

IN THE SUPREME COURT OF FLORIDA

ANDREW ALAN ABT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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CASE NO. 73,312

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

POINT I

SECTION 921.001(5) MAY NOT BE APPLIED AGAINST MR. ABT TO PRECLUDE REMAND FOR RESENTENCING WHERE ONLY ONE OF SEVERAL REASONS GIVEN FOR HIS GUIDELINE DEPARTURE SENTENCE WAS HELD VALID ON APPEAL.

In State v. McGriff, 14 F.L.W. S.C.O. 32 (Fla. January 19, 1989), this Court recently held that application of the amended portion of Section 921.001(5), Florida Statutes, which purports to abrogate this Court's decision in Albritton v. State, 476 So.2d 158 (Fla. 1985), to offenses committed prior to its effective date violates the ex post facto clauses of the Florida and United States Constitutions. Since Appellant's offenses were committed on May 18, 1985, well before the July 1, 1987 effective date of amended Section 921.001(5), it is readily apparent that the Fourth District Court of Appeal erred when it invoked that statute to deny Appellant relief in this cause.

Not addressed by McGriff is the validity of the statute, which Mr. Abt more fundamentally challenges as violating the Article V, Section 2(a) prohibition against legislative interference with matters of practice and procedure which are governed by the courts. Neither does Smith v. State, 14 F.L.W. S.C.O. 6 (Fla. January 5, 1989), wherein this Court held that the sentencing guidelines, at least with respect to the guidelines grids and the recommended sentencing ranges, constitute substantive law, which the legislature alone is empowered to enact. For

Smith specifically left open the question of whether the guidelines as set forth in Rules of Criminal Procedure 3.700 and 3.988

in their entirety consist of substantive law. There are certain portions thereof which appear to be procedural in nature and, therefore, properly within the subject of this Court's rule making authority.

Id., n.2. That the statute at issue here falls within this procedural sphere becomes clear upon analysis of its effect. Section 921.001(5) does no more nor less, after all, than tell the appellate courts when they may or may not reverse. It is as if the United States Congress passed a law dissolving the exclusionary rule: an apparently clean, simple solution to an aggravating problem, but it can't be done.

The State relies on Dobbert v. Florida, 432 U.S. 282 (1977) and by extension Glendenning v. State, 13 F.L.W. 690 (Fla. January 4, 1989), as support for its position that the legislature may sometimes act in procedural matters. This reliance is misplaced. In Dobbert, the United States Supreme Court refused to find an ex post facto problem where the defendant was sentenced pursuant to a death penalty statute which was enacted after the death penalty in effect at the time he committed his crime was held unconstitutional. The High Court held that the old statute gave the notice that the State viewed homicide as a capital offense and that the list of aggravating and mitigating circumstances set out in the new statute to aid in the judicial determination of when death was appropriate¹ did not affect the

¹ It cannot be too strongly emphasized here that the legisla-

substantive rights of the defendant. The State now argues that this means the legislature may invade the procedural function of the courts with impunity. But in Dixon v. State, 283 So.2d 1,9 (Fla. 1973), this Court had explained its view of those statutory and mitigating factors which

actually define those crimes when read in conjunction with Fla.Stat. §782.04(1) [homicide statute] and 794.01(1) [former rape statute], F.S. - to which the death penalty is applicable in the absence of mitigating circumstances.

Thus, this Court from the beginning viewed the death penalty statute itself as a matter of substantive law, a view made express in Vaught v. State, 410 So.2d 147,149 (Fla. 1982), where this Court held that Dobbert's characterization of the death penalty statute as "procedural"

concerned the matter in which as defendants who had committed murder before the new law took effect should be sentenced. They were not meant to be used as shibboleths for deciding whether the new law violates article V, section 2(a) of the Florida Constitution by regulating the practice and procedure in the Florida Courts. By delineating the circumstances in which the death penalty may be imposed, the legislature has not invaded this Court's prerogative of adopting rules of practice and procedure. We find that the provisions of Section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty...

Dobbert and Dixon thus demonstrate that what may be characterized as "merely procedural" for purposes of determining whether a defendant's substantial rights have been affected for

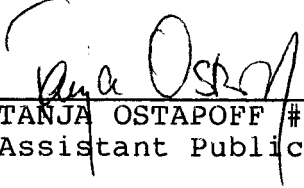
ture did not mandate the death sentence in certain specified situations, unlike the statute sub judice, which purports to direct when a court may reverse and when it may not.

ex post facto issues may be quite different from the question of what is substantive and what is "procedure" for the purposes of Article V, Section 2(a) analysis. Glendenning, supra, which addresses only the former matter without regard to the latter therefore has no application to the instant case.

Unlike the death penalty, a substantive law, Section 921.001(5) directly infringes upon a judicial function, a matter of practice and procedure solely within the province of the courts to determine. Consequently, it violates Article V, Section 2(a), and must be held invalid.

Respectfully submitted,

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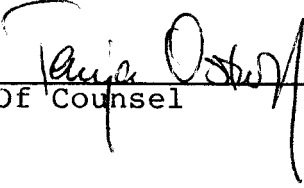


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JOHN TIEDEMANN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 24th day of January, 1989.



Of Counsel