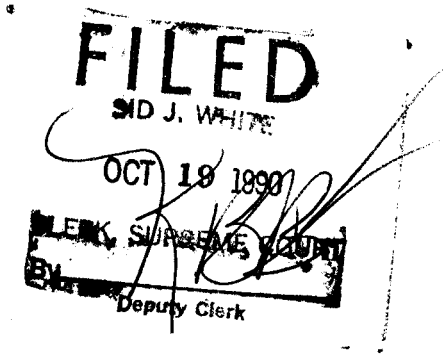


IN THE FLORIDA SUPREME COURT

RICHARD L. DUGGER,

PETITIONER,

VS.

CASE NO. 76,604
1ST DISTRICT - NO. 89-1201

JIMMIE WILLIAMS,

RESPONDENT,
_____/

---

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

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# RESPONDENT'S ANSWER BRIEF

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CRESTVIEW, FLORIDA 32536

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## TABLE OF CITATION

OTHER AUTHORITIES:

## PRELIMINARY STATEMENT

Jimmie williams, petitioner/appellant below, will be referred to herein as respondent. Richard L. Dugger, the respondent/appellee below, will be referred to herein as petitioner.

The record on appeal will be identified by the symbol "R" followed by the appropriate page number.

Reference to the exhibits submitted in the appendix will be identified by the symbol [A. #____].

## STATEMENT OF THE CASE

Respondent agrees with the statement of the case as set forth by petitioner.

## STATEMENT OF FACTS

Respondent agrees with the statement of facts as set forth by petitioner with exception of the following:

In March, 1976, respondent was indicted on a charge of first degree murder, for which a life sentence with a minimum mandatory twenty-five years was imposed on February 21, 1978. After pronouncing sentence, the trial Court advised respondent that he would be eligible for a clemency recommendation pursuant to section 944.30, Florida Statutes (1975), if he maintained a good institutional record for ten (10) years.

On November 23, 1987, respondent requested an interview with his classification officer to discuss being submitted by the Department of Corrections for a reasonable commutation of his sentence. Respondent was advised that pursuant to section 944.30, respondent might not be eligible for a clemency recommendation, but that respondent was not precluded from requesting a waiver of the executive clemency rules. (R. 7). When respondent requested clairification and information as to the proper channels in which to pursue his request, he was advised that section 944.30 prohibited the Secretary of Corrections from making a recommendation for a section 944.25 clemency investigation for inmates convicted of capital felony. (R. 8). Upon receipt of this information, respondent filed

a request for administrative remedy with the assistant superintendent, asserting that since his conviction was more ten (10) years old, the new or amended section of 944.30 did not apply to him. Respondent's request was denied on the basis that for capital felons consideration, they needed to have completed ten (10) prior to July 1, 1987, to meet the criteria. (R. 9). Respondent's subsequent administrative appeal was also denied on the basis that inmates cannot grieve state and federal laws and regulations. (R. 10).

On January 19, 1988, respondent filed a petition for writ of mandamus in the Circuit Court of the Second Judicial Circuit, Leon County, Florida alleging that application of the new or amended section of 944.30, as applied to him, constituted violation of the ex post facto laws of the federal and state constitution. (R. 1). On February 3, 1988, the Circuit Court directed the Department of Corrections to show cause why the petition should not be granted. Respondent was given ten days therein to file his reply. (R. 13). On March 1, 1988, in response, the Department cited Glover v. State, 474 So.2d 886 (Fla. 1st DCA 1985), for explication of the ex post facto concept, and Richey v. Hunter, 407 So.2d 427 (La. Ct. App, 1st Cir. 1981), as involving a situation analogous to the instant action. (R.14-29). On March 9, 1989, respondent filed a traverse to the Department's response. (R. 32-48). However, prior to receiving respondent's traverse, the Circuit

Court entered an order on March 8, 1988, denying respondent's petition for writ of mandamus, citing the Glover decision as authority. (R. 49). Respondent never received a copy of the denying order.

On January 12, 1989, respondent filed with the clerk of Circuit Court a motion to advance cause on the court's calendar, alleging that the matter had been pending before the Court for approximately one year and that respondent was entitled to a ruling as a matter of law. (R. 50-52). Respondent never received any type of response from his motion to advance.

On March 30, 1989, respondent filed a petition for writ of mandamus in the First District Court of Appeal, seeking an order compelling the lower court to enter a final order on his petition then pending before the Circuit Court. [A. # 1]. On April 13, 1989, the First District Court of Appeal denied respondent's petition as being moot, due to the trial Court's order dated March 8, 1988. A copy of the trial Court's order was attached to the District Court's order. This was the first knowledge respondent had of the trial Court's denying order. [A. # 2-3).

On May 2, 1989, respondent filed his notice of appeal, stating therein, the order denying his petition at the trial Court level was furnished to him on April 13, 1989, by order of the District Court in case number 89-850. (R. 53).

On September 29, 1989, at the direction of the District Court, a hearing was held in the trial Court to determine whether respondent was entitled to a belated appeal.(A.#4 ). The Circuit Court, in the hearing held September 29, 1989, found that respondent did not receive a copy of the March 8th, 1988, order denying his petition for writ of mandamus prior to the expiration of the time for filing an appeal, thereby preventing him from filing a timely notice of appeal. [A. #5]. By order of the District Court, the Department's motion to dismiss for lack of jurisdiction was denied on November 28, 1989, and respondent was granted a belated appeal. [A. #6].

On August 9, 1990, the District Court entered its decision reversing the trial Court's denying order, holding that application of the new or amended section of 944.30, Florida Statutes, as applied to respondent, constituted a violation of the ex post facto laws under the authority of Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). The District Court then certified a question of great public importance, which is the issue being presented herein. [A. 7].

## SUMMARY OF ARGUMENT

Petitioner's argument is the exact same argument he advanced in Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). It incorporates the "vested rights" approach and therefore, it is not only irrelevant to respondent's ex post facto claims, it is directed toward the circumstances that "might mitigate" the changed section, not toward the challenged section itself. Thus, the District Court did not err in applying Weaver to the facts of this case.

## ARGUMENT

## CERTIFIED QUESTION

WHETHER THE 1986 CHANGES IN SECTION 944.30, FLORIDA STATUTES, EFFECTIVE OCTOBER 1, 1986, ARE EX POST FACTO WHEN APPLIED TO PRISONERS CONVICTED OF CAPITAL FELONIES PRIOR TO THE EFFECTIVE DATE OF THE STATUTE.

The District Court properly applied Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), even if the statute was strictly procedure because it alters penal provisions accorded by the grace of the legislature, and was both retrospective and more onerous than the law in effect on the date of offense..

Section 944.30, Florida Statute (1975), which was in effect on both the date of the offense and the judgment of conviction and sentence provided:

> Life prisoners: Commutation to term for years. ---Any prisoner who is sentenced to life imprisonment, who has actually served 10 years and has substained no charge of misconduct and has a good institutional record, shall be Recommended by the [Department of Offender rehabilitation] for a reasonable commutation of his sentence, and if the same be granted, commuting the life sentence to a term for years, then such prisoner shall have the benefit of the ordinary commutation, as if the original sentence was for a term for years, unless it shall be otherwise ordered by the Board of Pardons. (Emphasis supplied.)

In 1986, section 944.30 essentially was rewritten to provide:

> Clemency: State prisoners.---
>
> (1) Any person sentenced to the custody of the Department for a term in excess of 40 years, up to and including life imprisonment, for a noncapital felony and who has served 10 calendar years of such sentence with the cumulative loss of no more than than 30 days of gain-time may be recommended by the Secretary of Corrections for an investigation pursuant to s. 947.25.
>
> (2) This section applies to any inmate in custody on or after July 1, 1987, but does not apply to any inmate who requested but did not receive a waiver of executive clemency rules until the commencement of the next ordinary review period.

This version of section 944.30 went into effect October 1, 1986, see Ch. 86-183, subsection 23, 48, Laws of Florida., and was repealed effective July 1, 1988. see Ch. 88-122, section 11, Laws of Fla.

The ex post facto clause of the United States Constitution forbids Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that prescribed." Cummings v. Missouri, 4 Wall. 277, 325-326, 18 L.Ed 356 (1867). See Lindsey v. Washington, 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937); Rooney v. North Dakota, 196 U.S. 319, 324-325, 25 S.Ct. 264, 265-266, 49 L.Ed. 494 (1905); In re Medley, 134 U.S. 160, 171, 10 S.Ct. 384, 387, 33 L.Ed. 835 (1 90); Carder v Bull, 3 Dall. 386, 390, 1 L.Ed 648 (1798).

Consistent throughout the cases is the premise that the Framers sought to assure that legislative Acts give fair warning of their effect and permit individual to rely on their meaning until explicitly changed. Dobbert v Florida, 432 U.S. 282, 97 S.Ct. at 2290, 2300, 53 L.Ed.2d 344 (1977); Kring v. Missouri, 107 U.S. 221, 229, 2 S.Ct. 443, 449, 27 L.Ed. 506 (1883); Calder v. Bull, supra, 3 Dall. at 387. The ban also restricts governmental power by restricting arbitrary and potentially vindictive legislation. Malloy v. South Carolina, 237 U.S. 180, 183, 35 S.Ct. 507, 508, 59 L.Ed. 905 (1915); Kring v. Missouri, Supra, 107 U.S. at 229, 2 S.Ct., at 449; Fletcher v. Peck, 6 Cranch 87, 138, 3 L.Ed. 162 (1810); Calder v. Bull, supra, at 395, 396 (Paterson, J.); the Federalist No. 44 (J. Madison), No. 84 (A. Hamilton.).

In accord with the above stated cases, a statute is rendered ex post facto in application when (1) the law attaches legal consequences to crimes committed before the law took effect, and (2) the law affects the prisoner who committed those crimes in a disadvantageous fashion. State v. Williams, 397 So.2d 663 (Fla. 1981), citing Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In other words, "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date." Weaver at 67 L.Ed.2d at 24. see also Waldrup v. State, 562 So.2d 687 (Fla. 1990).

Since respondent was sentenced for a capital felony, the change in section 944.30 attaches a legal consequence to his crime committed before the new statute went into effect. That is, under the 1975 version of section 944.30, the Department was required to recommend a reasonable communtation of sentence for life prisoners who maintained a good institutional record for ten (10) years. Under the 1987 version of section 944.30, a recommendation for a reasonable commutation of sentence not only was no longer mandated, but was completely precluded for prisoners (such as respondent) sentenced for a capital felony.

Application of the Weaver test to the facts of this case demonstrates that (1) the 1986 change to section 944.30 attaches legal consequences to respondent whose capital felony was committed prior to the effective date of the changed law, and (2) the changes are more onerous with regard to respondent who committed a capital felony, in that formerely respondent was entitled to be recommended for clemency consideration, but now clemency consideration is precluded due to the change in the statute. By virtue of this change in section 944.30, respondent has been denied the presumption of consideration for a reasonable recommendation for commutation provided under the 1975 version of section 944.30. Therefore, the District Court did not err in its application of the Weaver test to the facts of this case.

Petitioner's argument is the exact same argument he advanced in Weaver v. Graham, supra, 101 S.Ct., at 964, 450 U.S. at 28, in that petitioner asserts that section 944.30, Florida Statutes does not deal with the substantive law of crimes as it neither; (1) alters the definition of the crime of first degree murder, of which respondent was convicted, (2) changes the punishment for the crime, nor (3) changes the rule of evidence or burden of proof required for conviction. Petitioner's brief at page # 6. The Weaver Court addressed this exact same argument stating:

> [c]ontrary to the reasoning of the Supreme Court of Florida, a law need not impair a "vested right" to violate the ex post facto prohibition. Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clause, which solely protects pre-existing entitlements. See, e.g., Wood v. Lovett, 313 U.S. 362, 371, 61 S.Ct. 983, 987, 85 L.Ed. 1404 (1941); Dodge v. Board of Education, 302 U.S. 74, 78-79, 58 S.Ct. 98, 100, 82 L.Ed. 57 (1937). See also United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174, 101 S.Ct. 453, 459, 66 L.Ed. 2d 368 (1980). The present or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Weaver 101 S.Ct. at 964-65, 450 U.S. at 29; Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990) [F.L.W. at359].

In Waldrup this Honorable Court agreed with the analysis in Raske v. Martinez, 876 F.2d 1496 (11th Cir.), cert. denied, _____ U.S. _____, 110 S.Ct. 543, 107 L.Ed.2d 540 (1989), that the Weaver analysis is as applicable to discretionary gain-time as it is to mandatory gain-time, concluding that "[e]ven the 'grace' of the legislature, once given, cannot be rescinded retrospectively." Waldrup, supra, at 692. By the same token, logic dictates that the same holds true here. see Lindsey v. Washington, 301 U.S. at 401-402,57 S.Ct., at 799; Greenfield v. Scafati, 277 F. Supp. 644 (Mass. 1967)(three judge court), summarily aff'd, 390 U.S. 713, 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968). See also Rodriguez v. United States Parole Comm'n, 594 F.2d 170 (Ca7 1979)(elimination of parole eligibility held an ex post facto violation). A prisoner's opportunity to reduce his imprisonment is a significant factor of plea agreements and the judge's calculation of the sentence to be imposed. Wolff v. McDonnell, 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974); Warden v. Marrero, 417 U.S. 653, 658, 94 S.Ct. 2532, 2535, 41 L.Ed.2d 383 (1974). See also United States v. De Simone, 468 F.2d 1196 (Ca2 1972); Durant v. United States, 410 F.2d 689, 692 (Ca1 1969). Compare In re Medley, 134 U.S. 160. 10 S.Ct. 384, 33 L.Ed. 835 (1880), with Holden v. Minnesota, 137 U.S. 483, 11 S.Ct. 143, 34 L.Ed.734 (1890). See also Cummings v. Missouri, 4 Wall 277, 18 L.Ed 356 (1867).

Moreover, petitioner's argument is directed toward the alternatives to section 944.30. However, such argument fails to address the issue of actual effect on respondent, as it is the effect, not the form that determines if a law is contrary to the ex post facto inhibition. Weaver, supra. In other words, the inquiry looks to the challenge provision, and not to any special circumstances that might mitigate the effect on respondent. Dobbert v. Florida, Supra, 432 U.S., at 300, 97 S.Ct., at 2301; Lindsey v. Washington, supra, 301 U.S., at 401, 57 S.Ct., at 799; Rooney v. North Dakota, supra, 196 U.S. at 325, 25 S.Ct., at 265. Thus, the rules of executive clemency is a secondary procedure and does not have any real impact on the underlying issue being presented herein.

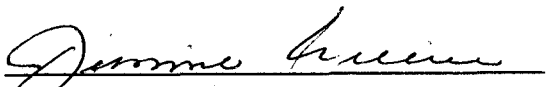
The bottom line is that section 944.30 was implemented through the grace of the legislature for the purpose of providing the Department of Corrections an avenue to award inmates like respondent, who maintained a good institutional record for ten (10) calendar years, a recommendation for a reasonable commutation of sentence, with the specific intent to promote rehabilitation and to create incentive for specified conduct. See section 944.30, Fla. Stat., (1975). Thus, even though respondent can submit himself pursuant to the rules of executive clemency, this fact does not compensate for the recommendation by the department which was available to him under the 1975 version of 944.30 "solely" for maintaining a good institutional record for ten (10) years. This is

especially so considering that the rules of executive clemency is seldom waived for inmates like respondent, regardless of their institutional records, unless recommended by the Department, a Judge, A State Attorney, medical staff, or the Parole and Probation Commission. [A. # 8]. In contrast, under the 1975 version of section 944.30, respondent was automatically eligible to be submitted for a reasonable commutation of his sentence simply for maintaining a good institutional record. Thus, the changes in section 944.30 constricts respondent's opportunity to earn early release from prison, and thereby makes more onerous the punishment for crimes committed prior to the inactment of the amended section of 944.30. This runs afoul of the prohibition against ex post facto laws.

## CONCLUSION

WHEREFORE, based upon the foregoing, the decision of the District Court must be allowed to stand.

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. Mail, postage pre-paid, to the Mr. FREDERICK J. SCHUTTE IV, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32399-1050, this 17 day of October, 1990.

Jimmie Williams

IN THE FLORIDA SUPREME COURT

RICHARD L. DUGGER,

PETITIONER,

VS. CASE NO. 76,604

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RESPONDENT,

_____/

APPENDIX