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POINT ON APPEAL

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

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 crime, he was on fair notice that any sentence he would receive would be subject to 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 receive a certain amount of automatically calculated good time 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.

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,

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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 Daniel J. Schafer, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the respondent, this 3 day of April, 1986.

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