047

FILED
SID J. WHITE
JAN 24 1991
CLERK, SUPREME COURT
By Deputy Clerk

IN THE
SUPREME COURT OF FLORIDA

RICHARD L. DUGGER, et al.,

Petitioner,

vs. CASE NO. 76,604

JIMMIE WILLIAMS,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA
Case No. 89-1201

ANSWER BRIEF OF RESPONDENT

FLORIDA INSTITUTIONAL LEGAL
SERVICES, INC.
925 N.W. 56th Terr., Suite A
Gainesville, Florida 32605
(904) 336-2260

PETER P. SLEASMAN
Senior Staff Attorney
Fla. Bar #367931
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

Table of Citations....................................i

Preface..iii

Issue on Appeal:

WHETHER THE 1986 AMENDMENT TO SECTION 944.30, FLORIDA STATUTES, VIOLATED THE EX POST FACTO CLAUSE WHEN APPLIED TO PRISONERS WHO COMMITTED CAPITAL FELONIES PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT..........1

Statement of the Case and Facts........................2

Summary of Argument....................................3

Argument:

THE 1986 AMENDMENT TO SECTION 944.30, FLORIDA STATUTES, VIOLATED THE EX POST FACTO CLAUSE WHEN APPLIED TO PRISONERS WHO COMMITTED CAPITAL FELONIES PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT..........5

Conclusion...20

Certificate of Service.................................21

TABLE OF CITATIONS

CASES | PAGES

In re Advisory Opinion of the Governor Civil Rights,
306 So.2d 520 (Fla. 1975).. 14

Calder v. Bull,
3 Dall. 386, 1 L.Ed. 648 (1798).................8

Dobbert v. Florida,
432 U.S. 282, 97 S.Ct. 2290)
53 L.Ed.2d 344 (1977)...........................11, 17

Hopt v. Utah,
110 U.S. 574, 4 S.Ct. 202,
28 L.Ed 262 (1884)..............................11

Miller v. Florida,
482 U.S. 423, 107 S.Ct. 2446
96 L.Ed.2d 351 (1987)...........................8, 9, 10, 11

Moore v. Florida Parole and Probation Commission,
289 So.2d 719 (Fla. 1974).......................15

State v. Williams,
397 So.2d 663 (Fla. 1981).......................14

Sullivan v. Askew,
348 So.2d 312 (Fla. 1977).......................14

Waldrup v. Dugger,
562 So.2d 687 (Fla. 1990).......................14

Weaver v. Graham,
450 U.S. 24, 101 S.Ct. 960,
67 L.Ed.2d 17 (1981)............................7, 8, 9,
11, 13, 14

Williams v. Dugger,
566 So.2d 819 (Fla. 1st DCA. 1990)..............4, 20

Session Law:
Chapter 57-121, § 28 Laws of Fla.....................5
Chapter 86-183, §§ 23, 48, Laws of Fla...............6
Chapter 88-122, § 11, Laws of Fla....................5, 6

Statutes:

Section 775.082(1), Fla. Stat........................12
Section 944.30, Fla. Stat. (1975)...............passim
Section 944.30, Fla. Stat. (Supp.1986)...........passim
Section 947.16, Fla. Stat. 14

Other Authorities:

United States Constitution:
Article I, § 10, U.S. Const...........................7

Constitution of the State of Florida:
Article I, § 10, Fla. Const...........................7
Article IV, § 8, Fla. Const...........................5

Rules:

Rule 2, Rules of Executive Clemency.................15
Rule 4, Rules of Executive Clemency.................16
Rule 11, Rules of Executive Clemency.................16
Rule 14, Rules of Executive Clemency.................16

PREFACE

For clarity the following reference words and symbols will be used throughout this brief.

Petitioners are RICHARD L. DUGGER, Secretary of the Florida Department of Corrections, et al., and will be collectively referred to as the **"Secretary"**.

Respondent is JIMMIE WILLIAMS and will be referred to as **"Mr. Williams"**.

Florida Department of Corrections will be referred to as the **"Department"**.

Reference to the Record on Appeal will be identified through use of the symbol **(R.___)**.

ISSUE ON APPEAL

WHETHER THE 1986 AMENDMENT TO SECTION 944.30, FLORIDA STATUTES, VIOLATED THE EX POST FACTO CLAUSE WHEN APPLIED TO PRISONERS WHO COMMITTED CAPITAL FELONIES PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT.

STATEMENT OF THE CASE AND FACTS

The Respondent, JIMMIE WILLIAMS, accepts the Petitioners' Statement of the Case and Statement of the Facts as substantially correct.

SUMMARY OF ARGUMENT

Section 944.30, Florida Statutes (1975), in effect when Mr. Williams committed his offense, provided that prisoners sentenced to life imprisonment, who had served 10 years without any charge of misconduct, must be recommended by the Department of Corrections for a reasonable commutation of their sentences. In 1986 the statute was amended to specifically exclude capital felons from any recommendation by the Department.

The 1986 amendment to Section 944.30 was a retrospective law which applied to all inmates in the custody of the Department regardless of the dates of their offenses. The change in the law meant that Mr. Williams was no longer able to receive an automatic recommendation from the Department of Corrections for commutation of his sentence.

The amendment to Section 944.30 disadvantaged Mr. Williams in several important ways. First, it took away his right to a recommendation by the Department for a "reasonable commutation of sentence". Second, the amendment singled out capital felons, such as Mr. Williams, and sent the Governor and Cabinet a clear signal from the legislature that capital felons should no longer be worthy of consideration for commutation of sentence. Third, the

removal of the recommendation meant that he was ineligible for executive clemency under the Rules of Executive Clemency unless he first sought and received a waiver of the Rules of Executive Clemency. The amendment to Section 944.30, therefore, was a prohibited ex post facto law because it was both retrospective and it disadvantaged Mr. Williams.

Although the ex post facto prohibition does not apply if the change in the law is merely procedural, a change in the law that alters a substantial right can be ex post facto even if the statute takes a seemingly procedural form. Mr. Williams has a substantial interest in the commutation of his sentence. The amendment to Section 944.30, which removed his right to a recommendation for commutation, adversely affected his ability both substantively and procedurally to have his sentence commuted.

Therefore, the question certified by the District Court of Appeal should be answered in the affirmative and the decision of the District Court in Williams v. Dugger, 566 So.2d 819 (Fla. 1st DCA 1990), should be affirmed.

ARGUMENT

THE 1986 AMENDMENT TO SECTION 944.30, FLORIDA STATUTES, VIOLATED THE EX POST FACTO CLAUSE WHEN APPLIED TO PRISONERS WHO COMMITTED CAPITAL FELONIES PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT.

The power of Executive Clemency is vested in the Governor by Article IV, Section 8 of the Constitution of the State of Florida. Pursuant to this power of Executive Clemency, the Governor may, with approval of three members of the Cabinet, "commute punishment". Art. IV, § 8(a), Fla. Const.

From 1957 to 1988 law provided that prisoners sentenced to life imprisonment, who had served ten years without any charge of misconduct, would be recommended by the Department of Corrections [hereinafter Department] to the Governor for a commutation of their sentence. See Ch. 57-121, § 28, Laws of Fla.; Ch. 88-122,§ 11, Laws of Fla.; § 944.30, Fla. Stat. (Supp. 1986)(repealed 1988). The version of the statute in effect when appellant committed the capital felony for which he is now serving a life sentence provided that any prisoner sentenced to life imprisonment, who had actually served ten years without any charge of misconduct, "shall be recommended by the [Department of Offender Rehabilitation, the former name of the Department] for a

reasonable commutation of his sentence". § 944.30, Fla. Stat. (1975).

In 1986 Section 944.30 was amended specifically to exclude capital felons from any recommendation by the Department for commutation. § 944.30, Fla. Stat. (Supp. 1986). The 1986 amendment also eliminated the mandatory recommendation ("shall be recommended" amended to "may be recommended") and changed the nature of the recommendation from requiring a "reasonable commutation of his sentence" to one which only called for "an investigation" of the prisoner's case by the Parole and Probation Commission. See § 944.30, Fla. Stat. (Supp. 1986)

The 1986 amendment applied to all inmates in the custody of the Department regardless of the dates on which their crimes were committed. Section 944.30(2) stated:

> 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 a commencement of the next ordinary review.

The amended statute became effective on October 1, 1986. Ch. 86-183, §§ 23, 48, Laws of Fla. Section 944.30 was repealed effective July 1, 1988. Ch. 88-122, § 11, Laws of Fla.

The issue in the instant case is whether application of the 1986 amendment of Section 944.30 to Williams and other inmates whose offenses pre-dated the amendment is proscribed by the ex post facto clauses of the constitutions of Florida and the United States. Art. I, § 10 Fla. Const.; U.S. Const. Art. I, § 10. The repeal of Section 944.30, which eliminated the Department's statutory authority to recommend any inmate for commutation of sentence, was not discussed below and is not part of the certified question. However, if the repeal is applied retroactively the ex post facto prohibition applies to it just as it does to the 1986 amendment. The result in this case is the same regardless of the repeal. Mr. Williams is entitled to the benefit of the law in effect at the time he committed his offense. Therefore, the Department must recommend him for a reasonable commutation of his sentence.

<u>The Amendment to Section 944.30 is an Ex Post Facto Law</u>

The ex post facto prohibition forbids the enactment of 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 then prescribed." <u>Weaver v. Graham</u>, 450 U.S.

24, 28, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981). The purpose of the prohibition was to "assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation". Miller v. Florida, 482 U.S. 423, 429, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987), citing Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648 (1798). In addition, the ex post facto clause "was aimed at a second concern, namely, that legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Miller, 482 U.S. at 430, 107 S.Ct. at 2451. The Court has noted that "central to the ex post facto prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated". Id.

The Court has not required that a law be "in some technical sense a part of the sentence" to be subject to ex post facto analysis. Weaver, 450 U.S. at 32, 101 S.Ct. at 966. It is enough that the law affect "one determinant of [a defendant's] prison term." Id. A prisoner's eligibility for commutation of sentence is one determinant of the length of his sentence because of its potential to shorten the prison term. It is well established that "eligibility for reduced imprisonment is a significant factor

entering into both the defendant's decision to plead guilty and the judge's calculation of sentence to be imposed". Id.

The test established by the Supreme Court of the United States for determining whether a law is ex post facto contains two elements: First, the law "must be retrospective, that is it must apply to events occurring before its enactment" Miller, 482 U.S. at 430, 107 S.Ct. at 2451; second, "it must disadvantage the offender affected by it". Id. Even if a law has these elements there is no ex post facto violation if the law does not "alter substantial personal rights but merely changes modes of procedure which do not affect matters of substance." Id.

Evaluating the amendment to Section 944.30 in light of the above test, it is initially clear that it was intended to apply retrospectively. The "critical question" in this part of the ex post facto analysis is "whether the law changes the legal consequences of acts completed before its effective date". Weaver, 450 U.S. at 31, 101 S.Ct. at 965. The amended statute, on its face, prohibited any capital felon in custody on July 1, 1987, from being recommended by the Department for a commutation of sentence. Therefore, the amended statute attaches legal consequences to a crime committed before the law took effect.

The second part of the ex post facto analysis requires a determination of whether Williams was disadvantaged by the application of the amendment to him. "It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law". Miller, 482 U.S. at 431, 107 S.Ct. at 2452. The law in effect at the time of Mr. Williams' offense entitled him to an automatic recommendation from the Department for "a reasonable commutation" if he served ten years without a charge of misconduct. The statute embodied a legislative policy which said that prisoners who met the criteria of the statute were worthy of consideration for a commutation of sentence. The law gave these prisoners the added advantage of the weight of a recommendation from the Department for commutation.

In contrast, the amended statute specifically excluded capital felons from a recommendation by the Department for a commutation of sentence. This change sent a message to the Governor and Cabinet that the legislature now thought that capital felons, as a class, were not worthy of commutation consideration. When the legislature amended Section 944.30 to prohibit the Department from recommending capital felons, it obviously intended to (and did) reduce their chance of receiving a commutation. A retroactive law which singles out a class of

offenders and harms their opportunity to receive a reduced sentence is precisely the type of vindictive legislation the ex post facto clause prohibits.

Section 944.30 Affects Substantial Rights and is Not Merely Procedural

There is no ex post facto violation "if the change in the law is merely procedural and does not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." Miller, 482 U.S. at 433, 107 S.Ct. at 2452, quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed. 262 (1884). The ex post facto prohibition "does not restrict legislative control of remedies and modes of procedure which do not affect matters of substance." Miller v. State, 482 U.S. at 433, 107 S.Ct. at 2452, quoting Dobbert v. State, 432 U.S. 282, 97 S.Ct. at 2290, 53 L.Ed.2d 344 (1977). However, "a change in the law that alters a substantial right can be ex post facto even if the statute takes a seemingly procedural form." Miller, 482 U.S. at 433, 107 S.Ct. at 2453, quoting Weaver v. Graham, 450 U.S. at 29, n.12, 101 S.Ct. at 964, n.12.

In his initial brief the Secretary argued that the amendments to Section 944.30 only affected procedural matters and did not alter matters of substance. He cited the Rules of Executive Clemency and claimed that Mr. Williams could still seek a commutation of sentence. Therefore, this argument goes, Mr. Williams has not been disadvantaged by the amendment to Section 944.30 since it only altered the procedure by which Mr. Williams may seek a commutation.

Regardless of Mr. Williams' ability to seek executive clemency or commutation through the Rules of Executive Clemency, he is still disadvantaged by his inability to receive a recommendation from the Department. Submitting an application for commutation of sentence with a recommendation from the Department is, without doubt, more advantageous than simply submitting an application without any recommendation. Mr. Williams clearly has a substantial interest in having his application for commutation of sentence supported by a recommendation from the Department.

Mr. Williams is serving a life sentence pursuant to Section 775.082(1), Florida Statutes, which requires capital felons to serve 25 years before becoming eligible for parole. Therefore, the only means by which Mr. Williams may affect his sentence length prior to the expiration of the 25-year term is through

clemency or commutation of sentence. The state Constitution has provided for clemency or commutation of sentence at the discretion of the Governor and Cabinet, and Mr. Williams has a substantial interest in the exercise of that discretion.

In Weaver v. Graham, the Court noted that a law does not have to alter an absolute or vested right before it is subject to ex post facto analysis. The Court said:

> The presence 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 fair 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 v. Graham, 450 U.S. at 30-31, 101 S.Ct. at 965. This statement from Weaver is equally applicable to laws which alter penal provisions involving the discretion of the executive.

Section 944.30 only addressed itself to a "recommendation" for commutation of sentence. The statute did not, and probably

could not, infringe upon the actual exercise of the clemency power. See Sullivan v. Askew, 348 So.2d 312 (Fla. 1977); In re Advisory Opinion of the Governor, 306 So.2d 520 (Fla. 1975). Executive clemency is an act of grace and is totally discretionary. Sullivan, supra, at 315. However, the fact that the Governor and Cabinet retain complete discretion regarding whether or not a commutation will be granted does not alter the conclusion that the recommendation for clemency involves a "substantial right".

This Honorable Court has found laws to be in violation of the ex post facto clause even though the punishment or benefit involved was ultimately discretionary. For example, in Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990), this Court found that a law which affected the amount of incentive gain-time a prisoner could receive violated the ex post facto clause even though the State argued that "the availability of incentive gain-time is nothing but a mere expectancy dependent entirely on the discretion of the DOC." Id. at 692. In State v. Williams, 397 So.2d 663 (Fla. 1981), this Honorable Court held that application of the retention-of-jurisdiction statute, Section 947.16, Florida Statutes, constituted an ex post facto violation when applied to a defendant whose offense occurred prior to the statute's

effective date. In Williams, the statute imposed an additional requirement before a prisoner could be paroled: "He must obtain the approval of both the Parole Commission and the trial court, as compared to just the commission's approval as it was under prior law". Id. at 664. The result in Williams was not affected by the fact that parole decisions are essentially discretionary matters. See Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla. 1974).

The Rules of Executive Clemency Did Not Render Section 944.30 Merely a Procedural Statute.

The wording of the applicable Rules of Executive Clemency do not support the Secretary's position that removal of the recommendation did not affect Williams' ability to seek a commutation of sentence. (Reference herein is to the Rules of Executive Clemency, found as an appendix to Chapter 27, Florida Administrative Code.) The Governor and Cabinet, by mutual consent, have issued Rules of Executive Clemency and have created the Office of Executive Clemency "to assist in the orderly and expeditious exercise" of the clemency power. Rule 2, Rules of Executive Clemency. However, the rules are not "intended to limit

the authority given to the Governor or the Cabinet in the exercise of [Executive Clemency]". Id.

The Rules contain the procedures and criteria for clemency applications. An application which falls into one of the narrow categories listed in Rule 11 will be placed on the agenda for actual consideration by the Governor and Cabinet at one of their clemency meetings. An application from an inmate "who is sentenced to life imprisonment, who has actually served ten years, has sustained no charge of misconduct, has a good institutional record, and who has been recommended by the Secretary of the Department of Corrections for a commutation of sentence" is eligible for consideration for clemency pursuant to Rule 11. Rule 11, C. (3), Rules of Executive Clemency.

Persons who are unable to meet the criteria listed in Rule 11 are ineligible to be considered for any form of clemency unless the applicant can obtain a "waiver" of the requirements in the Rules. Rule 4, Rules of Executive Clemency. A petition for a waiver can only be granted by the Governor with the approval of three members of the Cabinet. Rule 14, Rules of Executive Clemency. Only after the waiver is obtained will an application for clemency be placed on the agenda for actual consideration by the Governor and Cabinet. Id.

The amendment of Section 944.30 left Mr. Williams without access to the clemency process except through a petition for a waiver of the Rules. When he inquired to the Office of Executive Clemency about a waiver he was informed of the futility of seeking a waiver. (R.37). He was told by the Coordinator of the Office of Executive Clemency that without a recommendation from a government source such as the Department or a State Attorney he would be unable to obtain a waiver. (R.37). Based on the undisputed facts of this case it is clear that a recommendation was critical to consideration for commutation.

Prior to the amendment to Section 944.30 all Mr. Williams had to do was stay out of trouble to gain an automatic recommendation for a commutation. Pursuant to the Rules of Executive Clemency the recommendation meant that he was presumptively eligible to be considered for a commutation. Without the recommendation the Rules require that he convince the Governor and three members of the Cabinet (the same number required by the Constitution for an actual commutation) of his worth before he will even be <u>considered</u> for commutation.

The change in Section 944.30 did more than simply alter the "modes of procedure", <u>Dobbert v. Florida</u>, 432 U.S. at 293, 97 S.Ct. at 2298, for determining whether a prisoner would be

considered for a commutation of sentence. Rather, the change in the law signaled a fundamental shift in legislative policy regarding commutations of sentence for capital felons. Under the old statute Mr. Williams would have received a recommendation and would have been eligible for consideration for a commutation of sentence. Under the amended statute (and following its repeal) Mr. Williams was stripped of this recommendation and was ineligible for consideration for commutation unless he first obtained a waiver of the Rules.

The fact that the Rules of Executive Clemency incorporated Section 944.30 into the procedure for clemency application does not mean that the amendment to Section 944.30 was merely procedural. A recommendation from the Department did more than just provide access to the clemency process. The statute required a recommendation for a "reasonable commutation of sentence". The recommendation was obviously intended to have some influence with the Governor and Cabinet on the merits of the commutation decision. Even if Mr. Williams was otherwise assured of consideration for a commutation, he would still benefit from the recommendation by the Department.

A recommendation pursuant to Section 944.30 provided both a procedural and a substantive benefit. Procedurally, the

recommendation provided access to the clemency process. The recommendation was also substantive in that it could affect the decision of the Governor and Cabinet on the merits of a case. In either case Mr. Williams' entitlement to a recommendation from the Department was a substantial right.

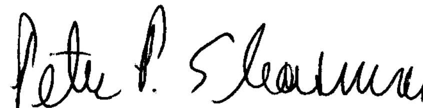
It is clear from the case law that when a retrospective penal statute adversely affects an inmate's eligibility for reduced imprisonment, even when the final decision involves executive discretion or rights accorded through the grace of the legislature, it is invalid under the prohibition of the ex post facto clause. Section 944.30 significantly affected a prisoner's ability to be considered for a commutation of sentence. Therefore the change in the law which adversely affected Mr. Williams and others similarly situated, violated the ex post facto clause.

CONCLUSION

For the foregoing reasons Respondent, JIMMIE WILLIAMS, asks this Honorable Court to affirm the decision entered by the District Court of Appeal for the First District in Williams v. Dugger, 566 So.2d 819 (Fla. 1st DCA 1990) and to answer the Certified Question in the affirmative.

Respectfully submitted,

FLORIDA INSTITUTIONAL LEGAL
SERVICES, INC.
925 N.W. 56th Terr., Suite A
Gainesville, Florida 32605
(904) 336-2260



PETER P. SLEASMAN
Senior Staff Attorney
Fla. Bar #367931
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondent has been furnished to FREDERICK J. SCHUTTE, IV, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301, by deposit in U. S. Mail this 22nd day of January, 1991.

PETER P. SLEASMAN
Attorney for Respondent
Florida Bar No. 367931