

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DAVID GOODWIN,

Petitioner,

vs.

CASE NO. 93,491

STATE OF FLORIDA,

Respondent.

_____ /

SUPPLEMENTAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the appellee and the prosecution in those respective courts. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record proper, contained in Volume I of the record on appeal

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts contained in his initial brief. This supplemental brief is filed in accordance with this Court's order of February 24, 1999.

SUMMARY OF THE ARGUMENT

The Criminal Appeal Reform Act shifting the burden of proving prejudicial error from the State to the defendant affects the substantial right of a defendant to a fair trial. Its application to an offense committed prior to its effective date therefore constitutes a violation of the proscription against *ex post facto* laws.

ARGUMENT

POINT

THE CRIMINAL APPEAL REFORM ACT CANNOT BE APPLIED RETROACTIVELY AGAINST A DEFENDANT WHOSE CRIME WAS COMMITTED PRIOR TO ITS EFFECTIVE DATE WITHOUT VIOLATING THE PROHIBITION AGAINST EX POST FACTO LAWS.

The crimes for which Petitioner was being sentenced were committed on April 11, 1996, before the effective date of the Criminal Repeal Reform Act, July 1, 1996. 1996 Laws of Florida ch. 248. The statute can not be applied retroactively to require Petitioner to establish prejudicial error in his appeal.

Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto Law." The meaning of the term "ex post facto" was comprehensively summarized in Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798):

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 a 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.

Accord Dobbert v. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290, 2297, 53 L.Ed. 2d 344 (1977), quoting Beazell v. Ohio, 269 U.S. 167, 169-170, 46 S.Ct. 68, 68-69, 70 L.Ed. 216 (1925).

The basis for including the *ex post facto* clause in the Constitution was to prevent the federal and State legislatures from enacting arbitrary or vindictive legislation and "to give fair warning of [the legislative enactments'] effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29 101 S.Ct. 960, 964, 67 L.Ed. 2d 17 (1981).

Thus, in order to be *ex post facto*, a statute first "must be retrospective, that is, it must apply to events occurring before its enactment," and second, "it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. at 29, 101 S.Ct. at 964. And excluded from the *ex post facto* prohibition are those changes in the law which do not alter "substantial personal rights," but merely amend "modes of procedure which do not affect matters of substance." *Id.* at 293.

In Florida, too, a statute which is retroactively applied to crimes committed prior to its effective date constitutes an impermissible *ex post facto* law. Article I, section 10, Florida Constitution; Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996) [1996 statute limiting amount of incentive gain time which could be earned violated *ex post facto* proscription when applied to prisoners whose crimes occurred before its effective date]. In Dugger v. Williams, 593 So. 2d 180, 181 (Fla. 1991), this Court echoed the United States Supreme Court when it explained that a law

violates the prohibition against *ex post facto* laws if 1) it is retrospective in effect, and 2) it diminishes a substantial right the party would have enjoyed under the law existing at the time of the offense. Importantly, this Court noted that there is no requirement that the substantive right be vested or absolute, since the *ex post facto* provision can be violated even by the retroactive diminishing of access to a purely discretionary or conditional advantage. Accord, Weaver v. Graham, 450 U. S. at 29 [law need not impair vested right to violate *ex post facto* prohibition]; Cunningham v. State, 423 So. 2d 580 (Fla. 2d DCA 1982).

Under the law existing at the time that Petitioner committed the offenses below, the State had the burden of establishing on appeal that any error committed at trial was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). That standard of review was made with the understanding that the legislature had enacted Section 924.33, Florida Statutes (1941), which provided:

No judgement shall be reversed unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the rights of the appellant.

This Court observed in DiGuilio that the authority of the legislature to enact harmless error statutes is "unquestioned." However, even in the face of this recognition, this Court

emphasized that appellate courts retain the authority to determine that certain errors, when committed, are beyond the legislative power to cure by way of a restrictive standard of review:

the courts may establish the rule that certain errors *always* violated the right to a fair trial and are, thus, *per se* reversible. To do so, however, we are obligated to perform a reasoned analysis which shows that this is true, and that, *for constitutional reasons*, we must override the legislative decision.

DiGuilio, 491 So. 2d at 1134 (emphasis original). Noting that both the harmless error rule and the *per se* reversible error rule are concerned with "the due process right to a fair trial," DiGuilio, 491 So. 2d at 1135, this Court explained that

The unique function of the harmless error rule is to conserve judicial labor by holding harmless those errors which, in the context of the case, do not vitiate *the right to a fair trial* and, thus, do not require a new trial.

DiGuilio, 491 So. 2d at 1135 (emphasis added). The rule therefore protects the "constitutional right to a fair trial, free of *harmful* error." *Id.* (emphasis added).

It is evident from the discussion of the harmless error test contained in DiGuilio, then, that substantial constitutional protections remain the Court's primary concern when applying a legislatively-mandated harmless error standard. Characterizing the changes in the standard of review set forth in Section 924.051(7)

as "merely" procedural¹ cannot, therefore, end the discussion as to whether its application to Petitioner constitutes an *ex post facto* law. *But see Neal v. State*, 688 So. 2d 392 (Fla. 1st DCA 1997), *review den.* 698 So. 2d 543 (Fla. 1997); *see also Quesada v. State*, 23 Fla. L. Weekly D489 (Fla. 4th DCA Feb. 18, 1998). As noted in *Dugger*, 593 So. 2d at 181,

[I]t is too simplistic to say that an *ex post facto* violation can occur only with regard to substantive, not procedural law. Clearly, some procedural matters have substantive effect. Where this is so, an *ex post facto* violation also is possible, even though the general rule is that the *ex post facto* provision of the state constitution does not apply to purely procedural matters.

Certainly, the assignment of the burden of establishing harmless error to the defendant rather than to the State is a change of major proportion in the law. In determining whether to apply the harmless error test to trial error, as opposed to applying the *per se* reversal rule which was once the norm, *see Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), this Court placed great emphasis on the fairness to each side of a rule which did not require reversal for every

¹Petitioner notes that Respondent has admitted in pleadings previously filed in this Court that the Criminal Appeal Reform Act is wholly *substantive*. *See Comments on Proposed Changes*, filed in connection with *In re Amendments to Florida Rules of Appellate Procedure*, 685 So. 2d 773 (Fla. 1996). If the law is substantive, of course, it is clear that the *ex post facto* prohibition precludes application of the statute to any offense committed prior to its effective date.

technical violation but which placed the burden of establishing
harmlessness on the State:

The [harmless error] test is not a sufficiency-of-the-evidence, a correct result, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. *The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.*

DiGuilio, 491 So. 2d at 1139 (emphasis added). By shifting the burden of proving prejudicial error, the legislature has substantially altered the balanced equation which this Court found so important when it adopted the harmless error standard. Instead of placing the burden on the party benefitting from the error and responsible for ensuring that a defendant is not only convicted, but fairly convicted, the new standard places the burden on the defendant, who is thereby substantially disadvantaged by having to prove not only that error existed but that the jury was affected thereby, a burden he may find impossible to satisfy in view of the relative lack of control he has over the proceedings as compared to the prosecution.

Thus, the standard of review applicable in a criminal appeal,

while containing procedural elements, also fundamentally impacts on a defendant's substantive due process right to a fair trial. A change in the law which alters a substantial right is *ex post facto* "even if the statute takes a seemingly procedural form." Weaver v. Graham, 450 U.S. at 29, n. 12, 101 S.Ct. at 964, n. 12. Where a defendant's substantive right to a fair trial tested in the crucible of the appellate process is affected, the legislature may not by fiat strip the defendant of that right under the guise of a procedural change.

This Court has recently examined the restriction on a defendant's right to counsel in postconviction proceedings attempted by another section of the Criminal Appeal Reform Act, Section 924.066(3), Florida Statutes (1997), which provides:

A person in a noncapital case who is seeking collateral review under this chapter has no right to a court appointed attorney.

See also Section 924.051(9), Florida Statutes (1997):

Funds, resources, or employees of this state or its political subdivisions may not be used, directly or indirectly, in appellate or collateral proceedings unless the use is constitutionally or statutorily mandated.

In Russo, the Public Defender, following his appointment to represent an indigent in a postconviction matter, had argued that the trial court had no authority to appoint him in the face of these statutory prohibitions. This Court rejected that argument out of hand, noting that *due process* concerns dictate the

appointment of counsel in certain postconviction proceedings:

The question in each proceeding of this nature before this Court should be whether, under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of the petitioner's claims. Of course, doubts should be resolved in favor of the indigent petitioner when a question of the need for counsel is presented. Each case must be decided in the light of the Fifth Amendment due process requirements.

Russo v. Akers, 724 So. 2d 1151, 23 Fla. L. Weekly S597 (Fla. Nov.28, 1998), quoting Graham v. State, 372 So. 2d 1363 (Fla. 1979) citing Hooks v. State, 253 So. 2d 424, 426 (Fla. 1971). When the application for relief "on its face reflects a colorable or justiciable issue or a meritorious grievance," the duty to appoint counsel for an indigent defendant becomes absolute. Graham, 372 So. 2d at 1365-1366. Recognizing that Section 924.066(3) appears to conflict with these principles, this Court cited with approval the lower appellate court's construction of this statute in Russo v. Akers, 701 So. 2d 366, 367 (Fla. 5th DCA 1997), to mean that though there is no statutory right to counsel, the statute nevertheless cannot preclude the appointment of counsel when constitutionally mandated, as that term has been defined in Graham v. State, 372 So. 2d 1363 (Fla. 1979) and State v. Weeks, 166 So. 2d 892 (Fla. 1964).

In the present case, the apparent procedural definition of the standard of review for harmless error, shifting the burden from the

State to the defendant to establish prejudice, similarly implicates the defendant's substantive constitutional right to a fair trial. The change in the burden has "substantially disadvantaged" Petitioner just as the apparently procedural change in the sentencing guidelines substantially disadvantaged the defendant in Miller v. Florida, 482 U.S. 424, 432-433, 107 S.Ct. 2446, 2452, 96 L.Ed. 2d 351 (1987) by expanding the permitted range of sentencing alternatives, thereby allowing the trial court to impose a greater sentence against a defendant without being required to file any reasons for the departure on facts proved beyond a reasonable doubt. In Miller, the United States Supreme Court held that application of that change to a crime committed prior to its effective date constituted a violation of the proscription against *ex post facto* laws.

The same reasoning applies in the instant case. Sections 924.051(3) and (7), Florida Statutes (1997), create procedural barriers to the substantive right to appeal. While this Court has stated that the legislature may place reasonable conditions on the constitutional right to appeal so long as the conditions do not thwart the litigant's legitimate appellate rights, Amendments to Florida Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996), the above provisions of the statute operate to thwart those rights. The statute's substantive impact on a defendant's right to a fair trial which substantially disadvantages him in comparison to

the earlier law therefore renders it *ex post facto* when applied, as in the instant case, to one whose offense was committed prior to its effective date.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court reverse the decision of the District Court below and remand this cause with directions to reverse Petitioner's conviction and grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 16th day of MARCH, 1999.

Of Counsel