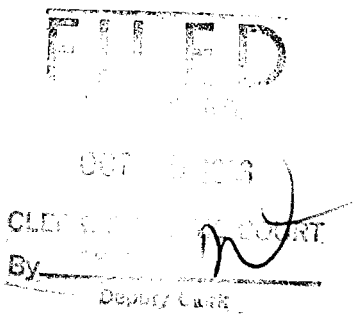
IN THE SUPREME COURT
STATE OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

BENNIE FRANK WILLIAMS,

Respondent.
_____/

CASE NO. 69,317
5th District - No. 85-1858

BENNIE FRANK WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 69,307
5th District - No. 85-1858

# PETITIONER'S BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

In this brief, the state is referred to as the "Petitioner". Bennie Frank Williams is referred to as the "Respondent".

## STATEMENT OF THE CASE

Respondent was charged by an information filed in the Circuit Court of Orange County, Florida, and amended on the day of trial, with two counts of sexual battery on a child and one count of kidnapping (R 520-521, 556-557, 106, 107, 108). He was tried by a jury on October 1 and 2, 1985, and found guilty as charged of each count (R 443, 579-581). His motion to set aside the verdicts for sexual battery was denied, and he was sentenced on December 6, 1985, to spend his life in prison with no eligibility for parole for twenty-five years for each of two counts of sexual battery, and to spend nine years in prison for kidnapping, the three sentences to be served consecutively (R 513, 593-598).

Notice of appeal to the Fifth District Court of Appeal was timely filed on December 12, 1985, and the Office of the Public Defender was appointed to represent respondent on appeal (R 601, 599). On its own motion, without briefing by the parties, the district court of appeal reversed, on ex post facto grounds, that portion of respondent's sentence requiring that costs of $200 be paid, citing Yost v. State, 490 So.2d 131 (Fla. 5th DCA 1986). On motion for rehearing, the court certified as a question of great public importance, the issue of the constitutionality of the retroactive application of section 27.3455(1), Florida Statute (1985), to crimes committed prior to its effective date.

Appeal to this court followed.

## STATEMENT OF THE FACTS

[redacted] testified that as she was playing in the back yard of her home in Winter Garden, Florida, on the afternoon of May 1, 1985, respondent picked her up and placed her through the window of his sister's house which was next door to [redacted]s. (R 128, 130, 131, 132, 147). Respondent entered the house through the back door (R 132, 152, 240). [redacted] testified at trial that she did not open the door for respondent, but she told her sister that day that she had (R 148, 173). She testified that respondent placed her on a bed in the house and put his penis in her mouth and his finger in her vagina (R 134, 136-137,140,142,174,175). She said he choked her and told her that if she told anyone about the incident, he would do it again and kill her (R 141, 177).

[redacted] testified that she saw [redacted] near the house next door, crying; she said she then saw respondent exit the house (R 159, 161, 162).

A medical examiner testified that [redacted]s hymen exhibited a laceration of about three millimeters, and that there was fresh blood at the introitus to the vagina, indicating that the injury, caused by penetration of the introitus by a foreign body, had occurred within twelve to twenty-four hours of the examination (R 267, 269, 270, 276, 278).

Respondent was convicted, as charged, of two counts of sexual battery on a child, and one count of kidnapping (R 520-521, 556-557, 106, 107, 108).

## SUMMARY OF ARGUMENT

Section 27.3455(1), Florida Statute (1985), represents a non-penal, procedural change in the method for imposition of court costs. A trial court, prior to the enactment of this section, could impose costs and community service under statutory provisions in effect at the time of the commission of respondent's offense. As a result, this new statute does not violate the ex post facto laws. Additionally, since sentencing has always been a matter of judicial discretion and respondent can demonstrate nothing more than a tenuous expectancey regarding the terms of his sentence under the law existing at the time of his offense, a critical element of the ex post facto doctrine (that the retroactively applied law disadvantages the offender by increasing the punishment prescribed for the offense) cannot be established.

## POINT ONE

THE RESPONDENT FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUE OF THE EX POST FACTO APPLICATION OF SECTION 27.3455(1), FLORIDA STATUTE (1985).

## ARGUMENT

Respondent was sentenced on December 6, 1985 (R 496, 593-598). Section 27.3455(1), Florida Statute (1985) has been in effect since July 1, 1985. See, Ch. 85-213, §§ 2 and 8, Laws of Fla. When the trial judge indicated his intention to assess against respondent, the costs "required to be imposed by statute", there was no contemporaneous objection interposed advising the judge of any alleged error with regard to ex post facto application of costs, pursuant to section 27.3455(1) (R 513), nor did respondent assign this as error for review (R 604).

This court has made it clear that an appellate court may review only those questions presented to the trial court. Mariani v. Schleman, 94 So.2d 829 (Fla. 1957). Even constitutional errors, other than those constituting fundamental error are waived, unless timely raised in the trial court. Clark v. State, 363 So.2d 331 (Fla. 1978), Castor v. State, 365 So.2d 701 (Fla. 1978). Respondent raised no objection on any grounds in the trial court to the imposition of $200 costs against him, pursuant to section 27.3455(1).

The application of the ex post facto doctrine to statutes has been held not to be fundamental error and a contemporaneous objection is required to preserve the issue for direct appellate review. Williams v. State, 414 So.2d 509 (Fla. 1982), Fredericks v. State, 440 So.2d 433 (Fla. 1st DCA 1983), Springfield v. State, 443 So. 2d 484 (Fla. 2d DCA 1984), Brown v. State, 428 So.2d 369 (Fla.

5th DCA 1983). As a result, the sua sponte reversal by the Fifth District Court of Appeal based upon Yost v. State, 490 So.2d 131 (Fla. 5th DCA 1986), decided over six months after sentencing in the instant appeal, was error. Respondent failed to preserve this issue for appellate review.

## POINT TWO

THE APPLICATION OF SECTION 27.3455, FLORIDA STATUTE (1985) TO CRIMES COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE IS CONSISTENT WITH THE EX POST FACTO PROVISIONS OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Respondent was sentenced for crimes committed on May 1, 1985 (R 520-521). His sentencing hearing took place on December 6, 1985 (R 496-514, 593-598). In the interim between the offense date and date of sentencing, section 27.3455(1), Florida Statute (1985), came into effect requiring the imposition of costs upon being found guilty of felonies, misdemeanors, or criminal traffic offenses and providing for disbursement of portions of these funds to various criminal justice funds and agencies.

Under section 27.3455(1), gain time is still accrued by indigents and non-indigents, alike. For non-indigents, however, the costs imposed by this section must be paid in full prior to the granting of any gain time accrued. Defendant's who are determined to be indigent are required to be sentenced to a term of community service in lieu of the costs imposed by section 27.3455(1), remain eligible to accrue gain time, and are required to perform the community service after release from incarceration, each hour of community service being credited against the costs imposed at a rate equivalent to the minimum wage. Retention of jurisdiction by the trial court is permitted for the purpose of determining any change in status regarding the indigency of a defendant as it relates to the payment of the costs imposed pursuant to this section.

At the outset, it would appear that respondent, having been determined to be indigent by the trial court (R 514), should have been sentenced to a term of community service, in lieu of the

costs required by section 27.3455(1). The inquiry should not stop here, however, since the Fifth District Court of Appeal determined that the entire section was unconstitutional, so that remand for imposition of community service in lieu of costs would be a futile gesture in light of its ruling in Yost v. State, 490 So.2d 131 (Fla. 5th DCA 1986).

The United States Supreme Court has held that in order to establish an ex post facto clause violation, three critical elements must be present in a statute: it must be a penal or criminal law, retrospective, and it must disadvantage the defendant because it may impose greater punishment. Paschal v. Wainwright, 738 So.2d 1173, 1175-1176 (11th Cir. 1984); Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981). This court recognized these critical elements in May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1984).

In May, May was serving a prison sentence for several felony convictions. His parole release date (PPRD) was originally set for July 31, 1984. On May 30, 1981, May was convicted of an offense while still in prison. Based upon this conviction, the Parole Commission, using his present and previous conditions, recalculated his PPRD based upon new parole guidelines adopted September 10, 1981. His new PPRD was October 4, 1994, an extension of almost ten years beyond his original PPRD.

On appeal to this court, May contended that the parole date guideline adopted after the commission of his in prison offense could not be used to recalculate his PPRD for that offense and that doing so, was an unconstitutional application of more stringent guidlines saying:

> . . . [W]here a prisoner can establish no more than a tenuous expectancy regarding probable punishment under the law existing at the time of his offense, it becomes difficult or impossible to establish (a critical ex post facto element) . . . that the retrospectfively applied law disadvantages the offender affected by it.

403 So.2d at 836.

Similarly, in the instant case, respondent had at best, nothing more than a tenuous expectancy regarding his punishment under the law existing when he committed his crimes. A trial court is not required to reveal to a defendant 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). Respondent's sentence always has been a matter of judicial discretion.

As noted by the court in Weaver v. State, 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 the discretion of the trial judge. Any alleged right to less "punishment" was vitiated by such notice.

The accrual of gain time is unaffected by section 27.3455(1). For non-indigents, retention of jurisdiction by the trial court permits the court to make adjustments in the order imposing costs where there is a change in circumstances causing indigency and to allow release for court ordered community service. Thus, for indigents and non-indigents, there is no loss of gain time. Respondent cannot demonstrate the second ex post facto element--

that the retrospectively applied law disadvantages him.

Although petitioner contends that section 27.3455(1) is not a penal or criminal statute, consideration of the statutory scheme for criminal defendants in effect at the time of respondent's sentencing, reveals that imposition of costs pursuant to section 27.3455(1), is not more burdensome than the laws (both penal and non-penal), in effect at the time of his sentencing. Court costs, not penal in nature, could always be imposed at the time of respondent's offense. See, §§ 939.01, 943.25, Fla. Stat. (1985). Under section 939.01 there appears to be no limit, excepting the sound discretion of the trial court, to the costs which might be imposed upon conviction. Trial courts could always impose split sentences, including incarceration followed by community service, public service, restitution, fines or any other disposition authorized by law. See, §§ 775.083, 775.089, 775.091, and 921.187, Fla. Stat. (1985). Section 27.3455(1), merely changes the procedure for imposition of costs and is, therefore, not ex post facto, even if it works to respondent's disadvantage. Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). State v. Jackson, 478 So.2d 1054 (Fla. 1985). Violation of court ordered payment of costs or community service would be enforced pursuant to the contempt statute and procedure. See, § 38.23, Fla. Stat. (1985).

Since under the costs and penalty statutes in effect at the time of respondent's offense, either costs or community service could be imposed, there can be no application of a subsequent costs provision which would do violence to the concept of the ex post facto law. See, Lee v. State, 294 So.2d 305, 307 (Fla.

1974). As a result, the Fifth District Court of Appeal erred in finding section 27.3455(1), unconstitutional as applied to respondent.

## CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District, vacating imposition of costs pursuant to § 27.3455(1).

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 Brynn Newton, Assistant Public Defender, and counsel for the respondent, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 13 day of October, 1986.

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