IN THE SUPREME COURT OF FLORIDA

RALPH GROSS,
PETITIONER.

CASE NO. :SC02-1695
Lower Tribunal No.: 4D01-2132

-VS-

STATE OF FLORIDA,
RESPONDENT.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

On Discretionary Review Based Upon an Express and Direct Conflict

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CERTIFICATE OF INTERESTED PARTIES

Counsel for defendant/petitioner certifies that the following persons and entities have or may have an interest in the outcome of this case:

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Circuit Court Judge, Seventeenth Judicial Circuit
(Trial Judge originally assigned to this case)

Honorable M. Daniel Futch, Jr.
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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for

Broward County, Florida and was the Appellant in the Fourth District Court of Appeal.

Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and was the Appellee in the Fourth District Court of Appeal.

The following symbols will be used:

“R” Record on Appeal

“T” Transcript of Hearings

SUMMARY OF ARGUMENT

Jurisdiction should not be reconsidered as there still

remains a significant conflict between the Supreme Court and the Second and Fourth Districts. Further, as to the issue of application of the rule of lenity, there exists a substantial conflict between the Second and Fourth Districts which must be resolved in order for trial courts to be consistent in sentencing offenders convicted of crimes spanning more than one sentencing guideline ranges.

The ex post facto clause was violated in this case because use of the 1991 guidelines resulted in a harsher sentence than would have been called for had the 1994 guidelines been utilized. Accordingly, the claim is cognizable under Fla. R. Cr. P. 3.800 (a). Respondent's claim to the contrary is not only erroneous, but should not be considered as it was not raised at the trial level.

The Second District's holding in Cairl v. State, 833 So.2d 312 (Fla. 2nd DCA 2003) that the rule of lenity mandates the use of the most lenient sentencing guideline range is applicable to Petitioner.

ARGUMENT

POINT ON APPEAL

THE FOURTH DISTRICT WAS INCORRECT IN HOLDING THAT PETITIONERS SENTENCE WAS LEGAL AS IT WAS IN VIOLATION OF THE EX POST FACTO CLAUSE AND, FURTHERMORE, THE RULE OF LENITY SHOULD HAVE BEEN APPLIED.

A. JURISDICTION

Respondent has requested that this appeal should be dismissed based on the holding in Cairl, wherein the Second District held that the decision in Hankin v. State, 682 So.2d 602 (Fla. 2nd DCA 1996) applied an "overly expansive reading of Puffinberger". Cairl, at 313; Answer Brief of Respondent, p.4. It is conceded that this was the holding in Cairl, and that the Second District has receded from Hankin concerning their interpretation of Puffinberger v. State, 581 So.2d 897 (Fla. 1991).

That being said, this appeal should not be dismissed for at least two reasons. Initially, it is not clear why this Honorable Court decided to accept jurisdiction. Although the Second District has changed it's opinion as to the holding of Puffinberger, it was argued in Petitioner's brief on jurisdiction that Gross v. State, 820 So.2d 1043 (Fla. 4th DCA 2002) not only conflicted with Hankin, but also conflicted with

Puffinberger. Petitioner's brief on jurisdiction, p. 4 and 5.[1] Gross and Hankin appear to have been reconciled by Cairl between the district courts on the issue of whether Puffinberger mandated the use of guidelines in effect at the end of the criminal episode in the district courts. Cairl clearly has receded from Hankin and held that Puffinberger did not mandate the use of the guidelines at the end of the criminal episode, but rather that to use those guidelines did not violate the ex post facto clause where the offender continued his criminal activity into the latter guideline range. There still exists the open question as to the meaning of Puffinberger. Obviously fair and reasonable minds can differ over the meaning of the opinion, as evidenced by Hankin which operated as the only decision in Florida interpreting Puffinberger for six years until Gross and Cairl were decided in 2002 and 2003, respectively. Because a conflict on the same question of law continues to exist between the supreme court and the district courts, jurisdiction is proper.

Gross and Cairl continue to create conflict on the fundamental issue concerning which guidelines to use in the

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[1] Fla. R. App. P. 9.030 (a) (2) (A) (iv) provides for discretionary review of opinions of a district court which expressly and directly conflicts with another district court, or with a decision of the supreme court on the same question of law.

continuing crime arena. The conflict is based on the differing interpretations of whether the rule of lenity applies in such a situation. The Fourth District weighs in against it's use, whereas the Second District falls the opposite way. Lenity was addressed in both the Gross and Cairl opinions, as it was at the trial level.[2] Logic and fairness dictate that this Honorable Court should take this opportunity to resolve this conflict in order to avoid continued disparity between the districts as to how to sentence those persons who fall into this category. Petitioner deserves an answer to this question as it will materially affect the amount of time which he must spend in the penitentiary.

B. PETITIONER'S CLAIM IS COGNIZABLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a); ISSUE NOT PRESERVED FOR APPELLATE REVIEW

Respondent argued that the claim made by Petitioner was not cognizable under Fla. R. Cr. P. 3.800(a). Answer brief, p. 5.

Petitioner brings the court's attention initially to the fact that this argument was made for the first time by Respondent on appeal. Nowhere in the State's arguments below, either in their written response or in their oral argument at the trial level, did they suggest to the trial judge that

[2] Lenity was apparently not raised in either Hankin or Puffinberger.

Petitioner had chosen the improper vehicle to seek redress of this alleged error.[3]

The State did not even make a general objection to Petitioner's use of Fla. R. Cr. P. 3.800(a) to address his argument. Rather, the State simply disagreed with his legal analysis as to the proper guidelines to follow. The State *conceded that the scoresheet error should be corrected* as to Counts 31, 32, and 33 so as to have those crimes scored on a 1994 instead of a 1993 guidelines scoresheet (R 67). Since the State failed to raise this argument below, it was waived and may not be raised for the first time on appeal. State v.Clark, 770 So.2d 237 (Fla. 4th DCA 2000)(issue of whether reasons for downward departure were valid not preserved by the State where they argued different grounds to reverse on appeal); Tillman v. State, 471 So.2d 32 (Fla. 1985)(in order for an issue to be preserved for further review, it must be presented in lower court with specific legal grounds or arguments).

Respondent argued in support of the assertion that Fla. R. Cr. P. 3.800(a) was an inappropriate vehicle to litigate the disputed point because Petitioner was not claiming a calculation

[3] Respondent first made this argument in their brief in the Fourth District. The Gross opinion did not address the issue of waiver.

error. Answer brief, page 5.[4] In support of this claim, Respondent cited Marciniak v. State, 754 So.2d 877 (Fla. 1st DCA 2000) for the proposition that except for calculation errors in a sentencing guideline scoresheet, a motion to correct an illegal sentence may not be used to correct sentencing guideline errors. Respondent is generally correct in this interpretation of the law. Davis v. State, 661 So.2d 1193 (Fla. 1995). If, however, the effect of the trial court's error was to impose a sentence greater than the maximum sentence authorized by law, the sentence is an "illegal sentence" within the meaning of Fla. R. Cr. P. 3.800(a). Marciniak, at 878. Marciniak considered the issue as to whether the trial court's misapplication of Fla. Stat.921.001(5) which resulted in a sentence in excess of 22 months in prison was cognizable under Fla. R. Cr. P. 3.800(a).[5] In Marciniak, the

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[4] Actually, it has been Petitioner's consistent assertion that the trial court made a drastic error in the calculation of the guidelines by it's failure to utilize the correct scoresheets. In essence, this appeal is based on the improper calculation of the guidelines by virtue of using the incorrect scoresheet. This situation is analogous to a computation error which could occur by assigning the incorrect level to an offense which results in a sentencing range higher than would be legally permissible, or use of a scoresheet subsequently held to be unconstitutional which is cognizable under Fla. R. Cr. P. 3.800
pursuant to Heggs v. State,759 So.2d 620 (Fla. 2000).

[5] Fla.Stat.921.001(5) states: "A person sentenced to a felony committed on or after July 1, 1997, who has at least one prior felony conviction and whose minimum recommended sentence is less than 22 months in state prison may be

accused scored 20.7 to 34.6 months, but the trial court sentenced him to 34 months, notwithstanding the applicable statute which limited the maximum prison term to 22 months. The Court held that Fla. R. Cr. P. 3.800(a) could be used to redress the sentencing error because "the effect of the trial court's error was to impose a sentence greater than the maximum sentence authorized by law." Marciniak, at 878. See also, Draper v. State, 782 So.2d 522 (Fla. 1st DCA 2001)(because *the face of the record* establishes entitlement of relief based on a Fla. Stat. 921.001(5) violation, accused was entitled to re-sentencing pursuant to Fla. R. Cr. P. 3.800(a)). Emphasis added.

Likewise, Petitioner was entitled to raise his sentencing error via Fla. R. Cr. P. 3.800(a). The error was similar to that complained of in Marciniak and Draper. In those cases, the error was a misinterpretation or misapplication by the trial court of a statute. Here, the trial court misinterpreted or misapplied case law which clearly supported Petitioner's position. This error was apparent from a review of the record and did not require an evidentiary hearing. A review of the information and the guideline scoresheets were the only documents which needed to be examined in order to correct the illegal sentence. Indeed, as

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sentenced to a term of incarceration not the exceed 22 months."

indicated, the State conceded that the error in the scoresheet should be corrected, and did so by a simple analysis of the information and an application to the 1994 guidelines (R 67). Fla. R. Cr. P. 3.800(a) motions generally are those, like the case at bar, which can be resolved as a matter of law without an evidentiary determination. State v. Callaway,658 So.2d 983 (Fla. 1995). This case was properly heard, but incorrectly decided.

C. Ex Post Facto Argument

Respondent argued that there was no ex post facto violation in this case. Answer brief, 6-8.

Petitioner was subjected to guidelines which clearly should not have been utilized. The effect of using the 1991 guideline scoresheets for the crimes which began in 1993 and ended in 1994 resulted in a substantial increase in the sentence which Petitioner was both subjected to and which he actually received. The prevailing case law in existence at the time that the crimes occurred mandated that the guidelines in effect at the *end* of the criminal enterprise must be used. Puffinberger and Hankin, supra.

As Respondent correctly pointed out, the accused in Puffinberger *unsuccessfully* argued that the application of the guidelines in effect at the end of his criminal activity violated the ex post facto clause because it had the effect of increasing his sentence. In Puffinberger the accused continued to violate

the law *after* a change in the guidelines which increased the sentence which he would be exposed to. He was on notice that if he continued to violate the law after the change in the law, he was facing a more severe sentence. The distinction here is that Petitioner was on notice that if he continued to violate the law into 1994 and was caught and convicted, that his sentencing range would be lower than if he simply stopped his criminal activity in 1993.[6]

Respondent argued that the guidelines in effect at the time that Petitioner committed his crimes were used, so it was not an ex post facto violation to use the earlier guidelines. Answer brief, p. 7. This argument begs the question of which guidelines the law mandates. Petitioner committed crimes during the period where two guideline ranges were in effect. It happens that in this case, use of the later guidelines resulted in a lower sentencing range. He continued committing crimes during this later guideline range which began in the earlier, more stringent range. Respondent's argument suggest that the court should ignore the fact that Petitioner continued to commit crimes in 1994 when

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[6] This fortuitously worked out in this quirky manner for Petitioner. The same cannot be said for the accused in the Puffinberger case. This fact does not mean that there has not been an ex post facto violation, or that Petitioner is not entitled to the benefit of the 1994 guidelines. Importantly, Puffinberger was decided in 1991, prior to the criminal activity in this case.

the guidelines had become less stringent. Those crimes, according to Respondent's argument should be sentenced under the prior guideline range which were amended while Petitioner was still engaged in his criminal conduct. Puffinberger held that the court did not violate the ex post facto clause in sentencing the offender under the more onerous guidelines *because he continued to commit criminal activity after the newer and stricter guidelines came into existence.* Puffinberger, at 900. As indicated, the opposite occurred here. Petitioner continued to commit crimes into a more lenient guideline range. Implicit in Puffinberger is that had the reverse been true there, the ex post facto clause would have been violated.

Accordingly, the application of the harsher guidelines to Petitioner violates the ex post facto clause.

D. The Rule of Lenity Argument

It is clear from the information that counts 1, 2, 21, 22, and 23 had continuing dates of criminal activity which began in 1993 and continued into 1994 (R 5,12,18 and 19). The Court was not required to conduct an evidentiary hearing to come to this conclusion. It simply had to review the information which formed the basis for the charge. The jury did not make any specific findings as to when the crimes actually took place. Counts 21, 22, and 23, as in Cairl, charged a range of time in which the

crime may have occurred; somewhere between September 11, 1993 and January 31, 1994. (R 18 and 19). Count 1 and 2 likewise charged a range of time spanning two distinct guidelines. As indicated in Cairl, it is not for the trial judge to determine the date of the offense. This determination is reserved exclusively for the jury. Cairl, at 899, citing State v. Overfelt, 457 So.2d 1385, 1387 (Fla. 1984).[7] Based upon the reasoning of Overfelt and Cairl, the legal principles enunciated in Apprendi as interpreted by the Second District and the Supreme Court of Florida, require that the jury, not the judge, determine when the crime occurred for purposed of determining which guidelines to use. In the case of an ambiguity as to this issue, the tie goes to the accused. The guidelines which provide the most lenient sentence apply.

In this case, the use of the 1994 guidelines for those crimes which spanned the two ranges benefits Petitioner. The rules of statutory construction mandate that "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Fla. Stat. 775.021(1). In Petitioner's case, the statutes were *silent* on the relevant

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[7] Respondent submitted that Apprendi v. New Jersey, 530 U.S. 466 (2000) which Petitioner raised in his initial brief on the merits has no application in this case, because, inter alia; Apprendi only applies when the sentence exceeds the statutory maximum; the argument was waived because it was not raised below; and Apprendi does not apply retroactively. Answer brief, p. 10.

issue. The case law dictated that the law be interpreted in the light most favorable to the Petitioner, not the opposite, as was done in this case. To ignore the existing case law and to effectively apply a statute not in effect at the time of the crime constitutes a blatant disregard for the rule of lenity in criminal prosecutions, due process of law, and an improper ex post facto application of laws. Gilbert v. State, 680 So.2d 1132 (Fla. 3rd DCA 1996)(rule of lenity requires application of the more lenient guideline scoresheet where it was impossible to determine from the evidence or the information whether the crime occurred before or after the 1994 guideline statute).

Cairl stands for the proposition that the Petitioner "is entitled to be sentenced to the most lenient version of the guidelines in effect during the time frame alleged in the information as opposed to the time frame that the trial court determined should apply". Cairl, at 314.

Applying this holding to the facts at bar, Petitioner should clearly be entitled to be sentenced to the 1994 guidelines for those crimes straddling the two ranges. The Fourth District decision in Gross should be reversed with directions to resentence Petitioner to the most lenient guidelines in effect during the time frames alleged in the information as to counts 1,2,21,22, and 23.

CONCLUSION

For the foregoing reasons, this case should be remanded for resentencing using the 1994 guideline scoresheet on counts 1,2, 21,22, and 23.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered by U.S. mail to James Carney, Assistant Attorney General, Department of Legal Affairs, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Fl. 33401-2299, this _____day of April, 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Petitioner's reply brief conforms to the Administrative Order dated July 13, 1998. This brief was prepared using 12 point Courier New type, a font that is not spaced proportionately.

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