IN THE SUPREME COURT OF FLORIDA

JAMES V. CROSBY, JR., Secretary
Florida Department of Corrections,

Petitioner,

v.

CLARENCE W. DOWNS,

Respondent.
_____/

Case No. SC04-1153
L.T. Case No. 2D03-4364

ANSWER BRIEF OF CLARENCE W. DOWNS

_____

On Review from the District Court
of Appeal, Second District,
State of Florida

_____

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Introduction and Preliminary Statement

This appeal has been accepted by this Court on discretionary review of the Second District's decision in ***Downs v. Crosby***, 874 So. 2d 648 (Fla. 2d DCA 2004) on the basis of conflict with ***McBride v. Moore***, 780 So. 2d 221 (Fla. 1st DCA 2001).

In this appeal, Petitioner JAMES V. CROSBY, Secretary, Florida Department of Corrections shall be referred to as "DOC." Respondent, CLARENCE W. DOWNS, shall be referred to as "DOWNS."

Subsequent to the entry of the decision of the Second District, Motions to Recall Mandate and for Stay were denied. A Motion to Enforce the Mandate and require that the lower tribunal rule on the original Petition was granted by order of the Second District Court of Appeal, which Order was later vacated as during the interim DOWNS had his petition heard by a trial judge and had been released. ***Downs v. Crosby,*** 882 So. 2d 542 (Fla. 2d DCA 2004) As that determination was not appealed, DOWNS would suggest that as to him, the issues contained within this appeal are moot and would request that whatever decision is reached – affirmance or reversal- it be made clear that the decision has no application to Mr. Downs as his issues with the DOC have concluded (thus relieving him of any potential need to deal with these issues at the United States Supreme Court level.)

This Court certainly has the ability to resolve this issue of great importance under ***Holly v. Auld***, 450 So. 2d 217 (Fla. 1984)

Respondent shall use Petitioner's Appendix for Record references and same shall be designated (App.)

All emphasis in this brief is added unless otherwise noted.

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Statement of the Facts and Case

The operative facts in this case are few. DOWNS does not dispute the facts set forth by the Petitioner in its main brief. However, DOWNS would add the facts set forth in his preliminary statement- those being that since the entry of the mandate related to the decision on review he has been released and that release was not challenged on appeal. As a result, as to DOWNS, this appeal should be moot.

Summary of the Argument

The cases in conflict with DOWNS failed to consider ex post facto factors when holding that retroactive application of legislative amendments to F.S. §944.277(1)(g) made in 1992 to expressly add a class of inmate to those ineligible for provisional release credits. Those cases were decided based upon a now overruled decision of this Court and therefore are no longer good law for when one considers the ex post facto application of the 1992 amendments it becomes clear that one cannot retroactively add a class of people who at the time of their offense were eligible for credits to the class of those who are not without running afoul of the constitutional prohibition. DOC attempts to hold the other decisions to be the law that this Court should adopt by reaching out to an argument that the legislative change that expressly added an entirely new class of people wasn't really doing that- it was just "clarifying the old law" that had been misconstrued by the Courts.

One can only clarify something that is ambiguous. The original 1988 statute was not ambiguous. The later legislative change was just that, a change. It may have added something that the legislature overlooked- but one can be sure that there are many laws that the legislature wishes it had passed each session and it is not free to pass them the following year when they realize that they REALLY should have done it the year before and retroactively apply them.

DOC has regularly attempted to lure this Court into violating the ex post facto prohibition against retroactive cancellation of release credits of one kind or another. Each time to date those attempts have resulted in reversal by the United States Supreme Court. This Court should not be lured by this overreaching argument that a significant legal change was nothing new. Nothing in the record supports it. The plain language of the statute before and after refutes it.

The District Court in this case beautifully laid out the law relative to reasons why it would have been an ex post facto violation to apply the 1992 amendment to Mr. Downs. This Court should affirm its analysis.

ARGUMENT

The Second District Court of Appeal Was Entirely Correct in its Determination That the 1992 Amendment to F.S. 944.277(1)(g) Could Not be Applied to Offenses That Occurred Prior to its Effective Date Without an Ex Post Facto Violation

DOC argues, as it has continuously in the history of proceedings dealing with attempts to take away gain time already statutorily made available to offenders at the time of the commitment of their offenses, that there is no ex post facto issue when a subsequently enacted piece of legislation would warrant a different result when applied to a particular defendant. That position, accepted by this Court on more than one occasion and reversed each time by the United States Supreme Court, has no merit. The DOC's argument that a substantial change in the wording of a statute that gives it an entirely different plain meaning (even if the legislature had, *maybe*, meant to say that in the first place although there is no real evidence on that issue) is "clarifying" and therefore can be retroactively applied stretches the word "clarifying" way too far.

DOC concedes at page 8 of its brief that the Legislature should not be allowed to retroactively change the law by simply asserting that it is "Clarifying its intent." That, however, is exactly what DOC seeks to have this Court accept in this case.

What is clear is that at the time of DOWNS original offenses, at the time when he accepted a plea bargain and was sentenced, the law relative to the application of credits permitted the application of the questioned credits unless at that time the inmate:

> **is sentenced,** or **has previously been sentenced under s. 775.084** (habitual offender statute) or has been sentenced at any time **in another jurisdiction** as a habitual offender §944.277(1)(g), Fla. Stat. (supp. 1988)

However DOC chooses to place its emphasis, and it certainly did emphasize different aspects of those words than does DOWNS, by the plain reading of the above language if an inmate had never been sentenced as a habitual offender in another jurisdiction, was not being sentenced as a habitual offender in the offense then before the sentencing judge, or had not been previously sentenced under s. 775.084 they were entitled to credits. Period. Those were the only exclusions. DOWNS knew that when he made his contract with the State in accepting the plea bargains in his first offenses. The Judge knew it when he sentenced DOWNS for those offenses (and one would expect considered it in the term length awarded.)

Without question, in 1992 the Florida Legislature amended the wording of the statute to create language which would potentially make an inmate ineligible for credits if they were later sentenced as a habitual offender since they make an inmate ineligible for credits if AT ANY TIME the inmate is sentenced as a habitual offender. That happened, however, AFTER DOWNS sentencing.

The record in this case does not include the legislative analysis discussed in the brief of appellant. DOC makes the bold statement on page 15 that the legislature had a "rather apparent intent" that habitual offenders not be released early when overcrowding occurred in the 1988 statute cited above and avers that the "apparent intent" was ignored when following the plain reading of the Statute the First District decided ***Dugger v. Anderson***, 593 So. 2d 1134 (Fla. 1DCA 1992). A review of that case, however, makes it clear that the Court found no ambiguity and did not "interpret" the statute- rather it did what it was supposed to do- enforce it as written.

DOC opines that the misreading of the Statute lead to a belief that the policy of the Florida Legislature would have a different treatment for a person who was at any time found to be a habitual offender in another State from one held in this State. That contorted logic asks us to believe that the Legislature considered that this Court would be sentencing someone who AFTER being sentenced here as a non habitual offender was sentenced as a habitual offender somewhere else and as a result of that we were going to eliminate the gain time credits in Florida. But, if that person were serving time…. How did they get sentenced later in that other State? It is hard to believe that there was a reasoned discussion for the disparate treatment- rather what is more likely is that what was considered was that no matter how remote the incident had been if a person had been sentenced in any

other jurisdiction as a habitual offender we were not going to give them a break here with these credits. The Statute, as written, made sense. The only way that the language in the statute made grammatical sense would be to break it down with plain meaning- an inmate would lose eligibility for the credits if the current sentence was as a habitual offender or a prior sentence under that particular statute had been (the purely Florida alternative) or at sometime somewhere that party had been sentenced as a habitual offender. It is doubtful that the potential for a later habitual offender crime in another state had even been considered. No legislative materials were provided to back up that premise.[1]

DOC, not liking the result that if a party became a habitual offender in a later sentencing their earlier sentences could still be subject to credits, did apparently seek legislative CHANGE to undo the plain reading of the statute so correctly decided in ***Anderson***. Additional language was added to the Statute that did not clarify one of the prior classes but added a new class of persons to those who were ineligible for credits during the 1992 legislative session.

[1] In fact, the "clarification" that was made in 1992 is more ambiguous than it should be… it would have been far better to eliminate these gain time credits if a party was later sentenced as a habitual offender directly than using the "at any time" because then it rendered superfluous the preceding sentence fragment. That being said, any ambiguity on that issue has been dealt with by court decisions made since 1992 clearing up the meaning of that Statute for those whose offenses took place after its effective date. All persons who are sentenced for any crime know that if they later are sentenced as habitual offenders they will not be eligible for credits on any of their current sentences- no surprises come up later and it is factored into their plea decisions.

While the Fifth District in ***Mamone v. Dean***, 619 So. 2d 36 (Fla. 1st DCA 1992) stated that the legislature had "remedied" the statute to show its "clear intent" that decision failed to appropriately consider the ex post facto application when applying that "intent" to inmates who, like DOWNS, had preexisting sentences and provided no basis for its finding that the statute was "remedial" rather than a change. The ***Mamone*** Court may have reached a different conclusion but for its easy dismissal of ex post facto factors. In fact, in ***McBride v. Moore***, 780 So. 2d 221 (Fla. 1st DCA 2001) the First District noted that the ex post facto argument could be disposed of BECAUSE of this Courts now overruled decision in ***Dugger v. Rodrick***, 584 So. 2d 2 (Fla. 1991). Perhaps had ***Rodrick*** not been deemed controlling, the First District would have reached the same correct conclusion reached by the District Court in DOWNS.

Art. I, § 10 of the Florida Constitution prohibits ex post facto laws. That provision has with great regularity been applied to attempts by DOC to retroactively knock out various types of gain time awarded by statute to inmates. This case is simply one more example of those continuing invalid attempts.

In December of 1998 this Court entered a series of opinions all of which lead to the inescapable conclusion that the DOWNS decision must be affirmed. In ***Gomez v. Singletary***, 733 So. 2d 499 (Fla. 1998) this Court exhaustively discussed the ex post facto issues related to provisional credit statutes. In its conclusion,

Justice Harding writing for the majority noted that "This Court has repeatedly accepted the State's view concerning retroactive legislation restricting gain time. Each of those times the United States Supreme Court vacated our decisions." This Court noted that when a new provision in a statute constricted an inmate's opportunity to earn early release- for whatever reason- it ran afoul of the prohibition against ex post facto laws. In ***Meola v. DOC***, 732 So. 2d 1029 (Fla. 1998) this Court spoke to the acknowledgment that the United States Supreme Court in ***Lynce v. Mathis***, 519 U.S. 433 (1997) had made it clear that overcrowding credits were, in fact, a type of credit that would be subject to an ex post facto evaluation and, in fact, noted that it was a factor directly considered in plea bargains and sentencing. Significantly ***Lynce***, declared invalid the ex post facto application of a legislative "clarification" such as the one herein where a class of prisoners who were previously eligible under a statute were made ineligible. In ***State v. Lancaster***, 731 So. 2d 1227 (Fla. 1998) this Court expressly discussed that the decision in ***Lynce*** mandated a holding that ex post facto principles do apply to overcrowding credits. In ***Lancaster*** Justice Overton writing for the majority noted that "it must be recognized that neither the legislature, the attorney general, nor this Court has been able to convince the United States Supreme Court that the Ex Post Facto Clause in the United States Constitution does not apply to gain time statutes." The case which DOC urges this Court to now

accept as the law in Florida completely dismissed the ex post facto argument as already disposed of against the inmate. That decision cannot be affirmed. And, there is nothing that would indicate that had that District Court not been under the misapprehension that it could not and should not consider the ex post facto factors it would not have reached the same conclusion that the court did in DOWNS- that the constitutional issue trumps any attempt to create a "clarification" when what actually happened was the correction of a "whoops we missed that" from a clear piece of previously passed legislation.

The DOC has now raised a new and unique method to once again try to get around the ex post facto application argument by saying that a legislative amendment, made four years after the prior enactment, was a "clarification" when it added an additional class of inmates who would be ineligible for credits. It is essentially the same argument that this Court did not accept in ***State v. Smith***, 547 So. 2d 613 (Fla. 1989). When a statute changes as a result of a judicial interpretation that is correct for the statute as written- even if it is an attempt to more correctly state original legislative intent- it would be an ex post facto application to retroactively apply the new statute to pre statute offenses because it was a new statute that would only legally be effective as to those offenses that came after it. As noted by then Justice Barkett, "a future legislature may simply be wrong in its assessment of what a prior legislature actually intended."

The fact that in 1992 additional language was added to add a class of offenders does not mean necessarily that in 1988 and before that class had been considered and were meant to be included but had been excluded by a bad legal reading of an ambiguous statute. There is nothing ambiguous about the 1988 statute. The legal interpretations were not wrong. The legislature's change cannot be retroactively applied.

While correctly citing ***Winkler v. Moore***, 831 So. 2d 63 (Fla. 2002) for the proposition that a legislature may not by legislative enactment retroactively change a person's sentence to their detriment, DOC then misreads the lesson when it argues that the 1992 amendments were really somehow applying pre 1992 law despite the clear wording of the 1988 statute.

As earlier noted, DOC cites to a bill analysis at page 22 of its brief that is nowhere part of this record. It avers that the analysis mentions an "erroneous interpretation" but DOWNS suspects (without having a copy of that analysis) that perhaps the analysis only notes how the statute had been analyzed without the "erroneous" connotation actually being within the analysis. There is no legislative intent in the bill that was passed- nothing to specify that it was a clarification. All we have is a new class of ineligible inmates- whose application to be constitutional must be held to be prospective only.

The case in conflict with the case at bar, ***McBride v. Moore***, 780 So. 2d 221 (Fla. 1st DCA 2001), dismissed any consideration of ex post facto application as a result of the now defunct ***Dugger v. Roderick.*** That constitutional consideration is a primary consideration which the District Court in DOWNS thoroughly outlined in its decision and found dispositive. The secondary finding in ***McBride v. Moore***, that the new statute was a reaction to ***Anderson*** did NOT find that there was an application of "old law." What that court stated was that the statute in question had been amended to show an intent that habitual offenders be included. But for ex post facto application considerations, it would be within the legislature's prerogative to do so. However, since it is clear that ex post facto application factors must be applied to this question, the only Court that has done so and done so properly is the court in DOWNS.

Conclusion

For the above stated reasons, the Decision of the Second District Court of Appeal herein should be affirmed, and all conflicting opinions quashed.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been mailed this 31st day of March, 2005 to Barbara Debelius, Esq., Assistant Attorney General, Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399-2500.

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