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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 67,713
	)	
ALPHONSO GRIFFIN,	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, FL 32014
(904) 252-3367

ATTORNEY FOR RESPONDENT

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The respondent accepts the statement of the case and facts as set forth in the petitioner's initial brief on the merits.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal correctly determined that it was a violation of the ex post facto doctrine to retroactively apply amendments to the sentencing guidelines, such as the one here, which effectively increased the defendant's permissible punishment. The amendment to the Committee Note to Rule 3.701(d)(12), Florida Rules of Criminal Procedure, permitting a longer probationary period in a split sentence situation, constitutes a more severe punishment.

It was improper in this case to sentence the defendant to more than the mandatory minimum three-year sentence since any probationary period imposed above that incarceration period exceeded the permissible guidelines sentence as it existed at the time of the offense.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT IT WAS A VIOLATION OF THE EX POST FACTO DOCTRINE TO RETROACTIVELY APPLY AMENDMENTS TO THE SENTENCING GUIDELINES WHICH EFFECTIVELY INCREASED THE QUANTUM OF PUNISHMENT TO WHICH THE DEFENDANT WAS SUBJECT.

Amendments to the sentencing guidelines which increased the permissible punishment or which increase the presumptive sentence of a defendant are substantive changes and cannot be applied retroactively to offenses committed prior to their enactment. Such an application is a violation of the ex post facto doctrine and violates Article I, Section 9, of the United States Constitution and Article I, Section 10, and Article X, Section 9, of the Florida Constitution.

The Fifth District Court of Appeal accepted the argument as to this issue, reversed the defendant's sentence, and remanded the cause for resentencing under the guidelines in effect at the time of the commission of the offense. Griffin v. State, 474 So.2d 1266 (Fla. 5th DCA 1985).

Subsequently, this Honorable Court decided the case of State v. Jackson, 478 So.2d 1054 (Fla. 1985). In Jackson, supra, the guideline amendment which was applied retroactively was a change in the way a probation violation was scored. This Court held that this modification was merely procedural:

> We conclude that a modification in the sentencing guideline 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.

State v. Jackson, supra at 1056 (emphasis added).

In the wake of Jackson, the Fifth District Court of Appeal and the First District Court of Appeal have reluctantly applied Jackson to other amendments to the guidelines. In Wilkerson v. State, 480 So.2d 213 (Fla. 1st DCA 1985), the First District expressed doubt as to the application of Jackson to all guidelines changes and certified the following question as one of great public importance:

> WHETHER ALL SENTENCING GUIDELINES AMENDMENTS ARE TO BE CONSIDERED PROCEDURAL IN NATURE SO THAT THE GUIDELINES AS MOST RECENTLY AMENDED SHALL BE APPLIED AT THE TIME OF SENTENCING WITHOUT REGARD TO THE EX POST FACTO DOCTRINE?

Concurring in the decision, Judge Barfield expressed serious doubts as to Jackson's holding being legally applied to all amendments:

> . . . .I have serious concern with the Supreme Court construction in Jackson which would characterize all sentencing guideline rules as procedural and not substantive and which would appear to eliminate constitutional considerations of equal protection and improper applications of constitutionally prohibited ex post facto laws.

> One need only consider the disparate treatment between codefendants who are otherwise equal in the eyes of the court, but are sentenced on separate days by the same or different judges with an intervening rule change that enhances the presumptive guideline range. Jackson should not be held to answer questions not before the court. It should be limited to the issue of appropriate rule application in probation revocation proceedings.

Wilkerson, supra.

The respondent submits (and hopes) that this Court in Jackson did not intend to allow retroactive application of all amendments to the guidelines, but that the opinion, as Judge Barfield suggests, should be limited to the issue of the procedure in which probation violations are counted.

The petitioner in its merit brief suggests that an amendment to the sentencing guidelines which does not affect the maximum statutory penalty for an offense does not violate the ex post facto doctrine. The state asserts that the recommended sentencing range for a particular defendant is not something that he has a right to rely upon at the time of the sentencing but is only, at best, a "tenuous expectancy". (Petitioner's brief, pp.5-7) This argument must fail for a number of reasons.

In Weaver v. Graham, 450 U.S. 24 (1981), the United States Supreme Court held that the ex post facto prohibition forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. The case involved a state statute which was used to determine the amount of "gain time" the petitioner could

receive for good conduct. The statute in question had been amended subsequent to the offense for which the petitioner was being sentenced and, as amended, the gain time computed thereunder was less than it would have been under the old statute. It was applied retroactively to the petitioner's case, effectively reducing any gain time he may have been entitled to for good conduct.

The Florida Supreme Court had decided that there was no violation of the ex post facto doctrine, relying on an earlier decision in which it reasoned that gain time is an "act of grace" rather than a vested right and thus may be withdrawn, modified or denied. Weaver v. Graham, 376 So.2d 855 (Fla. 1979). In reversing that decision, the United States Supreme Court held that a law need not impair a "vested right" to violate the ex post facto prohibition. See Weaver, 450 U.S. at 29, fn. 13. The court set forth two critical elements which must be present for a criminal or penal law to be ex post facto: it must be retrospective and it must disadvantage the offender affected by it.

The petitioner would have us believe that a change removing a guidelines limitation on the length of the probationary period of a split sentence does not disadvantage the offender because he has no vested right to rely on said range when considering his possible sentence. First of all, as pointed out in Weaver, 450 So.2d 29, fn. 13, this is an incorrect and irrelevant analysis. Secondly, the respondent asserts that there has been an increase in his sentence; there is a "more disadvantageous criminal or penal

consequence to an act than [there was] in place when the act occurred". Id.

The respondent asserts that the sentencing guidelines were established to promote uniformity in sentencing and that a judge is required to sentence a defendant within the established presumptive range unless there are clear and convincing reasons to exceed it. Through the case law that has evolved since the inception of the guidelines, we know that clear and convincing reasons are those that are so unique as to remove that particular case from the restriction of the presumptive guideline range. When such reasons are established, the court may then, and only then, exercise its discretion in sentencing up to the maximum statutory penalty. It is clear that the converse is also true. A defendant has the right to rely on his established recommended range when he anticipates his sentence except in those isolated cases where unique circumstances exist which take away his right to a presumptive sentence.

The respondent asserts that, under the analysis of Weaver v. Graham, supra, an amendment to the guidelines which increases the allowable total sanction (incarceration plus probation) has a disadvantageous effect on the offender and is more onerous than the rule in effect on the date of the offense. The trial court in the instant case sentenced the defendant pursuant to the guidelines presumptive sentence [as altered by Fla.R.Crim.P. 3.701(d)(9) and the minimum mandatory sentence], retroactively applying the amendment to

Fla.R.Crim.P. 3.701, Committee Note (d)(12) which allowed it to impose an additional probation sentence. Obviously, there were no clear and convincing reasons for departure. But for the amendment to the guidelines, the defendant's legal sentence (since there were no reasons to depart) could only have been the three-year minimum mandatory term of incarceration; after the amendment the defendant faces not only the three years imprisonment, but also an additional term of probation. Clearly the added allowable probation term is a more onerous consequence than a sentence without it and thus the application of the amendment in a retroactive fashion was a violation of the ex post facto doctrine prohibited by the United States and Florida constitutions.

The respondent admits that Jackson, supra, held that modification in the sentencing guideline procedure which changed how a probation violation should be counted was merely a procedural change and as such, was not within the realm of the ex post facto doctrine. However, amendments in the sentencing guidelines, such as the one in the instant case, changes the penalty, not the procedure. The amendments msut be approved by the legislature prior to their application. Hence, it is clear they are substantive rather than procedural changes. As such, the amendment in question in this case was improperly applied retroactively. It clearly had a disadvantageous effect on the respondent. The ruling of the Fifth District Court of Appeal in this case was correct and should be affirmed.

The petitioner also raises an additional issue in his merit brief which was not previously addressed below. The state now contends that even if the ex post facto doctrine prohibits the retroactive application of the amendment, the sentence was proper. (Petitioner's brief, pp. 7-9) The state argues that since the court was required to "depart" from the guidelines range in imposing the three year minimum mandatory sentence, that it is free to order a further departure (adding the probation) without providing for reasons for the departure. "There is no requirement," the petitioner states, "that he [the trial judge] impose only the minimum mandatory." (Petitioner's brief, pp. 7-8) This contention stems from a misinterpretation of Walker v. State, 473 So.2d 694 (Fla. 1st DCA 1985) and Rule 3.701(d)(9), Florida Rules of Criminal Procedure. Rule 3.701(d)(9), Florida Rules of Criminal Procedure, states that if the minimum mandatory sentence is in excess of the presumptive guidelines sentence "the mandatory sentence takes precedence." It does not allow for a longer sentence than the minimum mandatory unless the court elects to depart and states clear and convincing reasons for its departure. See Boldes v. State, 475 So.2d 1356 (Fla. 5th DCA 1985) (which holds that in an analagous situation concerning the rule allowing for the sentence to be automatically increased one cell in probation violation cases, the trial court is limited to this one-cell jump unless he provides additional reasons for a further departure).

The decision of the District Court of Appeal, Fifth District, is correct and should be affirmed and the defendant's probationary period should be vacated.

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the respondent requests that this Honorable Court affirm the decision of the District Court of Appeal, Fifth District.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, FL 32014
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Ave., Daytona Beach, FL 32014 and Mr. Alphonso Griffin, Inmate NO. 095988, P. O. Box699, Sneads, FL 32460 on this 11th day of March, 1986.

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER