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)))

REPLY BRIEF OF PETITIONER

S)))

Respectfully submitted,

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STATEMENT CERTIFYING SIZE AND STYLE OF TYPE

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

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Peter M. Siegel, Esq.

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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

A. Conflict Jurisdiction

Article V, Section (b)(4), Florida Constitution, grants this Court the power to review a decision of a District Courts of Appeal "certified ... to be in direct conflict with a decision of another district court of appeal." The First District Court of Appeal certified direct conflict with *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, Department of Corrections v. Goad*, 754 So. 2d 95, n. 1 (Fla. 1st DCA 2000).

Respondent's suggestion that the First District Court of Appeal was wrong when it recognized conflict is truly unpersuasive. In *Gary*, the Fourth District Court of Appeal, addressing the application of the Civil Restitution Lien and Crime Victim's Remedy Act of 1994, §§ 960.29-960.297, *Fla. Stat.* (Supp. 1994), held that "[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 this case, it was error to impose such upon appellant." In *Alberts* the Second District

Court of Appeal held, as an alternative, that § 960.292(2) of the Act could not be applied to Tina Alberts "because her offense . . . was committed prior to the effective date of that statute." By contrast, the First District Court of Appeal held that restitution was not punishment and, therefore, could be imposed on an individual whose offenses were committed prior to the effective date of the statute.

The Department's argument that there is no conflict because *Gary* and *Alberts* addressed restitution payable to the offenders' victims whereas the restitution here at issue is payable to the State is, as the First District Court of Appeal implicitly recognized, a distinction without meaning. The authorization for restitution is § 960.292, *Fla. Stat.* (Supp. 1994), whether the restitution is paid to the victim or to the State. In *Gary* the Fourth District Court of Appeal specifically referred to the restitution authorized by the Act as "punishment." In *Goad*, the First District Court of Appeal specifically held that the restitution authorized by the Act was not punishment. In both *Gary* and *Alberts*, the respective District Courts of Appeal held that the Act could not be applied to those whose offenses were committed before the adoption of the Act. In *Goad*, the Second District Court of Appeal held that it could. The conflict is obvious.

Because, as the First District Court of Appeal correctly held, there is direct and express conflict between its decision and the decisions of the Second and Fourth District Courts of Appeal, this Court has the jurisdiction to hear this appeal.

B. Retrospective Application

At issue in the instant case is § 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 mandated by § 960.293(2)(b), *Fla. Stat.* (Supp. 1994) "for the convicted offender's remaining sentence after July 1, 1994." If § 960. 297(2) can be applied to Mr. Goad, he will owe the State nearly $400,000 by the time he is released from prison.

Respondent's argument that § 960.297(2) is not retrospective founders on *Weaver v. Graham*, 450 U.S. 24 (1981) and *Britt v. Chiles*, 704 So. 2d 1046 (Fla. 1997). In *Weaver*, as it does here, the Department 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 affirmative. The ... provision attaches legal consequences to a crime committed before the law took effect." 450 U.S. at 31. In *Britt*, the Department of Correc-

tions adopted a rule which precluded an inmate from earning incentive gain-time for six months after the commission of a disciplinary infraction. As in the case *sub judice* and as in *Weaver*, the Department argued that application of the new rule did not violate the ban on *ex post facto* laws because the rule altered penalties associated with prison misconduct occurring after its enactment. This Court rejected the argument. *Weaver* and *Britt* fully, and unequivocally, rebut Respondent's contention that the Civil Restitution Lien and Crime Victim's Remedy Act of 1994 is not retrospective when applied to an individual whose offenses were committed before its enactment.

To avoid *Weaver* and *Britt*, the Department argues that the Act is not retroactive because it simply draws upon antecedent facts, citing for support several recidivist and habitual offender cases. Recidivist statutes have been upheld because:

> the increased severity of the punishment for the second or subsequent offense is not a punishment of the person a second time for his former offenses, but is a more severe punishment for the last offense, the commission of which is a manifestation of a criminal habit which may be taken into account in determining the adequacy of punishment to be imposed upon habitual offenders for offenses committed subsequent to the enactment of the statute. But for the commission of the subsequent offense, the enhanced penalty would not be imposed.

Cross v. State, 96 Fla. 768, 119 So. 380, 385 (1928).

So too, under the habitual offender statutes, "the law simply prescribes a longer sentence for the subsequent offense. The increased punishment authorized by the statute is an incident to the last offense for which conviction was obtained." *Washington v. Mayo*, 91 So.2d 621, 623 (Fla. 1957).

The application of the Civil Restitution Lien and Crime Victim's Remedy Act of 1994 to Mr. Goad is not triggered by any new conduct on his part. Respondent's argument that "[s]ection 960.297 does not focus on pre-enactment crimes"[1] is just wrong. The difference between a constitutionally unobjectionable recidivist or habitual offender statute and § 960.297 is something called "notice" and "fair warning." *Rollinson v. Florida*, 743 So.2d 585, 588 (Fla. 4th DCA 1999). As the *Cross* Court recognized, a recidivist statute could not be applied where all the offenses were committed prior to its adoption. 119 So. at 783. All of Mr. Goad's offenses were committed prior to the adoption of § 960.297. The First District Court of Appeal, as did the Second and Fourth District Courts of Appeal, got it right. Section 960.297 is retrospective when applied to an individual such as Mr. Goad, whose crimes were committed before its enactment.

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1. Respondent's Brief, p. 8.

C. Punishment

The question here is whether the Legislature can, by the use of the magic word "civil" convert what is plainly part and parcel of the criminal justice system into an ordinary action for money damages. No case from this Court, or from the United States Supreme Court, supports such a radical departure from the commonly understood difference between criminal and civil penalties.

Under the rationale advanced by the Department, the State could impose the death penalty, or any other obviously punitive measure, as part of a civil remedy so long as it clearly declared that it was doing so for a remedial, and not a punitive reason. Absurd? Of course! Sanctions which have historically been deemed punitive cannot, by way of legislative legerdemain, suddenly become remedial. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (loss of citizenship has historically been considered a punitive sanction).

Contrary to the Department's argument, the factors identified in *Kennedy v. Mendoza-Martinez* offer very limited help toward solving the criminal versus civil issue herein presented. Some of the factors suggest that the lien for costs of incarceration is punitive, including:

A. "[W]hether it has historically been regarded as a punishment." 372 U.S. at 168. As indicated in Petitioner's Initial Brief, restitution has always

been considered a form of punishment under both state and federal law. See, e.g., *State v. Champe*, 373 So.2d 874, 880 (Fla. 1978); *United States v. Siegel*, 153 F.3d 1256, 1259-1261 (11th Cir. 1998).

B. "[W]hether it comes into play only on a finding of *scienter*." 372 U.S. at 168. Since Section 960.297 is only triggered by a conviction and incarceration, scienter is implicit.

C. "[W]hether its operation will promote the traditional aims of punishment — retribution and deterrence." 372 U.S. at 168. If the threat of punishment acts as a deterrent, then the possibility of leaving prison with a large debt is certainly a deterrent, as the federal courts have held. See, e.g., *United States v. Turner*, 998 F.2d 534, 536 (7th Cir. 1993).

D. "[W]hether the behavior to which it applies is already a crime." 372 U.S. at 168. The Civil Restitution Lien and Crime Victim's Remedy Act of 1994 is only triggered by a conviction and sentence to a term of incarceration.

Other factors identified in *Kennedy v. Mendoza-Martinez* suggest that the Civil Restitution Lien and Crime Victim's Remedy Act of 1994 is civil, including:

A. "Whether the sanction involves an affirmative disability or restraint." 372 U.S. at 168. If "affirmative disability or restraint" is limited to

incarceration, then this factor certainly points toward the Civil Restitution Lien and Crime Victim's Remedy Act of 1994 as being a civil sanction. However, given the size of the judgment which can be rendered, it is certainly arguable that the Act imposes an affirmative disability. And that is particularly true when it is recognized that the real impact of the Act is to insulate the State from its own tortious conduct.

B. "[W]hether an alternative purpose to which it may rationally be connected is assignable for it." 372 U.S. 168-69. This factor supports the claim that the Act imposes a civil sanction.

C. "[W]hether it appears excessive in relation to the alternative purpose assigned." 372 U.S. at 169. This factor is an indicator that the Act is a civil sanction based on the holding of Ilkanic v. City of Fort Lauderdale, 705 So.2d 1371 (Fla. 1998).

As the Court admitted in *Kennedy v. Mendoza-Martinez*, the factors therein identified "may often point in differing directions." 372 U.S. at 169. That is certainly true here, although the historical record certainly suggests that Civil Restitution Lien and Crime Victim's Remedy Act of 1994 should be regarded as penal, both because restitution has always been regarded as a criminal sanction and because the effect of the Act is a return to the punitive conditions imposed on

prisoners in medieval England and colonial America. In those times, jails — which primarily held individuals awaiting trial — were run as a private enterprise. Confinement was not free. Prisoners were expected to pay for food, water and even bedding. If, at the completion of a prisoner's stay, the prisoner could not pay any remaining debt, often the jailer would continue to confine the prisoner." Note, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 Stan. L. Rev. 839 (1999). See also, Russell, *Privatisation of Prisons*, 137 New Law Journal No. 6294, p. 193 (London 1987) ("Medieval prisons theoretically belonged to the King, who made no contributions from the national exchequer towards thier running costs. Fees extracted from prisoners provided revenue for the prison which was expected to be self supporting. The keepers of the prison took on the appointment to make a profit."). When "modern" prisons first developed, early in the nineteenth century, one of the most significant differences was that the prisoners were not required to pay fees, the prison was no longer a business, but a state-run institution. Hatfield, *Criminal Punishment in America: From the Colonial to the Modern Era*, 1 USAFA J. Legal Studies 139 (1990).

If the historical record is not sufficient, how is the Court to distinguish a legitimate civil sanction from a disguised criminal penalty? The most obvious way

to distinguish the civil from the penal is, as suggested in Petitioner's Initial Brief, by requiring a civil sanction to have an independent existence not solely dependent on the commission of a crime, a criminal conviction and a sentence of incarceration, to trigger the application of the civil sanction. Consistent with Petitioner's suggestion, an examination of the cases relied upon by the Department shows that the civil remedies sustained in those cases all have an independent existence. Petitioner is unaware of any case, from this Court, or from the United States Supreme Court, which has ever concluded that a sanction is civil, not criminal, when its only trigger is a criminal conviction and resulting incarceration.

Thus, the fundamental flaw in the Department's argument is the failure to recognize that the statutory authorization for the State to recover costs of incarceration exists only as a result of a criminal conviction and resulting incarceration. A penalty requiring such a trigger can never be a civil penalty.

Helvering v. Mitchell, 303 U.S. 391 (1938), the first case to extensively address the issue of whether a particular sanction is civil or criminal, held that the taxpayer who files a fraudulent return, even when acquitted of criminal charges, can be forced to pay a civil penalty. Mr. Justice Brandeis noted that "[i]n spite of their comparative severity, such sanctions have been upheld against the contention that

they are essentially criminal and subject to procedural rules governing criminal prosecutions." 303 U.S. at 400.

In support of the conclusion that criminal and civil penalties could co-exist, the Supreme Court cited 29 of its own decisions and 35 lower court decisions. In each and every one of the cited cases, imposition of the civil sanction did not, as a condition prerequisite, require a criminal conviction.

A second way to distinguish civil from criminal sanctions is to keep in mind that civil remedies reimburse victims for losses incurred as a result of the offender's criminal conduct, whether the victim is a private individual or a state. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). None of Mr. Goad's crimes, however, caused loss to the State. Rather, all the expenses incurred by the State were, and continue to be, part and parcel of the criminal proceedings against Mr. Goad.

That the cost of incarceration is part and parcel of the criminal justice system, and not some free-standing civil cause of action, finds recognition in the history of penal reform in America, as discussed *supra*, at page 9. It also finds recognition in the Federal Sentencing Guidelines, which require offenders to pay for their cost of incarceration by way of fines imposed at the time of sentencing. See e.g., *United States v. Price*, 65 F.3d 903 (11th Cir. 1995), *cert. denied*, 518 U.S.

1017 (1996); *United States v. Turner*, 998 F.2d 534 (7th Cir. 1993); *United States v. Doyan*, 909 F.2d 412 (10th Cir. 1990).

To the extent the law so permitted at the time of Mr. Goad's crimes, neither the ban on *ex post facto* laws, or any other provision of the Federal or Florida Constitutions prevented sanctions which included the cost of incarceration. But, to the extent the law did not authorize the imposition of costs of incarceration on a offender, the *ex post facto* clause prevents so doing on an after the fact basis.

II.

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

If liability for costs of incarceration is a punitive sanction, as Mr. Goad contends, then the ban on *ex post facto* laws precludes its application to him. On the other hand, if liability for costs of incarceration is a civil sanction not subject to the *ex post facto* ban, as the Department contends, then under Florida law it cannot be applied to events completed before its enactment. *State Farm Mutual Automobile Insurance Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

Respondent's reliance on *Ilkanic v. City of Fort Lauderdale*, 705 So. 2d 1371 (1998) is misplaced. Because it appears that Eric Ilkanic's trespass offense

was committed after enactment of the Civil Restitution Lien and Crime Victim's Remedy Act of 1994, there was no occasion to consider whether retroactive application of the Act implicated due process.[2]

Remarkably, and most telling, the Department does not even make an effort to distinguish cases such as *State, Dep't of Transp. v. Knowles*, 402 So. 2d 1155 (Fla. 1981); *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994); *State Farm Mutual Automobile Insurance Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995) or *Hassen v. State Farm Mutual Automobile Insurance Co.*, 674 So. 2d 106, 108 (Fla. 1996). In fact, the instant action cannot be distinguished from *Laforet*. If State Farm cannot be forced to pay an additional $ 200,000 in damages as a result of a change in law, then Ollie James Goad cannot be forced to pay an even greater amount as a result of a change in the law. 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

2. Neither this Court's decision, nor the decision of the Fourth District Court of Appeal, set forth the date of Mr. Ilkanic's offense. However, given the docket numbers in both courts, and the absence in both courts of any reference to retrospective application, it seems apparent that the offense occurred after the adoption of the Act.

Because both the prohibition on *ex post facto* laws and the due process clause preclude application of the Civil Restitution Lien and Crime Victim's Remedy Act of 1994 to Mr. Goad, the decision of the First District Court of Appeal should be reversed.

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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.

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Peter M. Siegel, Esq.