

IN THE SUPREME COURT OF FLORIDA

JORGE OCHOA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent,

CASE NO.

67-870

Deputy Clerk

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REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CITATIONS

RE: Clarification of Florida Rule of Practice
and Procedure, 281 So.2d 204 (Fla. 1973)

State v. Cote, (Fla. 1986)

Weaver v. Graham, 101 S. Ct. 960 (US 1981)

OTHER AUTHORITIES

Florida Constitution, Article II, Section 3

Florida Statutes, Section 921.001 (1)

Florida Statutes, Section 921.001 (5)

SUMMARY OF ARGUMENT

The Respondent's argument is that the amendment to Section 921.001 is a matter of procedure and, therefore, is not subject to ex post facto attack. The Petitioner's reply is that if this amendment is merely procedural, then the Legislature has exceeded its authority and has violated the Constitutional separation of powers. In that case, the amendment is unconstitutional. The Petitioner's position is that the amendment is both substantive and procedural and, as such, is, at the very least, an ex post facto law as applied to this case.

ARGUMENT

SUPPLEMENTAL ISSUE

WHETHER Chapter 86.273, Section 1, Law of Florida, which amends Section 921.001 (5), Florida Statutes, has an impact on judicial review of sentencing in this case?

The Respondent has taken the position that the amendment is a matter of procedure and, as such, is not subject to attack as an ex post facto law. Unfortunately, this argument places the Respondent in a dilemma for it invites the conclusion that the amendment is unconstitutional. This Court has held that the Legislature's power to abrogate a court rule extends only to repeal and does not include the power of amendment, or the power to enact any law relating to practice and procedure. Re: Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204 (Fla. 1973). The Florida Constitution provides that no person properly belonging to one of the branches of government may exercise powers appertaining to either of the others, unless expressly provided in the Constitution. See Florida Constitution, Article II, Section 3.

Apparently realizing that it had no power to regulate judicial procedure, the Legislature characterized

the Statute as substantive. This, of course, is inconsistent with the Respondent's argument but Section 921.001 (1) plainly states that the "provision of criminal penalties and limitations upon the application of such penalties is a matter of predominately substantive law and, as such, is a matter properly addressed by the Legislature". But if the amendment is primarily substantive then it is an ex post facto law as applied to the Petitioner.

The prohibition against ex post facto laws has no application to exclusively procedural changes, as distinguished from changes which subject an accused to additional criminal liability and punishment. The amendment of Section 921.001 is both substantive and procedural. It is not exclusively procedural. The United State Supreme Court has held that the Constitution's ex post facto prohibitions forbid the Congress and the States from enacting any law which imposes a punishment for an act which is not punishable at the time it was committed, or imposes additional punishment to that then prescribed. Weaver v. Graham, 101 S. Ct. 9601 (US 1981).

Prior to the enactment of the amendment to Section 921.001, a defendant had a substantive right to have the extent of departure from a guidelines sentence reviewed by the appeallate Courts. In our case, the Petitioner received a sentence of 40 years in prison when the guidelines called for a sentence of 12 to 17 years. The Petitioner filed his


appeal prior to the enactment of the amendment. Therefore, no subsequently enacted law can constitutionally deprive the Petitioner of his right to a review of the extent of the departure from the guidelines.

CONCLUSION

As argued in the Petitioner's Supplemental Brief, the Supreme Court's opinion in State v. Cote, entered on April 13, 1986, holding that emotional and psychological impact on the victim did not constitute a clear and convincing reason for departure from sentencing guidelines, undercuts the reasoning of the Second District Court of Appeal in affirming the trial Court's decision to depart from the sentencing guidelines. This factor was the only significant support for a shaky foundation on which a departure could be based. Without this support, the decision collapses. Thus, there is no legitimate ground for any departure from the guidelines.

Further, the amendment of Section 921.001 of Florida Statutes cannot be applied here to limit review of the extent of departure from the guidelines because it was enacted after the Petitioner filed his appeal. As to the Petitioner, it is an ex post facto law or, if strictly procedural as the Respondent argues, then it is an unconstitutional attempt by the Legislature to amend a rule of procedure. In either case, it has no effect on judicial review in this case.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to WILLIAM I. MUNSEY, JR., Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602 this

1st day of February, 1987.


GERALD W. MEDEIROS, ESQ.