0.A. 6/3/91

FILED
SID J. WHITE
APR 11 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

RICHARD L. DUGGER, Secretary,
Department of Corrections,

Petitioner,

v.

JEFFREY RODRICK,

Respondent.
_____/

Case No. 76,801

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By _____ Chief Deputy Clerk

INITIAL BRIEF OF PETITIONER

SUSAN A. MAHER
ASSISTANT GENERAL COUNSEL
Florida Bar No. 0438359

Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500
(904) 488-2326

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Petitioner, Richard L. Dugger, the Secretary of the Florida Department of Corrections, was the Appellee below and the Respondent in the extraordinary writ proceeding before the circuit court. This cause originated as Petition for Writ of Mandamus filed by the Respondent, Jeffrey Rodrick, an inmate who was in the custody of the Florida Department of Corrections.[1] Rodrick sought to challenge the Department's denial of provisional credits under Section 944.277, Florida Statutes. The petition appears to have been brought within the context of Rodrick's criminal proceedings and there was no opportunity afforded the Department of Corrections to explain its decision at the circuit court level. The circuit court denied Rodrick's petition in an order rendered June 20, 1989.

Rodrick timely appealed to the Second District Court of Appeal. On August 24, 1990, the district court issued its opinion reversing the order of the circuit court denying the petition for writ of mandamus and remanding with instructions to grant the writ. On September 10, Secretary Dugger timely filed a motion for rehearing, or alternatively, motion for certification, which was denied by the district court on October 3. On October 16, 1990, the Secretary timely filed his notice to invoke the discretionary jurisdiction of this Court. The Secretary simultaneously requested a stay of the issuance of the mandate from the district court, which was granted on October 31, 1990. On March 21, 1991, this

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[1] Mr. Rodrick was released from the custody of the Department of Corrections in August 1990, shortly before the Second District Court of Appeal rendered its opinion in this case.

Court accepted jurisdiction of this cause to resolve the conflict between the decision of the Second District Court of Appeal in Rodrick v.State, 567 So.2d 906 (Fla. 2d DCA 1990), and the decision of the First District Court of Appeal in Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990). Rodrick also appears to be in conflict with this Court's decision in Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988).

The conflict between the Rodrick and Miller cases specifically to be resolved is whether Florida's early release statute found in Section 944.277, Florida Statutes (1988 Supp.), which supplanted the prior, less-restrictive early release statute found at Section 944.276, Florida Statutes (1987), is improper as an ex post facto application of the law as to prisoners whose offenses occurred prior to its enactment. The broader question to be answered is whether Florida's early release statutes are procedural in nature and, therefore, not subject to the prohibitions of the ex post facto clause.

SUMMARY OF ARGUMENT

In both Rodrick and Miller, the petitioners argued that the denial of provisional credits under Section 944.277, Florida Statutes, based upon more restrictive statutory exclusions, constituted an ex post facto application of law when applied to them as they wre deemed eligible for and received awards of administrative gaintime under the previous early release statute in effect between February 1987 and July 1988. The Second District Court of Appeal incorrectly relied on this Court's opinion in Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990), as Florida's early release statutes are procedural in nature as contrasted with the substantive statute addressed in Waldrup. A procedural change may constitute an ex post facto violation only if it affects "substantial personal rights" directly connected with the definition of crimes, defenses, or punishments. The purpose of Florida's early release statutes, and specifically, the provisional credits statute, is to relieve prison overcrowding. It is a procedural mechanism to accomplish this purpose, wholly discretionary on the part of the Department of Corrections. These statutes do not automatically attach and become incorporated as an integral part of a prisoner's sentence at the time the offense occurs. Neither do these statutes increase the original penalty assigned to a crime when committed. As such, these statutes cannot be construed as creating any "substantial personal rights" relating directly to the definition of crimes, defenses, or punishments, as contemplated by the ex post facto clauses of the United States Constitution.

ARGUMENT

In both Rodrick and Miller, the petitioners argued that the denial of provisional credits under Section 944.277, Florida Statutes, based upon more restrictive statutory exclusions, constituted an ex post facto application of law when applied to them as they were deemed eligible for and received awards of administrative gaintime under the previous early release statute in effect between February 1987 and July 1988. In support of this position, the petitioners cited Weaver v. Graham, 450 U.S. 24 (1981), Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989), and Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990). In contrast, the Secretary of the Department of Corrections has consistently maintained that Florida's early release statutes are procedural in nature, as contrasted with the substantive statutes addressed in Weaver, Raske, and Waldrup, and, therefore, not subject to the prohibitions of the ex post facto clause. The Department's position has been directly supported, on the state level, by this Court in Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988) and the First District Court of Appeal in Miller, supra, which followed Blankenship, and, on a federal level by the Southern District Court of Florida and the Eleventh Circuit Court of Appeals in the unpublished opinion rendered in Petrone v. Dugger, Case No. 88-6061, opinion entered on August 29, 1989.[2] (The Petrone decision

[2] It is especially important to note that Circuit Judge Tjoflat, who authored the opinion in Raske in July 1989, was also a member of the panel who entered the decision in Petrone, just one month later in August 1989. Thus, it is clear that the federal appellate court considered the two decisions distinguishable.

is included in the Appendix to this brief.)

For the reasons which follow, Petitioner Dugger submits that the decisions in Blankenship and Miller are correct and that the decision of the Second District Court in Rodrick should be disapproved.

The framers of the Constitution considered the ex post facto prohibition so important that it appears twice -- once in Article I, Section 9, forbidding the Congress from passing any ex post facto law, and again in Article I, Section 10, placing the same limitation upon the states. No doubt, the framers, not far removed from the excesses of tyranny, included the ex post facto clauses as an added precaution to future oppression. Early opinions of the Supreme Court of the United States have recognized that "ex post facto law" was a term of art with an established meaning at the time of the framing of the Constitution. Calder v. Bull, 3 U.S. (3 Dall) 386, 391 (1798) (opinion of Chase, J.); id. at 396 (opinion of Paterson, J.). In Calder, the seminal case in ex post facto analysis, Justice Chase noted that:

> The prohibition, "that no state shall pass any **ex post facto** law," necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing.

Id. at 390.

While taken literally, "ex post facto" could encompass any law passed "after the fact", Justice Chase sought to clarify in

Calder what laws, in his view, were implicated by the ex post facto clauses:

> 1st. Every law that makes an action done 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 greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the 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.

Id., at 390.

As is apparent from this definition, the constitutional prohibition on ex post facto laws applies to penal statutes which disadvantage the offender affected by them. Calder, 3 U.S. (3 Dall.) at 390-392; see also, Weaver, 450 U.S. at 24, 28-29. There is no doubt that one of the objectives underlying the ex post facto prohibition is to provide fair notice and to foster governmental restraint when a legislature increases punishment beyond what was prescribed when the crime was consummated. Calder, 3 U.S. (3 Dall) at 387-388; Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Dobbert v. Florida, 432 U.S. 282, 298 (1977); Weaver, 450 U.S. at 28-29 (1981); Miller v. Florida, 482 U.S.____, 107 S.Ct. 2446 (1987).

In Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), the Supreme Court of the United States, described the standards traditionally applied to determine whether a statute is

punitive or penal in nature:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of **scienter**, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. (Emphasis in original.)

The prohibitions of the ex post facto clauses do not extend to every change of law that "may work to the disadvantage of a defendant." Dobbert, 432 U.S. at 293.

> It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

Portley v. Grossman, 444 U.S. 131, 1312 (1980).

> The critical question, as Florida has often acknowledged, is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence.

Weaver, 450 U.S. at 32, n. 17 (citations omitted).

> The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there

> may be reasons other than punitive for such deprivation.

Paschal v. Wainwright, 738 F.2d 1173, 1176, n.4 (11th Cir. 1984), citing United States v. Lovett, 328 U.S. 303, 324 (1946).

The underlying purpose of the statutes now under ex post facto scrutiny is of critical importance in determining whether a statute is procedural or substantive, or indeed properly the subject of ex post facto analysis. This Court has previously recognized that administrative gaintime and provisional credits are no more than procedural mechanisms for reducing the prison population for the administrative convenience of the Department of Corrections -- these statutes do not address the substantive matters concerning punishment or reward. See Blankenship, 521 So.2d at 1098.

Like the term "ex post facto", the term "procedural" requires some explanation. While the earlier United States Supreme Court cases describing "procedural" changes have not explicitly defined what is meant by the term, the Supreme Court has recently expounded upon and limited the scope of the definition in Collins v. Youngblood, ____U.S.____, 111 L.Ed.2d 30 (1990).[3]

In Youngblood, the Supreme Court acknowledged that previous decisions of the court held that:

> [A] procedural change may constitute an ex post facto violation if it 'affect[s] matters of substance,' Beazell, supra, at

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[3] In declining to expand the scope of the ex post facto clauses, the Supreme Court receded from its earlier decisions in Kring v. Missouri, 107 U.S. 221 (1883) and Thompson v. Utah, 170 U.S. 343 (1898).

> 171, 70 L.Ed 216, 46 S.Ct. 68, by depriving a defendant of 'substantial protections with which the existing law surrounds the person accused of crime,' Duncan v. Missouri, 152 U.S. 377, 382-283, 38 L.Ed. 485, 14 S.Ct.570 (1894), or arbitrarily infringing upon 'substantial personal rights.' Malloy v. South Carolina, 237 U.S. 180, 183, 59 L.Ed. 905, 35 S.Ct. 507 (1915); Beazell, supra, at 171, 70 L.Ed 216, 46 S.Ct. 68.

Youngblood, ____U.S.____, 111 L.Ed 2d at 40-41.

However, the Youngblood court went on to hold that "the references in Duncan and Malloy to 'substantial protections' and 'personal rights' should not be read to adopt without explanation an undefined enlargement of the Ex Post Facto Clause." Youngblood, ____U.S.____, 111 L.Ed.2d at 41-42.

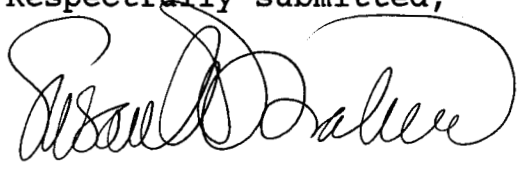
The underlying purpose of the provisional credits statute, like the predecessor administrative gaintime statute, is to relieve overcrowding. Unlike automatic or basic gaintime which were the subject of the decisions in Weaver, Raske, and Waldrup, supra, neither of the early release statutes which are the subject of this proceeding automatically attach and become incorporated a an integral part of a prisoner's sentence at the time the offense occurs. Rather the award of such credits is contingent upon the many outside variables which contribute to prison overcrowding. There is no relationship to the original penalty assigned to the crime at the time it was committed or the ultimate punishment meted out. No greater punishment is imposed by operation of these statutes -- indeed, the original sentence is not increased at all. Clearly, the statutes are procedural in nature and designed to

alleviate the administrative crisis created by prison overcrowding. At best, Petitioner possesses no more than a "mere expectancy" that he fortuitously might obtain early release as a result of prison overcrowding. Moreover, as it is wholly within the discretion of the Department of Corrections to decline to exercise its authority to make awards of provisional credits, the statute cannot be construed as creating any "substantial personal rights" relating directly to the definition of crimes, defenses, or punishments, as defined and limited by the Supreme Court's decision in Youngblood.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioner Dugger respectfully requests that the decision of the Second District Court of Appeal in this cause be disapproved, and the decisions in Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988), and Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990), be reaffirmed.

Respectfully submitted,



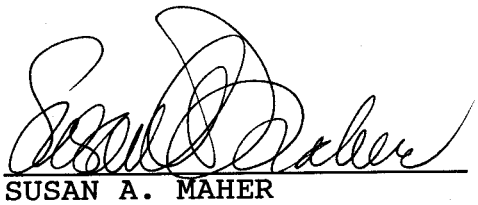
SUSAN A. MAHER
ASSISTANT GENERAL COUNSEL
Florida Bar No. 0438359

Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500
(904) 488-2326

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S INITIAL BRIEF** has been furnished by U.S. Mail to **RICHARD A. BELZ, ESQUIRE**, Florida Institutional Legal Services, Inc., 924 N. W. 56th Terrace, Suite A, Gainesville, Florida 32605-6413, on this 10th day of April, 1991.



SUSAN A. MAHER

Rodrick.Brf/sam