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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
✓ RICHARD L. DUGGER, Secretary,
Department of Corrections,

Petitioner,

v.

Case No. 76,801

JEFFREY RODRICK,

Respondent.

_____ /

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

I. Course of the Proceedings

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 a Petition for Writ of Mandamus filed by the Respondent Jeffrey Rodrick, an inmate in the custody of the Florida Department of Corrections. Inmate 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. (Appendix A.) 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. No ruling on the motion to stay has been received as of this date.

II. Factual Background

Rodrick was received by the Department of Corrections in June 1988, with convictions for the offenses of Burglary, Kidnapping with Intent to Commit Sexual Battery, and Aggravated Assault committed on April 17, 1987. Rodrick was denied awards of provisional credits by the Department of Corrections pursuant to Section 944.277(1)(e), Florida Statutes, which precludes such awards to any inmate who "[i]s convicted, or has been previously convicted of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery." Rodrick would have been eligible to receive awards of administrative gaintime under repealed Section 944.276, Florida Statutes, if he had been received into custody and met the statutory prerequisites prior to the statute's repeal.

SUMMARY OF THE ARGUMENT

Jurisdiction in this case is conferred under Article V, Section 3(b)(3), Florida Constitution, as the decision of the Second District Court of Appeal in this cause expressly and directly conflicts with the decisions of the First District Court of Appeal in Charles Miller v. Richard Dugger, 15 F.L.W. D2078 (August 9, 1990) and this Court in Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988).

In Blankenship, this Court considered whether changes in Florida's early release statute codified at Section 944.276, Florida Statutes, (generally referred to as the administrative gaintime statute), which disadvantaged the petitioner whose offense date preceded the statute's enactment, violated the ex post facto clause of the United States Constitution. The petitioner in Blankenship relied on the United States Supreme Court decision in Weaver v. Graham, 450 U.S. 24 (1981), in support of his contention that the more onerous provisions of Section 944.276 were in violation of the ex post facto clause. This Court distinguished the gaintime at issue in Weaver from the gaintime afforded under the early release statutes and found Florida's early release statutes to be procedural in nature, as contrasted with the substantive statute discussed in Weaver. The Court thus concluded that there was no violation of the ex post facto clause.

The provisional credits statute found at Section 944.277, Florida Statutes, is the early release statute which supplanted the administrative gaintime statute at issue in Blankenship. Thus, it is clear that the principles of Blankenship must apply in analyzing any ex post facto challenge brought against this later statute. In considering such a challenge to the application of Section 944.277, the First District Court of Appeal in Charles Miller v. Richard Dugger, 15 F.L.W. D2078 (August 9, 1990), followed this Court's reasoning in Blankenship. The First District concluded that since both Section 944.277 and Section 944.276 are procedural in nature, they do not create substantive rights and thus do not operate to deprive an inmate of any substantive right in violation of the ex post facto clause. However, the Second District Court of Appeal reached a contrary conclusion in Rodrick v. State, 15 F.L.W. D2137 (August 24, 1990), when it declared the application of Section 944.277 to an inmate whose offense was committed prior to the enactment of the statute, to be barred by the ex post facto clause. The Second District purports to rely on the reasoning in Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990); however, the Waldrup decision is distinguishable. The statutes considered in Waldrup, like those in Weaver, are neither procedural in nature nor enacted purely for the administrative convenience of the Department of Corrections. Thus, the Waldrup analysis is inapplicable and the decision of the Second District incorrect.

As there now exists a direct and express conflict between the decision of the Second District Court of Appeal in Rodrick and the decisions of this Court in Blankenship and the First District Court of Appeal in Miller, this Court should take jurisdiction of this cause to eliminate the conflict on this important issue of law.

ARGUMENT

The opinion of the Second District Court of Appeal in Rodrick is one paragraph in length and reads as follows:

This pro se appellant, Jeffrey T. Rodrick, challenges on ex post facto grounds the final trial court order that denied Rodrick's petition for mandamus in which he sought correction of an alleged improper denial of gain time. The recent decision of our supreme court in Waldrup v. Dugger, No. 74,012 (Fla. June 21, 1990) [15 F.L.W. S358], controls our decision in this case. After Rodrick's offense was committed, the legislature enacted section 944.277, Florida Statutes (Supp. 1988), the effect of which was to repeal section 944.276, Florida Statutes (1987) and, thereby to deny Rodrick gain time that he had already begun to receive. Waldrup holds that such an application of the statute, by precluding Rodrick from receiving the gain time to which he was entitled when his offense was committed, is improper as an ex post facto application of the law even though Rodrick had only a "mere expectancy" in the gain time.

Rodrick, 15 F.L.W. D2137 (Fla. 2d DCA, August 24, 1990) (Appendix A.)

Without distinguishing the earlier decision of this Court in Blankenship, the Rodrick court has held that Florida's early release statutes create substantive rights and that changes in these statutes which disadvantage prisoners previously eligible for early release awards are ex post facto applications of law. The Second District states that the recent decision of this Court in Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990), controls. While not expressly stated, it is apparent that the Second District is of the opinion that Waldrup implicitly overrules this Court's earlier decision in Blankenship.

In Blankenship, the Petitioner was convicted and sentenced in 1985 for crimes which occurred in 1984. Blankenship, 521 So.2d at 1099. (Appendix B.) Petitioner Blankenship was precluded from receiving administrative gain time under Section 944.276 because of a conviction for sexual battery. Id. This Court conducted the following analysis of the ex post facto challenge:

Petitioner's argument that his case is controlled by Weaver is misplaced. In Weaver the Supreme Court of the United States declared that a Florida law that reduced gain time was **ex post facto** as applied to prisoners whose crimes were committed before the law was changed. Initially, it should be observed that Weaver is not on point; it dealt with "good time," i.e., time off a prisoner's sentence awarded for exhibiting good behavior. The statutes at issue here award gain time purely for the administrative convenience of the Department of Corrections. Moreover, since these statutes are procedural in nature,

as contrasted to the substantive statute considered in Weaver v. Graham, they do not create substantive rights. 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. See Dobbert, 432 U.S. at 293-94, 97 S.Ct. at 2298-99. Under Weaver, prisoners entering the correctional system do have a statutory right under section 944.275, Florida Statutes (1985), to "good time" gain time, and it will automatically accrue to them if their behavior meets certain standards. However, when petitioner's crimes were committed, there was no guarantee that the prison population would ever reach ninety-eight percent of capacity while he was incarcerated. Petitioner had no control over the factors that would lead to the Department of Corrections granting administrative gain time.

521 So.2d at 1099.

In sum, in 1988, this Court declared Florida's early release statutes to be procedural in nature and, therefore, not subject to ex post facto challenge. Rodrnick, like Blankenship, has raised the same ex post facto challenge with regard to the provisional credits statute found at Section 944.277, Florida Statutes. Thus, the principles of Blankenship, not Waldrup, should apply.

In a case factually similar to Rodrnick, the First District Court of Appeal, has reached a decision consistent with Blankenship:

We have examined appellant's claims of violation of his right to equal protection and ex post facto application of the statute, and find them to be without merit. Section 944.277, formerly section 944.276, awards gain

time purely for the administrative convenience of the Department of Corrections. Since the statutes are procedural in nature, they do not create substantive rights, as contrasted to the substantive statute considered in Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). See Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988). Because section 944.277 does not operate to deprive appellant of a substantive right, it is not ex post facto as applied to him.

Miller v. Dugger, 15 F.L.W. D2078, 2079 (Fla. 1st DCA, August 9, 1990). (Appendix C.)

Although the Second District has declined to certify its decision to be in conflict, it is not necessary that the district court explicitly identify conflicting district court or Supreme Court decisions in its opinion in order to create an "express" conflict under Article V, Section 3(b)(3). Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981). The discussion of the legal principles applied by the Second District supplies a sufficient basis for establishing conflict review. Id. The conflict is clear, and the tension between this Court's decisions in Blankenship and Waldrup apparent. The Second District's alignment with this Court's decision in Waldrup is diametrically opposed to the earlier decision of this Court in Blankenship and the more recent decision of the First District in Miller. This schism on the same point of law must be resolved as the Department of Corrections is now faced with the dilemma of which line of decisions are the correct decisions with regard to awarding early release credits to inmates within its custody.

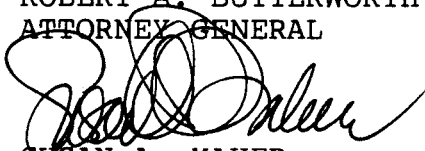
This Court should, therefore, exercise its discretion to take jurisdiction of this cause and resolve the conflict.

CONCLUSION

The decision of the Second District Court of Appeal in Rodrick expressly and directly conflicts with the decisions of the First District in Miller and this Court in Blankenship. Jurisdiction is conferred under Article V, Section 3(b)(3) of the Florida Constitution. This Court has jurisdiction of this cause and should exercise its discretion to consider the case on its merits and resolve the conflict raised on this very important issue of law.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

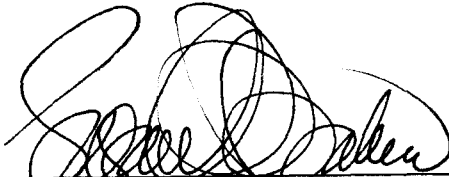


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON JURISDICTION** has been furnished by U.S. Mail to **JEFFREY T. RODRICK**, 2045 East Bay Drive, Apartment 622, Largo, Florida 34641, on this 22nd day of October, 1990.



SUSAN A. MAHER