

IN THE SUPREME COURT OF FLORIDA

ISAAC WEEMS, :
 :
 Petitioner :
 :
 vs. :
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

Case No. 65,593

FILED
SID J. WHITE
DEC 17 1984
CLERK, SUPREME COURT
By [Signature]
Chief Deputy Clerk

REPLY BRIEF OF THE PETITIONER

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: Deborah K. Brueckheimer
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STATEMENT OF THE CASE AND FACTS

Petitioner will rely on his original Statement of the Case and Facts as given in his initial brief.

ARGUMENT

DID THE TRIAL COURT ERR IN
EXCEEDING FROM THE RECOMMENDED
GUIDELINE RANGE BY USING PAST
CRIMINAL CONDUCT WHICH COULD
NOT BE CONSIDERED IN THE COM-
PUTATION OF THE SCORESHEET AS
GROUNDS FOR THE DEPARTURE?

The Respondent has replied to Mr. Weems' merit brief by pointing out other possible reasons for justifying a departure from the recommended guideline sentence. Although the Second District Court of Appeals did not discuss these other reasons, the Respondent argues that even if old juvenile convictions cannot be used to justify a departure, there were other reasons in this case that could. These reasons were listed as follows:

- (1) had petitioner been scored under burglary, he would fall in the 12-30 months guidelines range;
- (2) petitioner had been to State Prison twice before and it apparently taught him nothing (since he continued to commit offenses);
- (3) the burglary for which he was sentenced was petitioner's 11th burglary; and
- (4) it was apparent petitioner could not make it on probation since he violated his last probation and his last parole.

(Respondent's Answer Brief, pg. 3.)

The reason listed as #3 has already been discussed in detail. Reason #1 was mentioned in a footnote in the Second District Court of Appeal's opinion. In that footnote it noted that scoring the burglary as the primary offense instead of the battery would have resulted in a higher sentence had the initial guideline rules allowed for such an election. Because the guidelines applied to Mr. Weems did not allow for this type of election, the higher sentence was not applicable. The Second District Court of Appeals then noted that this particular situation has been remedied with the new amendments to the guidelines.

With the exception of the Third District Court of Appeals which has apparently not considered this particular issue, all of the other District Court of Appeals have ruled that the amended guidelines effective July 1, 1984, have no retroactive effect. Dorman v. State, Case No. AV-409 (Fla. 1st DCA August 28, 1984)[9 F.L.W. 1854]; Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984); Hanabury v. State, Case No. 84-310 (Fla. 4th DCA November 14, 1984)[9 F.L.W. 2393]; and Foreman v. State, Case No. 84-255 (Fla. 2d DCA November 16, 1984)[9 F.L.W. 2418]. These decisions are based on the concept of ex post facto applications of criminal sentences and the fact that a defendant is entitled to rely on the guidelines that were in effect when he committed the crime or elected the guidelines. Thus, the fact that things would have

been different under the new guidelines cannot justify a departure. To do so would be an indirect retroactive application of the new guidelines and, therefore, an ex post facto application of the law.

The other two reasons, #2 & 4, were already considered in Mr. Weems prior record and scored accordingly. To allow the trial court to "double-dip" in sentencing Mr. Weems with prior record points and departure reasons amounting to having a prior record is to ignore the purpose in the Guidelines. The Fourth District Court of Appeals noted this problem in Davis v. State, Case Nos. 84-87, 84-164, & 84-383 (Fla. 4th DCA October 17, 1984)[9 F.L.W. 2221], and certified the following question:

If the score sheets make provisions for prior convictions, can those convictions also constitute clear and convincing reasons for aggravated punishment outside the guidelines?

The response to this question should be in the negative.

As can be seen from the above, there are no justifiable reasons for departing from the recommended guidelines. Mr. Weems relies on his initial brief for further argument on this issue.

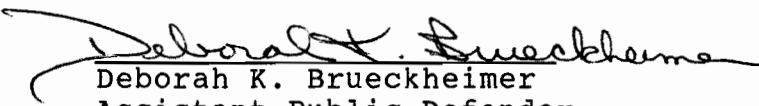
CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James H. Dysart, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, December 13^d, 1984.

Respectfully submitted,


Deborah K. Brueckheimer
Assistant Public Defender