entitled to be eligible. But in this case --

10 QUESTION: Well, you could say here, he was
11 entitled to be considered for the lesser sentence
12 instead of the seven years, that he would have entitled
13 to be considered --

14 MS. SHEARER: Well, the trial judge could have
15 departed under. He could have said there was not enough
16 reason to go to the sentence.

17 QUESTION: Mr. Shearer, Lindsey against
18 Washington, the case from the '30s in this Court, which
19 was certainly relied on in Dobbert and I think mentioned
20 in Grant, there the Washington State legislature changed
21 max-mix sentence where the max is 15 years, to mandatory
22 15 years.

23 And the Court said, this Court said, that was
24 a violation of the ex post facto clause. And the fact
25 that Lindsey there couldn't show that he might not have

1 gotten 15 years under the old statute didn't mean that
2 it wasn't a claim.

3 Because he had to get it under the new
4 statute, and that was a disadvantage in sentencing.

5 MS. SHEARER: I think that the distinction
6 between Lindsey and this case is that in Lindsey all
7 discretion in sentencing was removed completely, because
8 only the 15 year sentence could be given.

9 But in this case discretion existed under the
10 original guideline to depart up or down, and it
11 continues to exist to depart up or down.

12 So it's continuing discretion. Now it may be
13 that the discretion is reviewable or subject to certain
14 constraints, but it still exists, and it's not the same
15 mandatory sentence which removed all discretion that
16 happened in Lindsey.

17 I think it's clear in the rule itself that
18 governs the guidelines, 3.701, the statement of purpose
19 is that the guidelines are to guide and not eliminate
20 judicial discretion.

21 Section (b)(6) states that the sentencing
22 guidelines are designed to aid the judge in the
23 sentencing decision, and not to usurp judicial
24 discretion.k

25 And Section (b)(11) permits departures for

1 clear and convincing reasons.

2 Another important factor that I think was one
3 of the considerations in Weaver v. Graham is that our
4 sentencing guidelines statute, 921.001, gives fair
5 warning to offenders that the guidelines are subject to
6 revision.

7 In Weaver, there was no fair warning to the
8 defendant that this mandatory expectation of gain time
9 would be reduced.

10 QUESTION: You don't think these were ex post
11 facto?

12 MS. SHEARER: No, Your Honor.

13 QUESTION: Just plain no. Now, how could he
14 have imagined that when he committed the crime? How
15 could he have imagined that he would have the guidelines
16 changed?

17 MS. SHEARER: Because -- that's just what I
18 was getting to -- the guidelines statute states --

19 QUESTION: All the argument I've heard you
20 make is that he must assume that any law might be
21 changed. Well, to me, that means nothing.

22 MS. SHEARER: No, Your Honor, the guidelines --

23 QUESTION: Because they might change it and
24 say the crime is no longer a crime.

25 MS. SHEARER: The legislature, however, has

1 set up a guidelines commission by statute. And this
2 commission is sitting, it exists, it is told
3 specifically it has to meet every single year. It has
4 to recommend changes to the guidelines.

5 And it's supposed to take into consideration
6 the availability of correctional resources.

7 QUESTION: It was especially set up to get
8 around the ex post facto?

9 MS. SHEARER: No, it was --

10 QUESTION: Is that what you're saying?

11 MS. SHEARER: I'm saying it gives fair warning
12 to offenders that the statute specifically sets up a
13 commission to review and continually revise and amend
14 the guidelines.

15 QUESTION: To get around the ex post facto
16 part?

17 MS. SHEARER: No, the purpose is to benefit
18 from our experience with the guidelines and adjust them
19 and fine tune them to deal with problems tha come up,
20 because this is a whole new system.

21 QUESTION: Suppose the basic statute says, the
22 penalty for sexual assault is 15 years, provided however
23 that this penalty may be changed at any time. Merely
24 announcing that you're going to change it ex post facto,
25 does that immunize the state from ex post facto

1 restrictions?

2 MS. SHEARER: Well, I think here, though, the
3 guidelines, where the statutory maximum stays the same.
4 And that hasn't been altered.

5 QUESTION: No, but that's back to your other
6 argument that this is not, after all, the statutory
7 sentence or guidelines.

8 It doesn't seem to me that your argument is
9 improved any by saying, moreover, we warned you that we
10 were going to violate the Constitution.

11 MS. SHEARER: Well, we're not doing it to
12 violate the Constitution. We're --

13 QUESTION: Well, you didn't put it that way.
14 But if indeed, it's an ex post facto violation, I don't
15 see how it's eliminated by simply announcing in advance
16 that you're going to do it?

17 MS. SHEARER: Well, but fair warning to
18 offenders that the guidelines are subject to change is
19 one of the crucial factors in the parole cases that --

20 QUESTION: So you think that statute would be
21 okay, then. Fair warning: It's 15 years this year, but
22 we may change it anytime after you commit the offense?

23 MS. SHEARER: No, because that's the maximum
24 sentence for the offense. And that -- you know, the
25 defender is entitled to have fair notice of the

1 consequences of his acts.

2 But in this case, Mr. Miller had fair notice
3 that he would get 15 years maximum. That he would
4 receive guideline sentencing; that the court could
5 depart up or down depending on the existence of
6 aggravating or mitigating factors; and that the
7 guidelines were subject to annual revision.

8 There have been two sets of amendments already
9 approved by the legislature, and there's a third one
10 pending in the legislature now.

11 In the parole cases areas, several of the
12 circuit courts of appeals found that where revisions
13 were authorized by statute, that that did give offenders
14 fair warning that there could be revisions in the
15 guidelines.

16 QUESTION: (Inaudible) some what differently
17 if the prison authorities had said -- or the legislature
18 or someone said -- here is gain time, but we may change
19 it, may reduce it, may reduce it. And then they do
20 reduce it, so Weaver would have come out differently?

21 MS. SHEARER: It may have, if there was some
22 commission that was supposed to annually study the
23 problem and make some determination?

24 QUESTION: So your answer is yet, if there had
25 been adequate notice?

1 MS. SHEARER: Yes, because that was something
2 important in Weaver, that there was no notice to this
3 man that when he went to prison -- or actually, when he
4 committed his offense, that his gain time would be
5 altered.

6 But here there is clearly warning to Mr.
7 Miller and other people that the guidelines are going to
8 be annually reviewed.

9 The parole guidelines cases were -- actually,
10 the parole guidelines were one of the bases for this
11 state to develop sentencing guidelines. On page 56 of
12 my brief I've quoted former Chief Justice Sundberg's
13 article discussing the guidelines before they were
14 enacted, and he said they came from the parole
15 guidelines.

16 For that reason, I think the cases in that
17 area, the Ninth Circuit Court of Appeals and Justice
18 Rehnquist's decision, which hold that application of
19 amended guidelines is not ex post facto because
20 discretion is still available and because of the fair
21 warning, are clearly on point with this case.

22 In the parole guidelines area, departures also
23 are reviewable. It's administrative review, but the
24 standard is good cause.

25 We submit that's fairly analogous to clear and

1 convincing reasons.

2 And again, in the parole cases the guidelines
3 are followed 85 percent of the time. But the courts
4 have held that the fact that they're followed that often
5 doesn't mean that the departures become substantive -- a
6 matter of substantive law.

7 We submit that the defendant's cases are
8 distinguishable. As I mentioned, Weaver was a mandatory
9 entitlement, whereas this is discretionary.

10 The Rodriguez case, cited in the reply brief,
11 involved the elimination of parole hearings, which was
12 not the case here.

13 We submit that the amendments simply further
14 reduce arbitrariness and guide discretion. The
15 defendant was not deprived of a substantial right that
16 was available at the time of his offense, because the
17 maximum punishment remained the same.

18 The amendments do not remove sentencing
19 options, nor do they permit consideration of matters
20 previously barred.

21 Finally, there are policy reasons why the
22 legislature should be able to amend the guidelines and
23 courts apply the amendments that are in effect on the
24 sentencing date.

25 The guidelines really represent an innovative

1 change from the past manner of indeterminate sentencing,
2 with the parole commission making the decision for
3 relief.

4 Now the guidelines effectively the truth in
5 sentencing. The parole has been eliminated. And we
6 need to benefit from our experience with the guidelines,
7 and to modify them as necessary.

8 Procedurally, it would be difficult for trial
9 courts to be faced with using several different sets of
10 guidelines and having to apply -- figuring out which
11 ones apply to which defendant.

12 And if it ends up becoming too complicated, it
13 will discourage modification, because it will result in
14 administrative difficulty.

15 QUESTION: (Inaudible) that these guidelines
16 only apply to cases that were tried after the guidelines
17 were passed? Would that wreck the whole system?

18 MS. SHEARER: I'm sorry, what?

19 QUESTION: If we said that these guidelines
20 apply only in the future, would that wreck the system of
21 Florida?

22 MS. SHEARER: Well, I think that the problem
23 is that the guidelines have to be continually altered
24 and --

25 QUESTION: Would that wreck the whole thing?

1 MS. SHEARER: It would make it
2 administratively difficult for the courts, and it may --

3 QUESTION: How would it be difficult?

4 MS. SHEARER: Well, because the courts would
5 have to, when they're sentencing a particular
6 individual, determine the date of his offense, and then
7 determine what guidelines were in effect then.

8 QUESTION: That's a problem?

9 MS. SHEARER: It can be. Because it's really
10 -- there's already three different sets, and there's a
11 fourth that's pending in the legislature.

12 QUESTION: So one more would be a problem?

13 MS. SHEARER: But there's going to be a fifth
14 and a sixth.

15 QUESTION: It would be much easier not to try
16 them at all.

17 MS. SHEARER: Well, anyway, Your Honor, I
18 think that the administrative problems are a valid
19 concern. And I've cited a couple of the bail act cases,
20 where the courts have said that a change in the bail
21 format, which makes it more difficult to get bail on
22 appeal, really only advances the date of sentencing, and
23 is not ex post facto; and that administrative concerns
24 are valid, and the court shouldn't have to deal with two
25 sets of bail statutes when deciding a bail issue.

1 We submit that analysis applies here as well.

2 Therefore, in view of the ameliorative nature
3 of the guidelines, the continued existence of judicial
4 discretion, the fair warning given to offenders, and the
5 policy reasons given, we submit that the Florida Supreme
6 Court correctly relied on *Dobbert v. Florida*.

7 And we request that the judgment below be
8 affirmed by this Court.

9 Thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
11 Shearer.

12 Mr. Calvello, you have nine minutes remaining.

13 MR. CALVELLO: I have nothing further, Your
14 Honor. Thank you very much.

15 CHIEF JUSTICE REHNQUIST: The case is
16 submitted.

17 (Whereupon, at 11:43 a.m., the case in the
18 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#86-5344 - JAMES ERNEST MILLER, Petitioner V. FLORIDA

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BY Paul A. Richardson

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