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IN THE SUPREME COURT OF FLORIDA

ANTONIO R. FELK,
Appellant,

v. Case No. 77,855

RICHARD L. DUGGER, ETC.
Appellee.

_____/

CERTIFIED QUESTION
FIRST DISTRICT COURT OF APPEAL
CASE NO. 90-2499

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APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Appellee, Richard Dugger, accepts the Statement of the Case and Facts contained in the Initial Brief of Appellant/Petitioner.

SUMMARY OF THE 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. Appellant Felk never became eligible to receive administrative gaintime during the pendency of that statute. Felk instead argues that because he is eligible under the first emergency release statute, promulgated in 1983 but never implemented, that his later ineligibility under the provisional credits statute constitutes an ex post facto violation.

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 is to relieve prison overcrowding. 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 Felk's initial brief, the Appellant argued that the denial of provisional credits under Section 944.277, Florida Statutes (Supp. 1988), based upon more restrictive statutory exclusions, constituted an ex post facto application of law when applied to him as he is eligible for gaintime under the emergency release of prisoners provisions of Section 944.598, Florida Statutes (1983).[1]

In support of this position, the Appellant cited Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960 (1981), Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989), cert. denied, ____U.S.____, 110 S. Ct. 543 (1989), Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990) and Ex Parte Rutledge, 741 S.W.2d 460 (Tex. Cr. App. En Banc 1987). In

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[1]Section 944.598, Florida Statutes (1983), entitled "Emergency Release of Prisoners", provides, in pertinent part:

> The Department of Corrections shall advise the Governor of the existence of a state of emergency in the state correctional system whenever the population of the state correctional system exceeds 98 percent of the lawful capacity of the system for males and females, or both.
>
> * * * *
>
> Following the declaration of a state of emergency, the sentences of all inmates in the system who are eligible to earn gain-time shall be reduced by the credit of up to 30 days gain-time, in 5-day increments, as may be necessary to reduce the inmate population to 97 percent of lawful capacity of the system.

§944.598(1),(2), Fla. Stat. (1983).

In 1986, the Florida Legislature amended Section 944.598 to change the threshold percentage from 98% to 99%.

As this Court recognized in Blankenship v. Dugger, 521 So.2d 1091 (Fla. 1988), Section 944.598 has never been implemented.

contrast, the Secretary of the Department of Corrections has consistently maintained that Florida's early release statutes are procedural in nature, when compared 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 v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990) which followed Blankenship, and, on the 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] For the reasons which follow, Appellee Dugger contends that the decisions in Blankenship, Miller, and Petrone are correct and that the decision of the Second District Court of Appeal in Rodrick v. Dugger, 567 So.2d 906 (Fla. 2d DCA 1990) 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

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[2]It is especially important to note that Eleventh Circuit Judge Tjoflat, who authored the opinion in Raske v. Martinez 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.

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.

When 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 of 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. Miller v. Florida, 482 U.S. 421, 107 S.Ct. 2446 (1987); Weaver, 450 U.S. at 28 - 29; Dobbert v. Florida, 432 U.S. 282, 298 (1977); Fletcher v. Peck, 10 U.S. (6 Branch) 87, 138 (1810); Calder, 3 U.S. (3 Dall) at 387-388. The question then becomes one of whether the early release statutes increase the punishment "beyond what was prescribed when the crime was consummated."

Since 1983 Florida laws have provided for additional gaintime to be awarded when the prison system nears capacity to control overcrowding. In February 1987, the Florida Legislature enacted Section 944.276 which provided an early release mechanism to alleviate prison overcrowding. By cross-referencing existing statutory provisions regarding the classification and sentencing of convicted criminals, Section 944.276 established a selective early release scheme allowing for the alleviation of overcrowding while protecting the public from the early release of certain violent offenders.

A year and a half later, the Legislature replaced the administrative gaintime law with Section 944.277, Florida Statutes (1988 Supp.), which provided for the award of "provisional credits" instead of "administrative gaintime" to control prison overcrowding. A wide range of crimes which would disqualify an inmate from receiving provisional credits were added.

Therefore, it is apparent that because of severe prison overcrowding problems, those circumstances forced the Legislature to create mechanisms which lead to the very early release of some segments of the Florida prison population. A close reading of the exclusions in both the administrative gaintime statute (Section 944.276) and the provisional credits statute (Section 944.277) leads one to conclude that the Legislature is intending to prevent the very early release of offenders who place society at risk of repeated offenses and to prevent release of perpetrators of particularly violent, abhorrent and heinous crimes.

Appellant does not qualify for provisional credit awards because he was "convicted of committing or attempting to commit kidnapping ... and the offense was committed with the intent to commit sexual battery." §944.277(1)(e), Fla. Stat. (Supp. 1988). Because Appellant qualifies for gaintime awards if the emergency release of prisoners statute is ever enacted, Appellant argues his later disqualification disadvantages him and is therefore ex post facto law as applied to him.

The prohibition of the ex post facto clauses do not extend to every change of law that "may work to the disadvantage of a defendant". Dobbert v. Florida, 432 U.S. at 293. The United States Supreme Court opined that:

> 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. 1311, 1312, 100 S.Ct. 714, 715 (1980), citing Dobbert, supra.

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 substantive matters concerning punishment or reward. 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 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 - 383, 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,

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

46 S.Ct. 68.

Youngblood, ____U.S. at ____, 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. at ____, 111 L.Ed.2d at 41-42. Emphasizing that the constitutional prohibition is addressed to laws "whatever their form", which make innocent acts criminal, alter the nature of the offense, or increase the punishment, the court in Youngblood refocused the analysis on the original language in Calder, supra. Youngblood, ___U.S. at ____, 111 L.Ed. 2d at 41. It is not enough to argue that Appellant has been disadvantaged. The question is has his punishment been increased. The underlying purpose of the provisional credits statute, like the administrative gaintime statute and the "emergency gaintime" statute is only to relieve prison overcrowding. Unlike basic gaintime, the subject of the decision in Weaver, or incentive gaintime, the subject of the decisions in Raske and Waldrup, no early release statute automatically attaches and becomes incorporated as an integral part of the sentence at the time the offense occurs. Rather the awards of such credits are totally contingent on the many outside and often unanticipated 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, because 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. Indeed the prison population could be maintained within lawful capacity by constructing enough prisons to provide sufficient bedspace or by a leveling out or reduction in the number of persons committed to state prison because of a reduction in the number of prosecutions or by an increase in alternate sentencing. Changing demographics, for example, could result in the leveling of the number of new commitments.

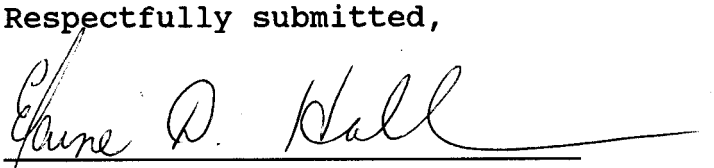
Chief Justice Rehnquist, authoring a concurring opinion in Weaver v. Graham, 450 U.S. at 37, began by saying he found "this case a close one." The case now before this Honorable Court is not a close one. The early release statutes do not increase the punishment for the crime which Felk committed. Appellee acknowledges that Felk may serve a longer sentence than others in prison who did not commit kidnapping with the intent to commit sexual battery but that fact standing alone is not enough to find

that Florida's early release statutes are a violation of the ex post facto clauses of the United States and Florida Constitutions.

CONCLUSION

Wherefore, for the foregoing reasons, Appellee Dugger respectfully requests that the decision of the Second District Court of Appeal in Rodrick v. Dugger 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,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPELLEE'S ANSWER BRIEF** has been furnished by U.S. Mail to Peter M. Siegel, Esquire, and Randall C. Berg, Jr., Esquire at the Florida Justice Institute, Inc., 4868 Southeast Financial Center, ~~200~~ South Biscayne Boulevard, Miami, Florida 33131-2309, this 10th day of June, 1991.

Elaine D. Hall

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