IN THE SUPREME COURT OF FLORIDA

RICHARD L. DUGGER,

Petitioner,

v.

JIMMIE WILLIAMS,

Respondent.

_____/

Case No. 74,604
1st District No. 89-1201

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

INITIAL BRIEF OF PETITIONER

RICHARD L. DUGGER, SECRETARY
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PREFACE

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

Petitioners, the Appellees/Respondents below are Richard L. Dugger, et al., and will be referred to as "Petitioner".

Respondent, the Appellant/Petitioner below is Jimmie Williams and will be referred to as "Respondent".

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

Reference to exhibits submitted in the Appendix will be identified through use of the symbol (A. _____).

POINT ON APPEAL

CERTIFIED QUESTION:

WHETHER THE 1986 CHANGES IN §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?

STATEMENT OF THE CASE

This action is an advancement of the certified question posed by the District Court of Appeal, First District of Florida in its opinion rendered August 9, 1990, reversing the judgment of the trial court, the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida.

On August 31, 1990, Petitioner filed its Notice to Invoke Discretionary Jurisdiction pursuant to Rule 9.030(a)(2)(a)(v), Florida Rules of Appellate Procedure, as authorized by Article II, Section 3, Florida Constitution.

STATEMENT OF FACTS

In March 1976, the Respondent was indicted on various charges including first degree murder, for which a life sentence with a minimum mandatory term of twenty-five (25) years was imposed on February 21, 1978. (R. 1).

In November 1987, the Respondent filed a request with his classification officer to be considered for Executive Clemency pursuant to section 944.30 Fla. Stat. (1975). Respondent was advised that as amended in 1986, section 944.30 no longer provided for a recommendation of clemency for persons convicted of a capital felony. Respondent was further advised that he could directly petition the board of pardons through the Rules of Executive Clemency.

Respondent pursued his administrative remedies and thereafter filed a petition for writ of mandamus. Respondent's petition was denied. On November 28, 1989, Respondent was granted a belated appeal. (R. 27).

On August 9, 1990, the District Court of Appeal, First District of Florida filed its opinion reversing the trial court's judgment and holding that section 944.30 Fla. Stat. (1987), under the authority of Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), violated the inhibition of "ex post facto" laws as applied to Respondent. The District Court then certified, as a question of great public importance, the question presently before this Court. (A. 1-1).

SUMMARY OF ARGUMENT

The sole point on appeal in this case is the District Court's certified question. This point is based upon argument that the Court improperly applied ex post facto analysis to a strictly procedural statute.

Historically ex post facto analysis is proper only in circumstances involving substantive law of crimes or procedural law arbitrarily infringing upon, or depriving affected persons of substantial personal rights or protections.

A law that does not address substantive law of crimes and serves only to alter one of two avenues of procedure is not proper for ex post facto analysis.

ARGUMENT

POINT ONE

WHETHER THE 1986 CHANGES IN §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 in its review of this case erred in applying Weaver analysis, Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), to a procedural statute, section 944.30 Fla. Stat. (1986).

The statute, as amended by Chapter 86-138, Laws of Florida, (1986), provides:

> 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 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.

As compared with the section in effect at the time Respondent committed the capital felony, first degree murder, for which he is now incarcerated, providing:

> Life prisoners: commutation to term for years. Any prisoner who is sentenced to life imprisonment, who has actually served 10 years and has sustained no charge of misconduct and has a good institutional record, shall be recommended by the department 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.

Section 944.30 Fla. Stat. (1975).

The amended version of section 944.30 went into effect on October 1, 1986. Its purpose was to effect a procedural change in the application process for clemency. The statute does not by any interpretation abridge clemency consideration, it merely invites recipient participation.

Historically, though admittedly with some deviation, the ex post facto clause has maintained the framers intent, narrow application to criminal and penal laws as expressed by Justice Chase in the case of Calder v. Bull, 3 U.S. 386, 3 Dall. 386, 1 L.Ed. 648 (1798);

> 1st. Every law that makes an action one before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters legal rules of evidence, and receives less, or different, testimony, than the

> law required at the time of the commission of the offense, in order to convict the offender.

Calder, 3 Dall. at 390. See also, Fletcher v. Peck, 6 Cranch 87, 138, 3 L.Ed. 162 (1810); Cummings v. Missouri, 4 Wall 227, 28 L.Ed 356 (1867); Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925); Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Collins v. Youngblood, ____ U.S. ____, 110 S.Ct. 2715 (1990).

Consistent throughout the cases is the premise that legislatures cannot retroactively redefine acts as criminal or increase the punishment for any criminal act after it has been committed, however, equally consistent is that procedural changes, leaving untouched the nature of the crime, punishment or proof thereof, do not offend the inhibition of ex post facto laws. Youngblood, supra at 2719, citing Hopt v. Utah, 110 U.S. 574, 45 S.Ct. 202, 28 L.Ed. 262 (1884).

Though the term procedural has never been explicitly defined, in looking to the cases, it is logical to surmise that procedural changes are antithecal to changes that deal with substantive law of crimes. Youngblood, supra. 110 S.Ct. at 2720.

Section 944.30 Fla. Stat. 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 rules of evidence or burden of proof

required for conviction, rather it is consistent with the Supreme Court's test of statutes not to be held as punitive or penal in nature; as, it does not represent an affirmative disability or restraint; it has not historically been regarded as punishment; and it does not promote the traditional aims of punishment. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 83 S.Ct. 554, 567, 9 L.Ed.2d 644, 660 (1963). Accordingly, failing to meet the test for substantive law, section 944.30 must be viewed as procedural and not subject to ex post facto analysis. Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925); Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed2d 344 (1977); Collins v. Youngblood, _____ U.S. _____, 110 S.Ct. 2715 (1990).

The Respondent did not, nor could he tenably, allege that 944.30 met the test for substantive law, however the District Court by applying Weaver analysis appears to incorrectly grant an otherwise procedural statute substantive status.

It is conceded that any law, procedural or substantive, arbitrarily infringing upon or depriving a person of substantial personal rights or protections is subject to analysis, Duncan v. Missouri, 152 U.S. 377, 14 S.Ct. 570 (1894); Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507 (1915), however, the problem lies in defining those substantial rights. As stated in Beazell, supra,

> Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended

> to secure substantial personal rights against arbitrary and oppressive legisation . . . and not to limit the legislative control of remedies and modes of proedures which do not affect matters of substance. (citations omitted).

Beazell, 269 U.S. at 171, 46 S.Ct. at 69.

To find the pinnacle necessary to transgress the prohibition, the cases provide a basis by defining what is not included in that amorphous phrase, "substantial personal rights"; Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202 (1884), change in definition of witness competency; Thompson v. Missouri, 171 U.S. 330, 18 S.Ct. 922 (1898), change is admissibility of evidence; Mallet v. North Carolina, 181 U.S. 589, 21 S.Ct. 730 (1901), state's right of appeal in criminal cases; Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507 (1915), change in method of execution; Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290 (1977), use of a newly re-enacted death penalty statute; Collins v. Youngblood, _____ U.S. _____, 110 S.Ct. 2715 (1990), ability to correct an illegal verdict rather than grant a new trial. As stated by Justice Stevens in his concurring opinion:

> [It] follows immediately from an observation which is both sensible and evident from precedent: a procedural protection is likely to be substantial, when viewed from the time of the commission of the offense, only if it affects the modes of procedure by which a valid conviction or sentence may be imposed. (emphasis added).

Youngblood, supra, 110 S.Ct. at 2727.

Contrasting the extrapolation of what procedures do not infringe upon substantial personal rights with the amended section 944.30, it is neither sensible, nor within the colloquial definition of substantial, evident that the removal of one vehicle for consideration of clemency is more substantial than the various situations found not to be in conflict with the inhibition of ex post facto laws. Section 944.30 does not deprive or infringe upon any substantial personal rights or protections.

By its use of Weaver analysis, the District Court failed to determine first whether the challenged statute met the true threshold test determining substantive law, or whether there was an arbitrary infringement upon a substantial right or protection. Rather, the Court looked at the language, saw only that the statute removed one course of action, thus affected persons in a disadvantageous fashion, and applied retrospective, therefore was ex post facto. Thereafter, the Court stated as rationale, those persons affected are precluded from clemency. The Court's analysis and rationale are incorrect.

Although the statute removes the requirement of recommendation for capital felons, it does not under any possible interpretation, remove such persons from consideration of clemency. The statute, in reference to capital felons, merely defers to the Rules of Executive Clemency. Rule 14 of such rules governs the application process for those persons, Respondent included, to petition for clemency. This use of the rules is more in line with the constitutional delegation of powers. As

this Court stated in Sullivan v. Askew, 348 So.2d 312 (Fla. 1977):

> This power [pardon/clemency] flows from the Constitution and not from legislative enactment, Advisory Opinion of the Governor, In Re: Administrative Procedure Act: Executive Clemency, 334 So.2d 561 (Fla. 1976). The United States Supreme Court in Schick v. Reed, 419 U.S. 256, 430 (1974), concluded:
>
> "A fair reading of the history of the English pardoning power, from which our Art. II, §2, Cl 2, derives, of the language of the clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by Congress.

Sullivan, 348 So.2d at 314.

Furthermore:

> . . . any attempt of the courts to interfere with the governor in the exercise of the pardoning power would be manifest usurption of authority, . . . [as] an attempt on the part of the legislature to exercise any part of the pardoning power would be in conflict with the Constitution, this Court, in Singleton v. State, 38 Fla. 297, 21 So. 21 (1896), opined: " . . . we are of the opinion that the pardoning power, after conviction, conferred by this section upon the board of pardons designated, in exclusive, and that the legislature cannot exercise such power" . . . This encroachment upon the executive's clemency power is equally applicable to the judiciary. Article II, Section

3, Florida Constitution.

Sullivan, supra at 315, 16.

The Rules of Executive Clemency were implemented for the specific purpose of granting an avenue for affected persons to petition for relief. Therefore the removal of a secondary procedure does not have any real impact on the underlying consideration.

While Respondent may argue that there is no need to look to alternatives to 944.30, such argument fails to address the issue of actual effect on the Respondent, as it is the effect not the form that determines if a law is contrary to the inhibition. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

The effect to be considered is whether section 944.30, as amended, substantially removes the Respondent's ability to be considered for clemency, as opposed to Respondent's contention and the District Court's pronouncement that the effect is the recommendation. The answer is in the negative, section 944.30 Fla. Stat. (1986) merely alters the procedure for application to the board, for in either scenario, clemency is constitutionally in the discretion of the Governor.

This Court has previously aligned its decisions with the fundamental principles intended by the framers, in holding that the legislative power to determine modes of procedure would not be abridged except in those narrow circumstances where the procedure denegrates substantial rights or protections.

Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988). Section 944.30 Fla. Stat. (1986) does not represent one of those narrow exceptions.

Finally, this Court has previously addressed this situation in Phillips v. Martinez, 544 So.2d 200 (Fla. 1989). Although Petitioner does not assert that the Phillips decision has any precedential value, it is useful in that the Court was made aware of section 944.30 being but one avenue to consideration for Executive Clemency. There, as here, the statute was challenged as being ex post facto in application. This Court, by its summary denial of Phillips petition for relief found such assertions to be meritless. A finding that is consistent with Blankenship, supra, where the Court stated:

> A retrospective statute may work to a person's disadvantage so long as it does not deprive the person of any substantial right or protection.

Blankenship v. Dugger, 521 So.2d at 1099, citing Dobbert v. Florida, 432 U.S. 282, 293, 4, 97 S.Ct. 2290, 98, 9 (1977). Phillips was not deprived of a substantial right or protection, nor was the Respondent. Therefore it is incumbent upon this Court to follow the lead of the Chief Justice of the United States Supreme Court when he stated:

> The language [alters the situation of a party to his disadvantage] . . . does not support a more expansive definition of ex post facto laws . . . . departure from Calder's explanation of

> the original understanding
> of the Ex Post Facto Clause
> [is], we think unjustified.

Collins v. Youngblood, _____U.S. _____, 110 S.Ct. 2715, 22, 3 (1990). Essentially, the District Court's opinion is predicated on just such language.

Section 944.30 is strictly procedural. It does not speak to the substantive law of crimes. It does not infringe upon substantial rights or protections. It is not contrary to the inhibition of "ex post facto" laws.

CONCLUSION

WHEREFORE, for the foregoing reasons, the opinion of the District Court of Appeal, First District of Florida, must be reversed.

Respectfully submitted,

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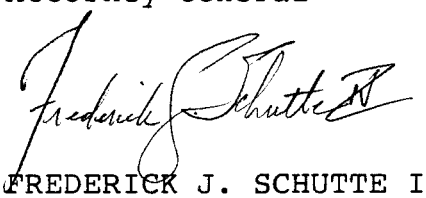

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **INITIAL BRIEF OF PETITIONER** has been furnished to **JIMMIE WILLIAMS, # 089628,** Okaloosa Correctional Institution, Post Office Box 578 - C53, Crestview, Florida 32536, on this 5th day of October, 1990.

FREDERICK J. SCHUTTE IV

williamsb/crs/kda