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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
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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

AMENDED SECTION 944.30 IS NOT EX POST FACTO

It is conceded by both parties that a law is subject to ex post facto analysis if the law is one envisioned by Justice Chase, that is:

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 loss, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3 U.S. 386, 390, 1 L.Ed. 648 (1798). 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). Furthermore, it is also conceded that a law having these pre-eminent elements, retrospective application and disadvantage to an offender, Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446 (1987), does not violate the ex post facto inhibition when the law does not "alter substantial personal rights but merely changes modes of procedure which do not affect matters of substance. Miller, id at 433. A

situation of the law previously addressed and affirmed by this Court in Blankenship, when 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 1097, 1099 (Fla. 1988), citing Dobbert v. Florida, 432 U.S. 282, 93-4, 97 S.Ct. 2290, 98-9 (1977).

Contrary to the Respondent's opinion, section 944.30 is not a determinant of an inmate's prison term. Section 944.30 does not embody legislative policy of secretly sending signals to the executive, stating who is worthy of clemency. Section 944.30 merely alters the mode of procedure, requiring affirmative participation by the recipient, in obtaining consideration for executive clemency. While this requirement may be viewed as a disadvantage, it is not a deprivation.

Section 944.30, pre and post amendment, is on its face a strictly procedural statute, having no effects on substance. The section does not speak to the law of crimes, it does not change the punishment for any crime, nor does it change the rules of evidence or burden of proof required for conviction. The section speaks only to the procedure that an inmate must use to seek clemency. Accordingly, failing to be substantive, Section 944.30, a procedural statute, is not subject to ex post facto analysis. Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68 (1925); Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290 (1977); Collins v. Youngblood, ____ U.S. ____, 110 S.Ct. 2715 (1990).

SECTION 944.30 IS PROCEDURAL
AND DOES NOT AFFECT SUBSTANTIAL
RIGHTS.

Although procedural laws are not generally subject to ex post facto analysis, an exception is made for those procedural laws arbitrarily infringing upon or depriving a person of substantial personal rights or protections. 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. Unlike the Respondent, stating that a more advantageous procedure is substantial, the Supreme Court has found that,

[j]ust 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.

Bezell v. Ohio, 269 U.S. 169, 171, 46 S.Ct. 68, 69 (1925).

Therefore the Court has taken a case by case approach to make the determination finding that: a change in definition of witness competency, Hopt v. Utah, 110 U.S. 574 (1884); a change in admissibility of evidence, Thompson v. Missouri, 171 U.S. 330 (1898); state's right of appeal in criminal cases, Mallet v. North Carolina, 181 U.S. 589 (1901); change in method of execution; Malloy v. South Carolina, 237 U.S. 180 (1915); use of a newly re-

enacted death penalty statute, Dobbert v. Florida, 432 U.S. 282 (1977); and the ability of correcting an improper criminal verdict rather than grant a new trial, Collins v. Youngblood, 110 S.Ct. 2715 (1990), are insufficient procedural changes to be termed substantial.

In comparison, it is obvious that Section 944.30 is less significant than those previously found to not impact substantial protections.

Section 944.30 does no more than require affirmative participation in the clemency process, and cannot be viewed as more than permissible, procedural disadvantage.

CONCLUSION

The Respondent argues to this Court that the amendment to Section 944.30 alters to his disadvantage a mode of procedure for clemency consideration and therefore as applied to him the law violates the constitutional inhibition of ex post facto laws. While the amendment may alter the situation to the Respondent's disadvantage, the change is insufficient to be found to deprive a party of a substantial personal right. Absent such deprivation, the law, section 944.30, is not a proper subject of ex post facto analysis.

WHEREFORE, based upon the foregoing reasons, the Petitioner, Richard L. Dugger, requests this Court to reverse the decision of the First District Court of Appeal in Williams v. Dugger, 566 So.2d 819 (Fla. 1st DCA 1990) and to answer the certified question in the negative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

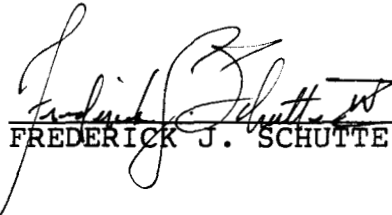


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CERTIFICATE OF SERVICE

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, and to **PETER P. SLEASMAN, ESQUIRE**, Florida Institutional Legal Services, Inc., 925 N.W. 56th Terrace, Suite A, Gainesville, Florida 32605, on this 11th day of February, 1991.



FREDERICK J. SCHUTTE IV

WILLIAMSB/crs/kda