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IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 67,713

ALPHONSE GRIFFIN,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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

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IN REPLY TO RESPONDENT'S ASSERTION THAT IT IS A VIOLATION OF THE EX POST FACTO DOCTRINE TO RETROACTIVELY APPLY AMENDMENTS TO THE SENTENCING GUIDELINES AND HIS ASSERTION THAT THE SENTENCING GUIDELINES DO NOT PERMIT SENTENCING IN ADDITION TO THE MANDATORY MINIMUM WHERE THE MINIMUM TAKES PRECEDENCE OVER THE RECOMMENDED RANGE.

ARGUMENT

Petitioner recognizes, as did this court in May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983), the declaration in Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) that:

> "[t]he presence or absence of an affirmative, enforceable [i.e. "vested"] right is not relevant ... to the ex post facto prohibition." 450 U.S. at 30, 101 S.Ct.

435 So.2d at 836. Respondent is mistaken in his belief that petitioner claims that a vested right is necessary to violate the ex post facto doctrine. Petitioner has consistently asserted that no substantive right (either vested or unvested)is established in behalf of a criminal defendant by the sentencing guidelines. The sentencing guidelines establish guidelines for judges as they exercise their discretion in the sentencing process. Fla. R. Crim. P. 3.701(b).

As noted by the court in Weaver, supra:

> "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice. . . ."

450 U.S. at 31, 101 S.Ct. at 965. When respondent committed his

would be subject to the discretion of the sentencing judge and that the sentencing guidelines were subject to change. Any alleged right to less punishment is vitiated by such notice. Regardless, respondent has no such right.

Respondent errs in his reasoning when he suggests that a defendant has a right to rely upon "his established recommended range" (Respondent's Brief on the Merits, p.7) (emphasis added), particularly since the sentencing guidelines establish guidelines for judges. Contrary to his assertions, he cannot anticipate what his sentence will be. See, Lepper v. State, 451 So.2d 1020 (Fla. 1st DCA 1984); Morgan v. State, 414 So.2d 593 (Fla. 3d DCA 1982). The fact that what constitutes a clear and convincing reason for imposing a departure sentence is still, and will be, a developing area of law and court discretion further belies respondent's claim that he can anticipate his sentence. Indeed, "it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice . . . in existence when its facts arose." Mallet v. North Carolina, 181 U.S. 589, 21 S.Ct. 730, 733, 45 L.Ed. 1015 (1901). Parenthetically, it would appear that even if the guidelines were labelled substantive law, the rationale of May, supra, would apply.

Respondent's reliance on Weaver, supra, is misplaced. As the court noted in Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984):

> The prisoner, in Weaver, had a mandatory statutory entitlement to

> credit. Since no discretion was involved in awarding that good time, the change in the formula by which it was calculated effectively lengthened the term of imprisonment for prisoners who obeyed the institutional rules. (Citation omitted).

738 F.2d at 1180 (emphasis supplied). The sentencing guidelines involve the use of discretion. Weaver does not control in these circumstances. State v. Jackson, 478 So.2d 1054 (Fla.1985).

Because respondent's punishment was not increased and he can establish no more than a tenuous expectancy regarding his probable sentence, under the sentencing guidelines, no ex post facto violation has occurred.

With regard to the imposition of probation following his mandatory minimum sentence, respondent suggests that the petitioner misinterpreted Walker v. State, 473 So.2d 694 (Fla. 1st DCA 1985), but fails to tell how it was is misinterpreted. In Walker, the court held:

> Because the habitual offender statute subjected appellant to a mandatory life sentence, this sentence automatically took precedence over the lesser guidelines sentence and there was no necessity for the trial court to justify departing from the guidelines (citation omitted).

473 So.2d at 699. Even if this court were to find that an ex post facto violation occurred, since, analogous to Walker, the mandatory sentence took precedence in the instant appeal, there was no necessity for the court to justify departing from the otherwise recommended sentence. The departure sentence would then be subject to review for abuse of discretion. Albritton v. State, 478 So.2d 1054 (Fla. 1985). Respondent, as the appellant,

below, has demonstrated no abuse of discretion . Blue v. Blue, 66 So.2d 228 (Fla. 1953).

Florida Rule of Criminal Procedure 3.701(d)(9) imposes no limit on the sentence which may be imposed by the sentencing judge, once the judge departs from the recommended range by imposing the mandatory minimum. As a result, there is no limit (except abuse of discretion, per Albritton) recommended by the Sentencing Guidelines Commission or this court and approved by the legislature which prevents imposition of probation following the mandatory minimum sentence.

Boldes v. State, 475 So.2d 1356 (Fla. 5th DCA 1985), relied upon by repondent is inapplicable to the instant appeal. Florida Rule of Criminal Procedure 3.701(d)(14) permits a sentencing court to increase a defendant's sentence one cell above the recommended sentence after revocation of his probation. In Boldes, the court held that where the sole reason for departure is a defendant's violation of community control, other clear and convincing reasons must be given for departure. Rule 3.701(d)(14) clearly imposed a cap on departure sentences, absent additional clear and convincing reasons for departure, where the reason for departure was solely the violation of probation then under consideration by the trial court. There is no such cap in Rule 3.701(d)(9).

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal, Fifth District.

Respectfully submitted,

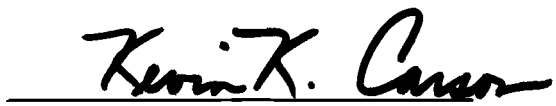
JIM SMITH
ATTORNEY GENERAL

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 the Merits has been furnished by mail to Nancye R. Crouch, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the respondent. this 4 day of April, 1986.



KEVIN KITPATRICK CARSON
COUNSEL FOR PETITIONER