IN THE SUPREME COURT OF FLORIDA

JORGE OCHOA,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

CASE NO, 67,870

RESPONDENT'S SUPPLEMENTAL BRIEF

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SUMMARY OF THE ARGUMENT

The Florida Legislature has the power to enact an amendment which makes extent of departure from a guidelines sentence no longer subject to appellate review. Because the amendment is a matter of procedure, the amendment must be applied by the Florida appellate courts, immediately upon July 9, 1986, to all pending appellate cases addressing this issue.

ARGUMENT

SUPPLEMENTAL ISSUE

WHETHER CHAPTER 86-273, Section 1, Laws of Florida, WHICH AMENDS Section 921.001(5), Florida Statutes, HAS AN IMPACT ON JUDICIAL REVIEW OF SENTENCING?

The above-described legislative action provides that "[t]he extent of departure from a guideline sentence shall not be subject to appellate review." This Court in Allbritton v. State, 476 So.2d 158, 160 (Fla. 1985) stated: "An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of departure, the reasons given for the departure, and the record to determine if the departure is reasonable." (emphasis added). Thus, appellate courts were faced with a dilemma. That dilemma was to determine whether the trial courts had applied the proper discretionary criteria to a sentencing deviation. This Court in Albritton held that the proper standard of review for departure sentences is an "abuse of discretion" one. See, Id. at 160, fn.3. This Court's decision in Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980) sets forth a full discussion of the abuse of judicial discretion standard. Judge Hall, in writing for the majority in Ochoa v. State,476 So.2d 1348 (Fla. 2nd DCA 1985) has asked this Court to establish "criteria" so that "extent of departure" review might ensue on a uniform basis throughout the District Courts of Appeal in Florida.

The "deus ex machina" of this dilemma has been the Florida legislature. Extent of departure from a guidelines sentence is now no longer subject to appellate review. See, §921.001(5), Florida Statutes (1985) which was amended by Ch. 86-273, §1, Laws of Florida.

Section 3 of Ch. 86-273 provides that the act shall take effect upon becoming law. This act was signed into law on July 9, 1986. It is the position of Florida that this law is now in effect and applies to all cases pending appellate review including the case sub judice. The "State" knows of two other cases which have this same issue: (1) Dilar S. Booker v. State of Florida, Fla. Case No. 68,400 (pending); and (2) Scott Lee Traver v. The State of Florida, Fla. 2nd DCA Case No. 86-670 (pending). 502 So.2d 1009

Any argument that application of this amendment to this case constitutes a violation of the constitutional prohibition against ex post facto laws is without merit. Although the right to appeal constitutes a substantive right, this Court has recognized that it should determine as a matter of appellate procedure what appeals by a defendant are permitted. See, Fla. R. App. P. 9.140(b)(1). Subsection (E) of the aforementioned Rule grants the Florida Legislature authority to enact such other procedural limitations on the right to appeal as it deems fit. In accordance with that, the Florida Legislature has established that a defendant may appeal

a sentence imposed outside the range recommended by the guidelines authorized by §921.001. See, §924.06(1)(e), Florida Statutes (1985).

The "State" acknowledges that the Florida Legislature has now limited the appeal of departure sentences by prohibiting appellate review of the extent of departure by amending §921.001. The 1986 amendment is a matter of procedure and not a matter of substantive law. It is, therefore, not subject to an ex post facto attack. Because it is a matter of procedure, the amendment should be applied by the appellate courts, immediately upon becoming effective, to all appellate cases pending at the moment of effectiveness. This Court has no alternative but to decline to answer the Certified Question as it is now moot.

As previously noted, the same issue is pending before this Court in Booker v. State, Fla. Case No. 68,400 (pending). For purposes of brevity and clarity, the "State" would incorporate by reference its argument presented there in a Motion to Dismiss with supporting memoranda. Attached as Appendix to this brief is a copy of that Booker pleading.

CONCLUSION

WHEREFORE, having complied with this Honorable Court's order of December 3, 1986, the "State" would urge this Court to affirm the decision of District Court of Appeal rendered in Ochoa v. State, 476 So.2d 1348 (Fla. 2nd DCA 1986) and decline to answer the certified question as it has been "mooted" by legislative action.

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 GERALD W. MEDEIROS, Esquire, 1519 Commercial Park Drive, Lakeland, Florida 33801 on this 12th day of January, 1986.

Of Counsel for Respondent