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IN THE SUPREME COURT OF FLORIDA

RICHARD L. DUGGER,
Petitioner,

v.

Case No. 76,604
1st District No. 89-1201

JIMMIE WILLIAMS,
Respondent.

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

REPLY BRIEF OF PETITIONER

RICHARD L. DUGGER, SECRETARY
DEPARTMENT OF CORRECTIONS

ROBERT A. BUTTERWORTH
Attorney General

FREDERICK J. SCHUTTE IV
Assistant Attorney General
Florida Bar No. 0842109

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1502
Tallahassee, FL 32399-1050
(904) 488-9935

Counsel for Petitioner

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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?

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?

Respondent presents to this court a scenario equating the instant case to the situation in Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 2290 (1981). To support his proposition, he states, "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date." Weaver, id., 450 U.S. at 67. Next, he applies Weaver analysis and states, "(2) the changes are more onerous with regard to respondent who committed a capital felony, in that formerly respondent was entitled to be recommended for clemency consideration, but now clemency consideration is precluded due to the change in the statute." Respondent's Brief, P. 9. Finally, he states that this court need not look at Petitioner's argument, that the challenged provision does not deal with substantive law of crimes as it neither; (1) alters the definition of the crime, (2) changes the punishment for the crime, nor (3) changes the rules of evidence or burden of proof required for conviction, as it is the same argument rejected by the Weaver court.

Contrary to the Respondent's assertions, the instant case cannot reasonably be equated to Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960 (1981), as the question is not whether the statute

changes the legal consequences of an act completed prior to its effective date, but whether the challenged statute, section 944.30 Fla. Stat. (1986), is substantive and thus proper for ex post facto analysis. For as stated in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290 (1977);

Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto.

Dobbert, id, 432 U.S. at 293, 97 S.Ct. at 2298.

To determine if the statute is proper for analysis the Court must first apply the fundamental test developed by Justice Chase in 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, 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).

Although Respondent contends this initial step is not necessary and constitutes an espousal of the vested rights theory, the Respondent is in error, Weaver analysis presupposes that this critical test has been applied. Moreover, Weaver analysis does not work absent the test being applied or the provision being predefined substantive, as in Weaver, supra, for no matter what the procedure may be, somewhere there is a party who will suffer a disadvantage, thus making all acts of the legislature susceptible to ex post facto analysis. It was not the intent of the framers to so limit the legislature. Collins v. Youngblood, ____ U.S. ____, 110 S.Ct. 2715 (1990).

Respondent's summation of his application of Weaver to the facts is an absolute misstatement. Respondent states that the revision of section 944.30 is a total preclusion of clemency consideration. Section 944.30 does not control clemency, clemency is a constitutional grant of power to the Governor under Art. II, S. 3, Florida Constitution. Clemency consideration remains open to the Respondent. Furthermore, as Respondent concedes, the revision of section 944.30 amounts merely to a requirement that any person seeking clemency have an affirmative role in obtaining it. This is not a restraint on clemency, it is an alteration of procedure that does not violate the constitutional inhibition of ex post facto laws.

The Rules of Executive Clemency, in particular Rule 14, are not as the Respondent states, a secondary procedure designed to serve as a mitigating force to the revision of section 944.30. The rules are an enabling code for the constitutional grant of power, Art. II s. 3 Florida Constitution. As such, they rank higher in the traditional hierarchy of law. The Rules are therefore the primary procedure with section 944.30 relegated to a secondary position.

Section 944.30 Fla. Stat. (1986) is a strictly procedural statute, as it does not address the substantive law of crimes, nor does it affect any substantial rights or protections. It is not proper for ex post facto analysis. As the Chief Justice recently stated in Collins v. Youngblood, _____ U.S. _____, 110 S.Ct. 2715 (1990);

. . . departure from Calder's explanation of the original understanding of the EX POST FACTO clause was, we think unjustified. The language . . . does not support a more expansive definition of ex post facto laws.

Youngblood, 110 S.Ct. at 2722, 3.

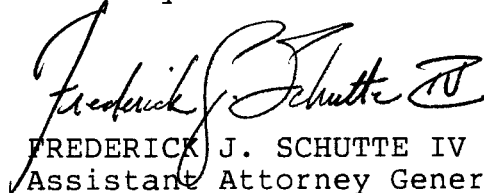
To accept the Respondent's contention, and the District Court's decision that as applied to the Respondent section 944.30 Fla. Stat. (1986) is ex post facto, is unjustified.

CONCLUSION

WHEREFORE, based upon the foregoing, the decision of the District Court must be reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

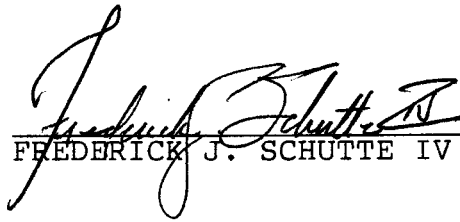
A handwritten signature in cursive script, reading "Frederick J. Schutte IV". The signature is written in black ink and is positioned above the typed name of the signatory.

FREDERICK J. SCHUTTE IV
Assistant Attorney General
Florida Bar No. 0482109

Department of Legal Affairs
The Capitol - Suite 1502
Tallahassee, FL 32399-1050
(904) 488-9935

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER** has been furnished to **JIMMIE WILLIAMS, # 089628**, Okaloosa Correctional Institution, Post Office Box 578 - C53, Crestview, Florida 32536, on this 24 day of November, 1990.


FREDERICK J. SCHUTTE IV

williamsrb/crs/kda