SUPREME COURT OF FLORIDA
CASE NUMBER SC00-785

OLLIE JAMES GOAD,)
)
Petitioner,)
)
v.)
)
STATE OF FLORIDA, DEPARTMENT)
OF CORRECTIONS,)
)
Respondent.)
_________________________________)

Appeal from the First District Court of Appeal
Case Number 1D99-0836
Padovano, Miner and Wolf, Judges

S)))

INITIAL BRIEF OF PETITIONER

S)))

Respectfully submitted,

Peter M. Siegel, Esq.
Randall C. Berg, Jr., Esq.

Florida Justice Institute, Inc.
2870 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2310
305-358-2081
305-358-0910 (FAX)

Attorneys for Petitioner

SUPREME COURT OF FLORIDA
CASE NUMBER SC00-785

OLLIE JAMES GOAD,)
)
Petitioner,)
)
v.)
)
STATE OF FLORIDA, DEPARTMENT)
OF CORRECTIONS,)
)
Respondent.)
________________________________)

Appeal from the First District Court of Appeal
Case Number 1D99-0836
Padovano, Miner and Wolf, Judges

S)))

INITIAL BRIEF OF PETITIONER

S)))

Respectfully submitted,

Peter M. Siegel, Esq.
Randall C. Berg, Jr., Esq.

Florida Justice Institute, Inc.
2870 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2310
305-358-2081
305-358-0910 (FAX)

Attorneys for Petitioner

STATEMENT CERTIFYING SIZE AND STYLE OF TYPE

Pursuant to the Administrative Order entered July 13, 1998, I hereby certify that this Initial Brief of Petitioner is in 14 point proportionately spaced Ariel type.

____
Peter M. Siegel, Esq.

TABLE OF CONTENTS

Page

STATEMENT CERTIFYING SIZE AND STYLE OF TYPE i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 6

ARGUMENT

I. APPLICATION OF THE CIVIL RESTITUTION LIEN AND CRIME VICTIMS' REMEDY ACT TO THOSE WHOSE OFFENSES WERE COMMITTED PRIOR TO ITS ADOPTION VIOLATES THE PROHIBITION ON *EX POST FACTO* LAWS 10

A. Section 960.297 is Retrospective in Effect 13

B. Section 960.297 Results in an Increase in Punishment . . 14

II. DUE PROCESS BARS THE APPLICATION OF LEGISLATION TO MR. GOAD THAT ATTACHES NEW LEGAL CONSEQUENCES TO EVENTS COMPLETED BEFORE THE LAW'S ENACT-MENT 26

CONCLUSION 30

CERTIFICATE OF SERVICE 32

APPENDIX (Opinion below)

TABLE OF CITATIONS

Cases **Page(s)**

Alamo Rent-A-Car v. Mancusi, 632 So. 2d 1352 (Fla. 1994) 27

Alberts v. State, 711 So. 2d 635 (Fla. 2d DCA 1998) 3

Allen v. Illinois, 478 U.S. 364 (1986) 18

Arrow Air, Inc. v. Walsh, 645 So. 2d 422 (Fla. 1994) 28

Beazell v. Ohio, 269 U.S. 167 (1925) 12

Britt v. Chiles, 704 So. 2d 1046 (Fla. 1997) 14

Burello v. Com. State Emp. Retirement System,
411 A.2d 852 (Pa. Cmwith. 1980) 23

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 12

Carmell v. Texas, 13 Fla. L. Weekly Fed. S267 (U.S. May 1, 2000) . . . 12

Cox v. State, 394 So.2d 103 (Ala. Cr.App. 1981) 23

Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) 7, 16

Department of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767 (1994) 19

Fitzpatrick v. Federal Deposit Ins. Corp., 765 F.2d 569 (6th Cir. 1985) 19

Gary v. State, 669 So. 2d 1087 (Fla. 4th DCA 1996) 3

Government of Virgin Islands v. D.W., 3 F.3d 697 (3d Cir. 1993) 22

Greenberg v. Comptroller of the Currency, 938 F.2d 8 (2d Cir. 1991) . 18

Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475 (Fla. 1995) . 26

Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996), *cert. denied*,
519 U.S. 1142 (1997) . . . . 12 - 14

Hassen v. State Farm Mutual Automobile Insurance Co.,
674 So. 2d 106 (Fla. 1996) 28

Heller v. Doe, 509 U.S. 312 (1993) 18

Hudson v. United States, 522 U.S. 93 (1997) 16, 18

In re Thomas L. Maxwell, 229 B.R. 400 (Bkrtcy. E.D. Ky. 1998) 20

Kansas v. Hendricks, 521 U.S. 346 (1997) 18

Life Care Centers v. Sawgrass Care Center, 683 So. 2d 609
(Fla. 1st DCA 1996) 26

Loomer v. State, 768 P.2d 1042 (Who. 1989) 23

Lynce v. Mathis, 519 U.S. 433 (1997) 14

Matter of Appeal in Maricopa Cty. Juv. Action, 677 P.2d 943
(Ariz. Ct.App. 1984) 23

Metropolitan Dade County v. Chase Fed. Hous. Corp.,
737 So. 2d 494 (Fla. 1999) 27, 30

Miller v. Florida, 482 U.S. 423 (1987) 13

Minnesota ex rel. Pearson v. Probate Court of Ramsey Cty., 309 U.S. 270 (1940) 18

Padavich v. Thalacker, 162 F.3d 521 (8th Cir. 1998) 19

People v. Rivera, 65 Cal. App. 4th 705, 76 Cal. Rptr.2d 703 (Cal. App. 3d Dist. 1998) 24

People v. Stead, 845 P.2d 1156 (Col. S.Ct. 1993) 22

People v. Tran, 67 Cal. App. 4th 1320, 79 Cal. Rptr. 2d 770 (Cal. App. 3d Dist. 1998) 24

People v. Woodward, 989 P.2d 188 (Col. Ct. App. 1999) 22

Petition of State, 603 A.2d 814 (Del. S.Ct. 1992) 22

Spielman v. State, 298 Md. 602, 471 A.2d 730 (Ct.App. 1984) 23

State Farm Mutual Automobile Insurance Co. v. Laforet, 658 So. 2d 55 (Fla. 1995) 8, 26, 28, 29

State of Florida v. Goad, 25 Fla. L. Weekly D682 (Fla. 1st DCA March 13, 2000) 3, 4, 11

State v. Beltran, 170 Ariz. 406, 825 P.2d 27 (Ct.App. 1992) 23

State v. Champe, 373 So. 2d 874 (Fla. 1978) 17

State v. Davis, 645 S.W.2d 160 (Mo. Ct.App. 1982) 23

State v. Lancaster, 731 So. 2d 1227 (Fla. 1998) 14

State v. Yost, 507 So. 2d 1099 (Fla. 1987) 21

Taylor v. Rhode Island, 101 F.3d 780 (1st Cir. 1996), *cert. denied*, 521 U.S. 1104 (1997) 24

U.S. v. DeSalvo, 41 F.3d 505 (9th Cir. 1994) 22

U.S. v. Elliott, 62 F.3d 1304 (11th Cir. 1995) 22

United States v. Baggett, 125 F.3d 1319 (9th Cir. 1997) 17

United States v. Bapack, 129 F.3d 1320 (D.C. Cir. 1997) 17

United States v. Edwards, 162 F.3d 87 (3d Cir. 1998) 17

United States v. Karam, 201 F.3d 320 (4th Cir. 2000) 17

United States v. Newman, 144 F.3d 531 (7th Cir. 1998) 17

United States v. Price, 65 F.3d 903 (11th Cir. 1995) 21

United States v. Siegel, 153 F.3d 1256 (11th Cir. 1998) 17

United States v. Thompson, 113 F.3d 13 (2d Cir. 1997) 17

United States v. Williams, 128 F.3d 1239 (8th Cir. 1997) 17

Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990) 14, 25

Weaver v. Graham, 450 U.S. 24 (1981) 14, 16

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 18

Other

U.S. Const. Art. I, § 10 11

Art. I, § 10, *Fla. Const* (1980). 12

Art. V, § 3(b)(3), *Fla. Const*. (1980) 4, 30

Section 768.28(5), *Fla. Stat*. (1999) 15

Civil Restitution Lien and Crime Victims' Remedy Act,
§§ 960.29 - 297, *Fla. Stat*. (Supp. 1994) . . . 6, 8, 10, 13, 21, 25, 30

Section 960.292, *Fla. Stat.* (Supp. 1994) 17, 21

Section 960.292(2), *Fla. Stat.* (Supp. 1994) 11

Section 960.293(2)(b), *Fla. Stat.* (Supp. 1994) 10, 25

Section 960.297, *Fla. Stat*. (Supp. 1994) *12-18, 20, 21, 24, 26*

Section 960.297(1), *Fla. Stat.* (Supp. 1994) 11

Section 960.297(2), *Fla. Stat.* (Supp. 1994) 11

9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure 4

STATEMENT OF THE CASE AND FACTS

Petitioner, Ollie James Goad, seeks review of the decision of the First District Court of Appeal which became final on April 12, 2000, when the Respondent's Motion for Rehearing and Clarification was denied. The original decision of the First District Court of Appeal was rendered on March 13, 2000.

Petitioner sued the State of Florida, Department of Corrections (hereinafter "Department") for injuries sustained when he was attacked by another prisoner. R-01-03. The Department answered under certificate date of May 8, 1996, denying liability.[1] Subsequently, Mr. Goad filed an Amended Complaint. R-20-23. The Department then filed an Answer and Counterclaim. R-35-39. The Counterclaim alleged that the Department was entitled to recover costs of incarceration, at the rate of $50.00 per day, for all days after July 1, 1994, pursuant to section 960.297, Florida Statutes (Supp. 1994). R-38.

---

1. Reference to the Answer does not appear in the Record Index prepared by the Circuit Court.

The impact of section 960.297 on Mr. Goad, as of the date this Brief is filed, is potential liability in the amount of $107,050.00, based on the statutory rate of $50.00 per day, or $18,250.00 per year.

In response to the Counterclaim, Petitioner moved for Judgment on the Pleadings, asserting that (1) “[t]he statute is unconstitutional under the Florida and United States constitutional proscription against *ex post facto* laws,” (2) “[r]etroactive application of the statute violates the due process clause of the Florida and United States Constitutions” because “retroactive application interferes with the settled expectations of the parties” and “also violates the notice provisions of the due process clauses” because “there was no notice at the time of the commission of Plaintiff’s offenses or at sentencing that the State would charge Plaintiff for the costs of his incarceration, and (3) “[t]he sanction of § 960.297 violates the Double Jeopardy Clause of both the Florida and United States Constitutions.” R-66-68.

The Circuit Court, without opinion, entered Judgment on the Pleadings in favor of Mr. Goad and dismissed the Counterclaim. R-137-138. The Department’s Motion for Rehearing, R-121-136, was denied on

February 15, 1999. R-147-149. A timely appeal to the First District Court of Appeal followed. R-150-154.[2] Before the District Court of Appeal, the Department addressed each of the arguments raised by the Mr. Goad in support of his Motion for Judgment on the Pleadings. Mr. Goad, whose trial counsel had withdraw, filed a brief unresponsive to the issues at hand.

By opinion dated March 13, 2000, the First District Court of Appeal reversed, holding "[b]ecause the statute affords a civil remedy for the recovery of subsistence costs incurred after its enactment and does not increase the penalty for the inmate's crime, we conclude that it can be applied retroactively without violating the constitutional prohibition against *ex post facto* laws." *State of Florida v. Goad*, 25 Fla. L. Weekly D682 (Fla. 1st DCA March 13, 2000). The District Court of Appeal did not address the due process or double jeopardy claims raised in the Circuit Court.

---

2. Subsequent to the entry of Judgment on the Pleadings, the Circuit Court granted the Department's motion for summary judgment on Mr. Goad's failure to protect claim (R-141-143 & R-144-146) and that matter is no longer in issue.

The First District Court of Appeal certified that its decision conflicted with the holding of the Fourth District Court of Appeal in *Gary v. State*, 669 So. 2d 1087 (Fla. 4th DCA 1996) and *Alberts v. State*, 711 So. 2d 635 (Fla. 2d DCA 1998). *State of Florida v. Goad*, 25 Fla. L. Weekly D682, n.1 (Fla. 1st DCA March 13, 2000). In *Gary* the appellant committed his crimes in 1992. The Fourth District Court of Appeal held it was error to impose a civil restitution lien "[b]ecause the restitution of the type imposed by the trial court was not a prescribed means of punishment at the time appellant committed his crimes." In *Alberts* the Second District Court of Appeal reached the same conclusion, although as the First District Court of Appeal noted, the holding can be viewed as dicta.

The Department's Motion for Rehearing and Clarification, filed on March 15, 2000, was denied on April 12, 2000.

Mr. Goad, now represented by counsel, filed a Notice to Invoke Discretionary Jurisdiction on April 10, 2000, on the basis that the decision of the District Court of Appeal was within the discretionary jurisdiction of the Florida Supreme Court pursuant to Art. V, § 3(b)(3), *Fla. Const*. (1980) and Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure, based

on the statement in footnote one of the opinion that “[f]or the reasons expressed in this opinion, we certify conflict with these decisions.”

At the time the Notice to Invoke Discretionary Jurisdiction was filed, counsel was unaware of the pending Motion for Rehearing and Clarification. Accordingly, an Amended Notice to Invoke Discretionary Jurisdiction was filed under certificate date of April 21, 2000.

SUMMARY OF ARGUMENT

I. *Ex post Facto* Violation. As applied to Petitioner, the Civil Restitution Lien and Crime Victims' Remedy Act, §§ 960.29-297, *Fla. Stat*. (Supp. 1994)(the "Act") is an *ex post facto* law since it is (1) retrospective in its effect and (2) increases the penalty by which a crime is punishable. It is retrospective because it changes the legal consequences of acts completed before its effective date, attaching new, and substantial legal consequences to crimes committed years before the law took effect.

The core issue is whether the *ex post facto* clause can be avoided by characterizing the Act as a civil sanction for the recovery by the State of costs of incarceration. If the Act is a civil sanction, then Mr. Goad is not protected by the *ex post facto* clause. On the other hand, if the Act is a penal sanction, then the *ex post facto* clause prohibits its application to Mr. Goad.

The Act is a penal sanction. It dramatically increases the penalty imposed on Mr. Goad. On the date he committed his crimes, he was not required to pay for costs of incarceration. As a result of subsequently enacted legislation, he will owe the State nearly $400,000 by the time he is

released from prison. There is no question but that the State has, after the fact, decided to treat more harshly those who commit crimes.

Although the Legislature liberally used the word “civil” throughout the Act, there are sound reasons to reject this slight of hand. First, the Act appears in that portion of the Florida Code which is entitled “Criminal Procedure and Corrections.” Second, the debt created by the Act can be imposed as part of the criminal sentencing process. Third, restitution is generally considered a criminal sanction.

But, the primary reason to conclude that the Act is a penal sanction is that it has no independent existence. While it is true that conduct which is criminal can also subject the offender to civil sanctions, there must be some basis for the civil sanction other than only the criminal conviction. By holding that the Act created a civil remedy, and not a punitive sanction, the First District Court of Appeal overlooked the principle that "[t]he Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment,

under any form, however disguised."[3] Thus, the fundamental flaw in the decision below is the failure to recognize that a law that is triggered only by a criminal conviction and resulting incarceration is a penal law, despite the language the Legislature chooses to use.

II. Due Process Violation. The Civil Restitution Lien and Crime Victims' Remedy Act imposes an entirely new obligation on offenders. And, by its terms, it is expressly meant to apply retrospectively. Because it attaches new legal consequences to events completed before its enactment, and because it gives preenactment conduct a different legal effect from that which it would have had without the passage of the statute, the due process clause is implicated.

Without question, the Legislature has expressly stated that the Act is remedial and is to be applied retroactively. Just because the Legislature labels something as being remedial, however, does not make it so. Even when legislation expressly states that it is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs

---

3. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867).

vested rights, creates new obligations, or imposes new penalties. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

The Civil Restitution Lien and Crime Victims' Remedy Act creates new obligations and imposes new penalties. Therefore, under established Florida law, it cannot be applied retroactively. *Laforet* compels the conclusion that the Act cannot be applied to Mr. Goad.

ARGUMENT

I.

APPLICATION OF THE CIVIL RESTITUTION LIEN AND CRIME VICTIMS' REMEDY ACT TO THOSE WHOSE OFFENSES WERE COMMITTED PRIOR TO ITS ADOPTION VIOLATES THE PROHIBITION ON *EX POST FACTO* LAWS

At the time Mr. Goad committed his crimes, at the time he was sentenced, and at the time he came into the custody of the Department of Corrections, no statute authorized the Department to bring suit to recover the costs of incarceration from a prisoner. Now, as a result of the Civil Restitution Lien and Crime Victims' Remedy Act, §§ 960.29 - 297, *Fla. Stat*. (Supp. 1994), Mr. Goad faces a potential judgment of nearly $400,000 based on his anticipated release date of October 12, 2015.[4]

Section 960.293(2)(b), *Fla. Stat.* (Supp. 1994) provides that a defendant who is incarcerated for an offense that is neither a capital

---

4. Mr. Goad's crimes were committed in early 1990, he was sentenced on October 18, 1990, and he came into the custody of the Florida Department of Corrections on February 13, 1991. This public record information is available from the Web site of the Department at http://www.dc.state.fl.us/inmateinfo/inmateinfomenu.asp.

offense nor a life felony offense is liable to the state in the amount of $50 per day for the costs of incarceration. The liability imposed by section 960.293(2)(b) is called a “civil restitution lien” and is enforceable in two ways. First, section 960.292(2), *Fla. Stat.* (Supp. 1994) authorizes the court before which the offender’s criminal case is pending to impose a lien for the costs of incarceration authorized by section 960.293(2). Second, section 960.297(1), *Fla. Stat.* (Supp. 1994) authorizes the state to recover the costs of incarceration by way of litigation, including the filing of a counterclaim in a pending civil action.

The Act is explicitly made retrospective by section 960.297(2), *Fla. Stat.* (Supp. 1994), which provides that for offenders convicted before July 1, 1994, the state may recover the $50.00 per day fee “for the convicted offender’s remaining sentence after July 1, 1994.”

The First District Court of Appeal upheld the application of the Act to Mr. Goad, finding that the Act “affords a civil remedy” which “does not increase the penalty for the inmate's crime” and, therefore, “can be applied retroactively without violating the constitutional prohibition against

ex post facto laws.” *State of Florida v. Goad*, 25 Fla. L. Weekly D682 (Fla. 1st DCA March 13, 2000).

Article I, Section 10 the Constitution of the United States, provides that: "No State shall . . . pass any . . . ex post facto Law. . . " The Florida provision, also Art. I, § 10, *Fla. Const.* (1980), is identical. In 1798 Mr. Justice Chase described the meaning of the *ex post facto* Clause:

> "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 offence, *in order to convict the offender*."

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis in original). Mr. Justice Chase’s definition was most recently reaffirmed in *Carmell v. Texas*, 13 Fla. L. Weekly Fed. S267 (U.S. May 1, 2000).

It is clearly established that any statute, such as section 960.297, *Fla. Stat.* (Supp. 1994), “which makes more burdensome the punishment

for a crime, after its commission" is prohibited as *ex post facto*. *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925).

In *Gwong v. Singletary*, 683 So. 2d 109, 112 (Fla. 1996), *cert. denied*, 519 U.S. 1142 (1997), this Court explained that, "in evaluating whether a law violates the ex post facto clause, a two-prong test must be applied: (1) whether the law is retrospective in its effect; and (2) whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable."

The Civil Restitution Lien and Crime Victims' Remedy Act, §§ 960.29-297, *Fla. Stat.* (Supp. 1994) meets both prongs of the *Gwong* test.

A. Section 960.297 is Retrospective in Effect

Section 960.297, *Fla. Stat.* (Supp. 1994) applies regardless of the date when a prisoner's offense was committed. The First District Court of Appeal correctly deemed section 960.297 to be retrospective for purposes of *ex post facto* analysis.[5]

---

5. The reason for the Department's Motion for Rehearing and Clarifica-
(continued...)

"A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" *Miller v. Florida*, 482 U.S. 423 (1987). Section 960.297 was enacted ***after*** the date of Mr. Goad's offenses. The legal consequences are certainly changed, to the tune of $107,050.00 as of the due date of this Brief. Thus, the first prong of the test for an *ex post facto* law, retrospective application, is clearly met.

The Department's argument that section 960.297 is not retrospective ignores the fact that the trigger for its application is Mr. Goad's conviction and sentence to prison in 1990, not anything that happened on or after July 1, 1994. Indeed, the Department made the very same non-retrospective argument in *Weaver v. Graham*, 450 U.S. 24, 31 (1981), wherein it asserted that "Florida's 1978 law altering the availability of gain time is not retrospective because, on its face, it applies only after its effective date." In rejecting the argument, the United States Supreme Court held that "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date. ... Clearly, the answer is in the

---

5. (...continued)
tion, which was denied without opinion, was the claim that section 960.297 was not retrospective.

affirmative. The ... provision attaches legal consequences to a crime committed before the law took effect." 450 U.S. at 31. To the same effect are *Lynce v. Mathis*, 519 U.S. 433 (1997); *Waldrup v. Dugger*, 562 So. 2d 687 (Fla. 1990); *Gwong v. Singletary*, 683 So. 2d 109 (Fla. 1996); *Britt v. Chiles*, 704 So. 2d 1046 (Fla. 1997); and *State v. Lancaster*, 731 So. 2d 1227 (Fla. 1998).

B. Section 960.297 Results in an Increase in Punishment

The clear and obvious impact of section 960.297, *Fla. Stat.* (Supp. 1994) is to increase the level of punishment imposed on Mr. Goad. Now he must pay for his incarceration whereas, prior to enactment of section 960.297, he was not required to pay for his incarceration.[6] If the Act applies, then as of May 9, 2000, the Department would be entitled to a judgment in the amount of $107,050.00. That certainly works to the

---

6. The number of prisoners from whom the state can actually collect the $50.00 per day fee is, at best, minuscule. Thus, the practical effect of section 960.297 is to relieve the State from the consequences of its own wrongdoing. That follows because the State's maximum liability in tort, pursuant to section 768.28(5), *Fla. Stat.* (1999) is $100,000. Thus, any prisoner serving 5½ years will be able to recover nothing, no matter how serious the prisoner's injury and no matter how egregious the State's conduct.

disadvantage of Mr. Goad. It certainly inflicts far greater punishment on Mr. Goad than was legally possible at the time of his crimes.

To overcome the prohibition on *ex post facto* laws, the Department argued below, and the First District Court of Appeal agreed, that section 960.297 does not impose a penal sanction but is simply a civil claim for damages. The fundamental flaw in the Department's argument is the failure to recognize that the Act's only application is to those who have committed a criminal offense, have been convicted of that offense, and have been sentenced to a period of incarceration. Nevertheless, because the Legislature liberally sprinkled the word "civil" throughout the Act, the First District Court of Appeal agreed with the Department that the Act created a civil remedy and, for purposes of *ex post facto* analysis, was not a punitive statute.

Obviously, the drafters of the Act knew that if it was deemed to create a civil, not a criminal, sanction, then the ban on *ex post facto* laws might be avoided. In upholding this slight of hand, the First District Court of Appeal overlooked the principle that "[t]he Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the

name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867), cited in *Weaver v. Graham*, *supra*, 450 U.S. at 31 n.15.

Where the Legislature has clearly expressed its intent to impose a civil remedy that decision is entitled to great weight in determining whether the law at issue is civil or criminal. *Hudson v. United States*, 522 U.S. 93 (1997). Nevertheless, despite the frequent use of the word "civil", there are many reasons to reject the argument that section 960.297 imposes only a civil sanction.

As an initial matter, the use of the word "civil" is inconsistent with the placement of the Act in Title XLVII of the Florida Code, which is entitled "Criminal Procedure and Corrections." It is also inconsistent in that the "civil" restitution lien can be imposed by the trial court as part of the sentencing process, as authorized by section 960.292, *Fla. Stat.* (Supp. 1994). Thus, it is fair to say that the Act is part and part of the criminal process.

Second, the use of the word "restitution," albeit with the word "civil" always in front, is also inconsistent since restitution is generally deemed to be a criminal sanction. *State v. Champe*, 373 So. 2d 874, 880 (Fla. 1978)("the five percent surcharge in Section 960.25 may quite properly be considered as a form of punishment for the offense. Punishment in the form of restitution is not a novel concept...").[7] Thus, it is fair to conclude that section 960.297 is part and parcel of the criminal process. To put it another way: a State, by *ipse dixit*, may not transform a criminal penalty into a civil remedy.[8]

---

7. Federal law also considers restitution to be punishment. Thus, all but one of the Federal Courts of Appeal which have considered whether application of the Mandatory Victims Restitution Act to conduct occurring before its enactment would violate the *ex post facto* clause have concluded it would. See *United States v. Edwards*, 162 F.3d 87 (3d Cir. 1998); *United States v. Karam*, 201 F.3d 320, 328 (4th Cir. 2000); *United States v. Siegel*, 153 F.3d 1256, 1259-1261 (11th Cir. 1998); *United States v. Bapack*, 129 F.3d 1320, 1327 n. 13 (D.C. Cir. 1997); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997); *United States v. Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997); *United States v. Thompson*, 113 F.3d 13, 14 n. 1 (2d Cir. 1997). *Contra United States v. Newman*, 144 F.3d 531 (7th Cir. 1998).

8. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

Third, unlike section 960.297, the “civil” remedies sustained in recent cases such as *Hudson v. United States*, *supra,* and *Kansas v. Hendricks*, 521 U.S. 346 (1997) all have an independent existence not dependent on a criminal conviction and resulting incarceration, or even a criminal act, to trigger a civil remedy. Section 960.297, on the other hand, has no independent existence.

For example, the sexual predator whose civil commitment after completion of his criminal sentence was upheld in *Kansas v. Hendricks* is also subject to civil commitment in the absence of any criminal conviction. *Heller v. Doe*, 509 U.S. 312 (1993); *Allen v. Illinois*, 478 U.S. 364 (1986); *Minnesota ex rel. Pearson v. Probate Court of Ramsey Cty*., 309 U.S. 270 (1940). Likewise, the banker in *Hudson* who commits fraud is subject to monetary penalties and occupational disbarment whether or not charged with a criminal offense. *See e.g., Greenberg v. Comptroller of the Currency*, 938 F.2d 8 (2d Cir. 1991); *Fitzpatrick v. Federal Deposit Ins. Corp*., 765 F.2d 569 (6th Cir. 1985).

Although civil penalties, forfeitures, and taxes can all be imposed on conduct which is also criminal, “the legislature’s description of a statute as civil does not foreclose the possibility that it has a punitive character.” *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 777 (1994). The absence of an independent existence was evident in *Kurth Ranch*, where a ”tax” on illegal drugs was “conditioned on the commission of a crime” and was “exacted only after the taxpayer had been arrested for the precise conduct that gave rise to the tax obligation in the first place.” 511 U.S. at 781. *Kurth Ranch* can be contrasted with *Padavich v. Thalacker*, 162 F.3d 521 (8th Cir. 1998), which upheld an Iowa tax on illegal drugs because the tax lacked the punitive features the Supreme Court found controlling in *Kurth Ranch* — it was not conditioned on the commission of a crime and was not exacted only after the taxpayer has been arrested for the conduct giving rise to the tax obligation, but was "due and payable immediately upon manufacture, production, acquisition, purchase, or possession" of specified drugs.

Like *Kurth Ranch*, and unlike *Padavich v. Thalacker*, section 960.297 has no independent existence. It is an exaction premised solely

on the commission of a crime resulting in incarceration. As such, it is punitive in nature and, therefore, subject to the limitations imposed by the *ex post facto* clause.

The question of whether a statute requiring an offender to pay for the costs of incarceration is a criminal or civil statute was directly addressed in *In re Thomas L. Maxwell*, 229 B.R. 400 (Bkrtcy. E.D. Ky. 1998). There, the court was confronted with an effort by a former prisoner to discharge his debt for the costs of incarceration imposed under Kentucky law. Whether the debt was dischargeable turned on whether it was civil or penal. After noting that "the basic test whether a law is penal in the strict and primary sense is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual," and that the cost of incarceration statute was part of the Kentucky Penal Code, the court held that the debt was penal and, therefore, not dischargeable, stating that "the fact that the fine collected pursuant to K.R.S. 534.045 is described as a 'reimbursement fee to help defray the expenses of the prisoner's room and board' does not bear upon whether the statute is penal in nature." 229 B.R. at 404.

Like the Kentucky statute, the Florida Act seeks to redress a wrong to the public by letting the public recover the costs of incarceration. Like the Kentucky statute, the Florida Act appears in that part of the Florida statutes dealing with Criminal Procedure and Corrections. Also like the Kentucky statute, the Florida Act authorizes the imposition of a lien for the costs of incarceration as a part of the criminal process. Section 960.292, *Fla. Stat.* (Supp. 1994). That section 960.297 also permits counterclaims where the lien was not imposed at the time of sentencing does not eliminate the fundamental fact that the remedy authorized by the Act is truly part and parcel of the criminal process.[9]

The imposition of larger fines, additional costs, or additional restitution, when applied to prior offenders, has uniformly been struck down as an *ex post facto* violation. This Court did so in *State v. Yost*, 507 So. 2d 1099 (Fla. 1987). In *Yost* legislation increased the amount of costs which could be taxed against offenders and imposed penalties on those who could not pay. This Court held that application of the penalties to those

---

9. *Cf. United States v. Price*, 65 F.3d 903 (11th Cir. 1995) (fines for cost of incarceration authorized by Federal Sentencing Guidelines).

whose crimes were committed before its enactment violated the *ex post facto* prohibition.[10]

The decision in *Yost*, as well as the *Maxwell* case, is fully consistent with the great weight of authority. Directly on point is *U.S. v. Elliott*, 62 F.3d 1304 (11th Cir. 1995), where the court found an *ex post facto* violation when a subsequently enacted statute was used to increase the amount of restitution. To the same effect is *U.S. v. DeSalvo*, 41 F.3d 505 (9th Cir. 1994). See also, *Government of Virgin Islands v. D.W.*, 3 F.3d 697, 700 (3d Cir. 1993)(in rejecting the imposition of a fine on a juvenile: "Nor are we persuaded by the government's argument that because juvenile proceedings serve a rehabilitative rather than a punitive function, any increase in punishment is outside the purview of the Ex Post Facto Clause"); *People v. Woodward*, 989 P.2d 188 (Col. Ct. App. 1999) (amended restitution statute cannot be applied retrospectively); *People v. Stead*, 845 P.2d 1156 (Col. S.Ct. 1993)(drug offender treatment sur-

---

10. The issue of whether the increased costs, without the penalties imposed on those who could not pay, would also violate the *ex post facto* clause was not raised in the *Yost* case.

charge, because it “changes the punishment” is an *ex post facto* law); *Petition of State*, 603 A.2d 814 (Del. S.Ct. 1992)(increases in Victims Compensation and Drug Rehabilitation Fund assessments, “because they are annexed to a criminal conviction” are subject to *ex post facto* restrictions); *State v. Beltran*, 170 Ariz. 406, 825 P.2d 27 (Ct.App. 1992) (increase in penalty assessment is a fine, subject to *ex post facto* restrictions); *Loomer v. State*, 768 P.2d 1042 (Wyo. 1989) (statute imposing costs of prosecution cannot be applied to those whose crimes were committed before its enactment); *Spielman v. State*, 298 Md. 602, 471 A.2d 730 (Ct.App. 1984)(statute providing for restitution makes punishment for crime more burdensome and, therefore, cannot be applied to crimes committed before its enactment); *Matter of Appeal in Maricopa Cty. Juv. Action*, 139 Ariz. 170, 677 P.2d 943 (Ct.App. 1984) (statute that permits fine and restitution orders in juvenile cases cannot be applied to prior offenses); *State v. Davis*, 645 S.W.2d 160 (Mo. Ct.App. 1982) (Crime Victims Compensation Fund assessment limited by *ex post facto* restriction); *Cox v. State*, 394 So. 2d 103 (Ala. Cr. App. 1981)(newly

enacted restitution statute cannot be applied to crimes committed before its enactment); *Burello v. Com. State Emp. Retirement System*, 411 A.2d 852 (Pa. Commw. 1980)(statute disqualifying state employees from the receipt of pension benefits upon conviction of a felony violates *ex post facto* restriction when applied to former employee whose pension rights have vested).

The First District Court of Appeal's reliance on *People v. Rivera*, 65 Cal. App. 4th 705, 76 Cal. Rptr.2d 703 (Cal. App. 3d Dist. 1998) and *Taylor v. Rhode Island*, 101 F.3d 780 (1st Cir. 1996), *cert. denied*, 521 U.S. 1104 (1997), is misplaced. Both are easily distinguishable. Indeed, the same court that decided *Rivera* made the distinction, which is equally applicable to *Rivera* and *Taylor*, in *People v. Tran*, 67 Cal. App. 4th 1320, 1326, 79 Cal. Rptr. 2d 770, (Cal. App. 3d Dist. 1998), where it said: "We note this restitution fine is different from the jail booking and classification fees which we held did not constitute punishment for *ex post facto* purposes, in *People v. Rivera* (1998) 65 Cal. App. 4th 705. We concluded the fees were administrative costs and did not promote the traditional aims

of punishment — retribution and deterrence — in the same way a restitution fine does." Moreover, *Rivera* and *Taylor* are inconsistent with the great weight of authority cited above.

The claim imposed by Section 960.297 is clearly part of a punitive scheme. It imposes substantial costs on an offender that, before its enactment, were not imposed. Thus, if applied to Mr. Goad, it would violate the prohibition on *ex post facto* laws. On the date Mr. Goad committed his crimes, he was not required to pay for the cost of his incarceration. As a result of subsequently enacted legislation, he is now liable for in excess of $107,000, a sum which continues to grow by $50.00 every day. There can be no dispute that the State has, after the fact, decided to treat more harshly those who commit crimes. It has acted to increase the quantum of punishment. This after the fact increase in the quantum of punishment satisfies the two critical elements that must be present for a law to violate the *ex post facto* prohibition: "The law must apply to events occurring before its enactment, and it must disadvantage the offender." *Waldrup v. Dugger*, *supra*, 562 So. 2d at 691.

A law that operates only in the context of a criminal conviction and resulting incarceration is a penal law, no matter the language the Legislature chooses to use. The Civil Restitution Lien and Crime Victims' Remedy Act drastically changes the legal consequences of the criminal acts committed by Mr. Goad long before its adoption. Section 960.293(2)(b) certainly increases the actual amount of punishment inflicted on Mr. Goad. And that is precisely what the State intended to do when it decided that those who committed crimes deserved to pay. Because section 960.297 imposes a substantial monetary liability which did not exist at the time of his crimes, section 960.297 clearly alters the penalty imposed on Mr. Goad and, therefore, violates the prohibition on *ex post facto* laws of both the Florida and United States Constitutions.

II.

DUE PROCESS BARS THE APPLICATION OF LEGISLATION TO MR. GOAD THAT ATTACHES NEW LEGAL CONSEQUENCES TO EVENTS COMPLETED BEFORE THE LAW'S ENACTMENT

"The general rule [of statutory construction] is that a substantive statute will not operate retrospectively absent clear legislative intent to the

contrary, but that a procedural or remedial statute is to operate retrospectively." See *Life Care Centers v. Sawgrass Care Center*, 683 So. 2d 609, 613 (Fla. 1st DCA 1996), quoting *State Farm Mutual Automobile Insurance Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995). "Statutes that relate only to procedure or remedy generally apply to all pending cases," but a substantive law that interferes with vested rights will not be applied retrospectively. See *Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 477 (Fla. 1995).

The Civil Restitution Lien and Crime Victims' Remedy Act, §§ 960.29-297, *Fla. Stat.* (Supp. 1994) is clearly a substantive statute because it imposes an entirely new obligation. See *Alamo Rent-A-Car v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). And, by its terms, it is expressly meant to apply retrospectively. As this Court said in *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494 (Fla. 1999):

> At the outset, it should be noted that: A statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment .... Rather, the court must ask

> whether the new provision attaches new legal consequences to events completed before its enactment. . . . A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute.

737 So. 2d at 499 (citations and internal quotes omitted).

Under the *Metropolitan Dade County* standard, the Civil Restitution Lien and Crime Victims' Remedy Act obviously operates retrospectively in that it "gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute."

Even if it is designed to serve a remedial purpose, the Act cannot be applied retroactively when it is clear that doing so "would attach new legal consequences to events completed before its enactment." *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994). *See also Hassen v. State Farm Mutual Automobile Insurance Co.*, 674 So. 2d 106, 108 (Fla. 1996). An obligation approaching $400,000 is certainly a new legal consequence.

"Even when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute

retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mut. Auto. Ins. Co. v. Laforet*, *supra*, 658 So. 2d at 61. The Act creates new obligations and imposes new penalties. Therefore, under established Florida law, it cannot be applied retroactively.

Application of the standards set out in *Laforet* compels the conclusion that the cannot be applied retroactively to Mr. Goad because it creates new obligations and because it is, in substance, a penalty. Without question, the Legislature has expressly stated that the Act is remedial. "Just because the Legislature labels something as being remedial, however, does not make it so." *Laforet*, *supra*, 658 So. 2d at 61, citing *State v. Smith*, 547 So. 2d 613 (Fla. 1989); *State, Dep't of Transp. v. Knowles*, 402 So. 2d 1155 (Fla. 1981).

What this Court said in *Laforet* is equally applicable here:

> . . . although the Legislature has characterized section 627.727(10) as simply a remedial clarification of legislative intent, the damages incurred by State Farm under section 627.727(10) would be over $ 200,000 higher in this case than if the section did not apply to this action. Further, in addition to imposing a significant penalty on all insurers found guilty of bad

> faith, section 627.727(10) is an entirely new provision; it would apply to all actions brought under section 624.155 since its effective date in 1982 if it were to be applied retroactively; and it significantly alters the language used to determine damages. By implementing section 627.727(10), the Legislature is in essence subjecting insurance companies in first-party bad faith actions to two penalties because, not only are they subject to punitive damages for the willful or reckless refusal to pay a claim, they are also subject to a penalty for the wrongful failure to pay a claim. This means that an insurance company found to have acted in bad faith in a first-party action may now be liable for: (1) damages proximately caused by the bad faith including interest, attorney's fees, and costs; (2) a penalty consisting of the entire amount of the excess judgment without regard to proximate causation; and (3) the additional penalty of punitive damages when the bad faith is found to be willful or reckless. To say that, under these circumstances, section 627.727(10) is simply a remedial clarification that does not retroactively impose a new penalty is not a justifiable interpretation.

658 So. 2d at 61.

Metropolitan Dade County v. Chase Fed. Hous. Corp., *supra,* also compels the conclusion that the Act cannot be applied to Mr. Goad. This Court said, “A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein vested rights are adversely affected or destroyed ***or when a new obligation or duty is created or***

imposed, or an additional disability is established, on connection with transactions or considerations previously had or expiated." 737 So. 2d at 503 (emphasis added). Because the Civil Restitution Lien and Crime Victims' Remedy Act imposes a new and substantial obligation on Mr. Goad, it cannot be applied retroactively.

CONCLUSION

Because the First District Court of Appeal certified conflict, this Court has jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const. (1980).

Petitioner respectfully requests that this Court exercise its discretionary jurisdiction, find that the Civil Restitution Lien and Crime Victims' Remedy Act imposes a penal sanction and, therefore, cannot be applied to Petitioner because of the prohibition on *ex post facto* laws. Alternatively, because the Act imposes a new obligation on the Petitioner, he respectfully submits that the due process clause, as applied in *State Farm Mut. Auto. Ins. Co. v. Laforet* and *Metropolitan Dade County v. Chase Fed. Hous. Corp*. precludes application of the Act to those whose crimes were committed before it enactment.

Because both the ex post facto clause and the due process clause preclude application of the Act to Mr. Goad, the decision of the First District Court of Appeal should be reversed.

Respectfully submitted,

Peter M. Siegel, Esq.
Randall C. Berg, Jr., Esq.

Florida Justice Institute, Inc.
2870 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2310
305-358-2081
305-358-0910 (FAX)

Attorneys for Petitioner

____

By: Peter M. Siegel, Esq.
Florida Bar No. 227862

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document has been mailed to Charlie McCoy, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Suite PL-01, Tallahassee, Florida 32399-1050, on July 22, 2002.

____
Peter M. Siegel, Esq.