IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

CLARENCE W. DOWNS, DC# 251539

Respondent.

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

PETITIONER DEPARTMENT OF CORRECTIONS' MERITS BRIEF

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

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STATEMENT OF THE CASE AND FACTS

A. Preliminary Statement: The petitioner, Secretary James V. Crosby, Jr., will be referred to as the Florida Department of Corrections or "DOC"; the respondent, Clarence Downs, will be referred to by his last name. There was no record on appeal prepared by the Second District for its certiorari proceeding as it was an original proceeding. This Court's order of December 6, 2004, indicates that the record will not be sent by the Second District to this Court until after this brief is due. Further, the Second District has informed the undersigned that when its submits the record to this Court the pages will not be numbered. Thus, for the convenience of the Court and the parties, counsel for DOC has prepared a page-numbered appendix (of the most relevant documents which were part of the record in the Second District) and will refer both to the description of the document and the page number of DOC's appendix.

B. Jurisdiction:

This case is before the Court on discretionary review of the Second District's decision in Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004) (ex post facto violation occurs when DOC retroactively applies 1992 clarifying legislation to make Habitual Offenders ineligible for overcrowding credits). This

Court has granted review to DOC on the basis of conflict with the First District's decision in McBride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001) (Ex Post Facto clause is NOT violated when DOC retroactively applies 1992 clarifying legislation to make Habitual Offenders ineligible for overcrowding credits because clarifying legislation made it clear that the intent of the prior law was to preclude an award of provisional release credits if the defendant is sentenced as an Habitual Offender at any time).

C. Facts:

1. Downs was sentenced to serve a number of 1991 concurrent "Guidelines sentences" totaling 12 years. **See Habeas Petition - Doc. 2 - App. at 5-6.**[1] After he finished serving those sentences, he had a consecutive 15-year Habitual Offender sentence to serve in a 1992 case. Id. This meant he had an overall 27-year prison term. (12 + 15 = 27). The following page sets forth in more detail the criminal offenses/sentences at issue in this case: See Habeas Petition - **Doc. 2 - App. at 5-6.**

[1] The documents numbered 1 thru 5 contained in DOC's appendix to this Brief were also included in the Appendix Petitioner filed with his Petition for Writ of Certiorari (originally entitled "Initial Brief of Appellant").

DOWNS' SENTENCES:

Total Prison Term = 27 yrs.

	OFFENSE DATE	OFFENSE	SENTENCE DATE	COUNTY	CASE NO.	PRISON SENTENCE LENGTH	TYPE OF SENTENCE
#1	01/19/1991	POSS. FIREARM BY FELON	4/07/1992	PINELLAS	91-1093	12 YRS	- GUIDELINES - CONCURRENT
#2	01/19/1991	AGG. ASSAULT	4/07/1992	PINELLAS	91-1093	5 YRS	- GUIDELINES - CONCURRENT
#3	4/10/1991	ROBBERY	10/22/1992	PINELLAS	91-6041	12 yrs	- GUIDELINES - CONCURRENT
#4	01/10/1992	ROBBERY	10/22/1992	PINELLAS	92-0464	15 yrs	★HABITUAL OFFENDER ★ CONSECUTIVE

2. In 2003, Downs informed DOC personnel that he believed he should be awarded prison overcrowding gain time (Provisional Credits) on the Guidelines sentences despite the fact that he had been subsequently adjudicated an Habitual Offender on his consecutive sentence. See Section 944.277(1)(g), Florida Statutes. **See** Internal Administrative Appeal Denial - **Doc. 1 - App. at 1-2.**

3. Also in 2003, DOC denied Downs' request citing McBride v. Moore 780 So. 2d 221 (Fla. 1st DCA 2001) (Ex Post Facto clause is NOT violated when DOC retroactively applies 1992 clarifying legislation to make Habitual Offenders ineligible for overcrowding credits because clarifying legislation made it clear that the intent of the prior law was to preclude an award of provisional release credits if the defendant is sentenced as an Habitual Offender at any time). **See** Internal Administrative Appeal Denial - **Doc. 1 - App. at 1-2.**

4. On July 10, 2003, Downs filed a Petition for Writ of Habeas Corpus/Alternatively Petition for Writ of Mandamus in the circuit court in Polk County. **See** Petition for Writ of Habeas Corpus - **Doc. 2 - App. at 3-15.**

5. On August 20, 2003, the circuit court denied the petition, agreeing with DOC that since Downs had been adjudicated an Habitual Offender, he was ineligible for Provisional Credits (on any of his sentences). **Doc. 3 - App. at 16-17.**

6. Petitioner appealed the case to the Second District Court of Appeal, see **Downs' Petition for Writ of Certiorari - App. at p. 27-44,** which treated his pleadings as a petition for writ of certiorari.[2]

7. On April 23, 2004, the Second District granted the petition for writ of certiorari and quashed the circuit court's order denying the petition for writ of habeas corpus in a written opinion containing directions that the court re-consider the petition for writ of habeas corpus "in accordance with section 944.277(1)(g), Florida Statutes (1991) [the version of the overcrowding gain time (Provisional Credits) statutes in effect when Downs committed his guidelines offenses], **as interpreted by Duggar v. Anderson**, 593 So. 2d 1134 (Fla. 1st DCA 1992)." See 2d DCA's Written Decision/Opinion in Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004)- **Doc. 12 - App. at 83-87.**

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[2] See Downs Notice of Appeal - **Doc. 5 -App. at 22-24**; 2d DCA Order advising that Appeal will be Treated as Petition for Writ of Certiorari - **Doc. 6 - App. at 25-26**; 2d DCA's Order Treating Downs' Initial Brief as the Petition for Writ of Certiorari - **Doc. 8 - App. at 45-46. See Downs' Petition for Writ of Certiorari with Appendix filed in the 2d DCA (originally filed as the Initial Brief of Appellant Downs) - Doc. 7 - Appendix at 27-44; 2d DCA's Order Treating Downs' Initial Brief as the Petition for Writ of Certiorari - Doc. 8 - App. at 45-46; 2d DCA's Order to Show Cause requiring response by DOC - Doc. 9 - App. at 47-48; DOC's Response to Petition for Writ of Certiorari - Doc. 10 - App. at 49-72; Downs' Reply ("Answer") - Doc. 11 - App. at 73-82.**

SUMMARY OF THE ARGUMENT

The Legislature has always intended to exclude Habitual Offenders from the award of Provisional Credits because such offenders should not be released early when prison overcrowding occurs. The Legislature always intended that offenders be ineligible on ALL SENTENCES, once he or she is given an Habitual Offender sentence, regardless of whether the Habitual Offender is serving sentences imposed before or after receiving the Habitual Offender sentence.

At one time the First District mistakenly thought otherwise and said so in Anderson v. Duggar, 593 So. 2d 1134 (Fla. 1st DCA 1992). Shortly thereafter, the Second District in McBride v. State, 601 So. 2d 1335 (Fla. 2d DCA 1992) held the same thing, specifically relying on the First District's decision in Anderson.

Fortunately, however, immediately after those decisions the Legislation acted to clarify its ORIGINAL INTENT. At its next occasion, the First District recognized its error and **explicitly** receded from Anderson in McBride v. Moore 780 So. 2d 221 (Fla. 1st DCA 2001) (Ex Post Facto clause is NOT violated when DOC retroactively applies 1992 clarifying legislation to make Habitual Offenders ineligible for overcrowding credits because clarifying legislation made it clear that the intent of the prior law was to preclude an award of provisional release credits if the defendant is sentenced as an Habitual Offender at any time).

This Court has held that a court may look to a statutory amendment to determine the intent of the prior version of that statute if the amendment "is enacted soon after controversies as to the interpretation of the original act arise." Lowry v. Parole & Prob. Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985).

The Second District erroneously concluded in the case under review (Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004)), that giving effect to the clarifying legislation would constitute a violation of the Ex Post Facto clause.

In order for there to be an ex post facto violation the new law must be retrospectively applied and it must disadvantage the offender. For gain time cases that means that the new law must be applied to sentences for offenses which were committed prior to the law's enactment. See Winkler v. Moore 831 So. 2d 63, 67-68 (Fla. 2002) (explaining what the United States Supreme Court's use of the phrase retrospective application of a law to "events occurring before its enactment" means when it comes to gain time cases).

Giving affect to clarifying legislation is not the same thing as retroactively applying completely new legislation. Since the 1992 amendments to the Provisional Credits statute were simply a clarification of the original intent of the prior version, there is no "**change**" in the law, only a correction of the original, proper meaning. In other words, the original law is the one that is being applied

and there is really no retroactive application of any NEW or later-enacted law. That being the case, the first element - retrospective application - is not present in this case.

To be sure, the Legislature should not be allowed to retroactively **change the law** by simply asserting that it is "clarifying its intent" every time a court issues an opinion it does not like. When there is a true change in legislative law, that change should not be applied retroactively (if it increases punishment). This is not such a case. In this case, the original law could easily and should really have been read to exclude all inmates sentenced as Habitual Offenders - regardless of which sentence they are serving. The First District was simply wrong in its interpretation and the amendment was put forth to correct that misinterpretation. While it is an elementary concept that the Legislative Branch makes "the law" and the Judicial Branch interprets "the law," separation of powers principles compel the conclusion that if a court has completely misinterpreted law written by the Legislative Branch, the Legislative Branch should be permitted to correct that misinterpretation.

The Second District seemed to feel that it was constrained to find an ex post facto violation based on this Court's decision in State v. Smith, 547 So. 2d 613 (Fla. 1989). Nevertheless, the Second District misunderstood this Court's decision

in Smith because it failed to appreciate the difference between a true change in legislation (one type of a change in "the law") and a change in case law (another type of change in "the law").

The Second District thought that this Court in Smith had prohibited courts from correcting improper interpretations of pre-existing statutory law. In Smith, this Court prohibited the retrospective application of new case law based on true changes to statutory legislation (or new case law based on new statutory legislation). In other words, if a court interprets a statute correctly but the Legislature does not like the result and changes the statute to change the result, that is a true change in legislative law. When the court again looks at the statute (as amended) and sees that it is now means something different, that court's decision should not be applied retroactively (if it increases punishment) because that would be applying new law to people and things that should be controlled by the old law.

In this case, while there was new case law (the First District issued a new opinion), there was no new statutory law - simply a clarification of old law that had been improperly interpreted in the first place.

Further, to the extent Smith could be read to prohibit the retroactive application of any new court decision, this Court has already implicitly receded

from that decision in Mayes v. Moore, 827 So. 2d 967, 973 (Fla. 2002) ("The Supreme Court has held that the Ex Post Facto Clause of the United States Constitution does not generally apply to case law. . . . only when it results in an "unforeseeable enlargement of a criminal statute.").

Like the gain time statute this Court interpreted in Mayes, a corrected interpretation of the Provisional Credits statute as intending to disqualify Habitual Offenders regardless of which sentence they are serving is completely foreseeable. Accordingly, retrospective application of the 1992 clarifying legislation to pre-1992 sentences does not violate the Ex Post Facto Clause.

ARGUMENT

I. RETROACTIVELY APPLYING LEGISLATIVE CLARIFICATIONS TO ORIGINAL INTENT DOES NOT VIOLATE THE EX POST FACT CLAUSE WHEN THE CLARIFICATION IS NOT A TRUE CHANGE IN THE LAW

A. History of Florida's Overcrowding/Early Release Statutes

In 1983, the Florida Legislature enacted the Emergency Gain Time statute, the first of several prison overcrowding gain time statutes. § 944.598, Fla. Stat. (1983). The statute allowed for the early release of certain inmates when prison overcrowding surpassed a certain level. § 944.598(1), Fla. Stat. (1983).

The Emergency Gain Time statute was repealed effective June 17, 1993. Ch. 93-406, §§ 32, 44, at 2966, 2974, Laws of Fla.

In its place, in 1987, the Legislature enacted a second early-release, prison overcrowding statute -- the Administrative Gain Time statute. § 944.276, Fla. Stat. (1987).[3] This statute specifically excluded certain violent or repeat offenders from

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[3] As this Court noted in Gomez v. Singletary 733 So. 2d 499, 507 (Fla. 1998):

> [T]he Supreme Court's discussion of that statute [the Emergency Gain Time Statute] was merely a reaffirmation of the "core Ex Post Facto" argument that all the later overcrowding statutes were really the same, at least for purposes of deciding whether a later statute was merely a "revamping" of the prior statute. In other

receiving administrative gain-time credits. Inmates were able to receive credits unless such inmates:

(d) were sentenced under **s. 775.084** [the Habitual Offender statute].

§ 944.276(1)(d), Fla. Stat. (1987) (Emphasis added).

In 1988, the Legislature repealed the Administrative Gain Time statute, and replaced it with the Provisional Credits statute. § 944.277, Fla. Stat. (Supp. 1988); ch. 88-122, § 5, 6, at 535-37, 572, Laws of Fla. As this Court has recognized, in many ways, the new statute was very similar to the Administrative Gain Time statute, except that it excluded additional types of offenses.[4] It was, in essence, a refinement of the Administrative Gain Time statute and like the prior statute, the

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> words, we believe that the Supreme Court's discussion of that statute was only meant to reject the Department of Corrections' assertions in that case that all the separate overcrowding statutes had nothing to do with each other and that an inmate's entitlement to overcrowding credits under one statute terminated upon the enactment of a new statute.

[4] This Court has recognized that Administrative Gain Time and Provisional Credits were essentially the same thing. See Mayes v. Moore, 827 So. 2d 967, 973 (Fla. 2002) ("The Department had long considered administrative gain time to be forfeitable upon supervision revocation, and this Court had previously held that provisional credits were essentially the same as administrative gain time."). See Griffin v. Singletary, 638 So. 2d 500, 501 n. 1 (Fla. 1994).

new statute allowed credits unless an 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) (Emphasis added).

Effective September 1, 1990, the Legislature enacted another version of the early release gain time statutes - the Control Release Program. This version essentially "lifted" much of the language from the Provisional Credits statute but also incorporated several of the more discretionary aspects of a traditional parole-type program. This was a further refinement intended to ensure that only the least dangerous inmates would be released early when prison overcrowding occurred. § 947.146, Fla. Stat. (1989); ch. 89-526, §§ 1, 2, 52, at 2659-61, 2690, Laws of Fla.; Gomez, 733 So. 2d at 501-502. Like the previous two statutes, an inmate sentenced as an Habitual Offender was STILL not eligible prison overcrowding gain time under the Control Release program. § 947.146(4)(e), Fla. Stat. (1989).

B. Rendering Habitual Offenders Ineligible for Early Release Credits on Previous Non-Habitual Offender Sentences Does Not Increase the Non-Habitual Offender Sentences.

Habitual Offenders receive longer sentences and are kept incarcerated longer than other offenders not just as increased punishment, but also for purposes

of protecting the public from an offender who has demonstrated his or her propensity for crimes - hence the term "habitual." See Henderson v. State, 569 So. 2d 925, 927 (Fla. 1st DCA 1990) (the sentence imposed for a subsequent offense is enhanced on the theory that the defendant's prior conviction of a violent felony indicates the "incorrigible and dangerous character of the accused and establish[es] the necessity for enhanced restraint.")

It would make sense, therefore, that the Legislature would not want these types of offenders to be set free when unconstitutional prison overcrowding occurs. Once a court determines that a defendant qualifies as an Habitual Offender and thus a danger to society, allowing that offender to have his other non-habitual offender sentences reduced by the award of Provisional Credits would not make sense. In reality, not allowing the award of prison overcrowding credits does not really increase the prior non-habitual sentence, it simply effectuates the habitual offender sentence. This Court has noted in Tillman v. State, 609 So. 2d 1295, 1298 (Fla. 1992), that:

> The purpose of the habitual offender act is to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism. The enhanced punishment, however, is only an incident to the last offense. The act does not create a new substantive offense. It merely prescribes a longer sentence for the subsequent offenses which triggers the operation of the act.

Id. (*quoting* Eutsey v. State, 383 So. 2d 219, 223 (Fla. 1980)).

C. Judicial Interpretation of the Habitual Offender Disqualification in the Provisional Credits Statute.

Despite the legislature's rather apparent intent that Habitual Offenders not be released early when overcrowding occurred, on February 7, 1992, in Dugger v. Anderson, 593 So. 2d 1134 (Fla. 1st DCA 1992), the First District interpreted the Habitual Offender disqualification of the Provisional Credits statute as making Habitual Offenders ineligible for Provisional Credits on non-Habitual Offender sentences ONLY if the offender had PREVIOUSLY been adjudicated an Habitual Offender (in another case). In Anderson's case, since his Habitual Offender sentence was for a crime committed AFTER his non-Habitual Offender sentences, the First District felt that he should be eligible to receive Provisional Credits on the non-Habitual Offender sentences even though he was now an Habitual Offender. Dugger v. Anderson, 593 So. 2d 1134 (Fla. 1st DCA 1992). Shortly thereafter, the Second District relied on the First District's decision in Anderson, to also hold that the Habitual Offender disqualification for the receipt of Control Release overcrowding gain time was applicable only if the Habitual Offender sentence was received before the other non-Habitual Offender sentences. See McBride v. State, 601 So. 2d 1335 (Fla. 2d DCA 1992).[5]

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[5] It is very important not to confuse the First District's 2001 decision in McBride v. Moore with the Second District's 1992 decision in McBride v. State,

The original statute read, in pertinent part, as follows:

> Whenever the inmate population of the correctional system reaches [the pertinent triggering point] . . . . the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:
> . . . .
> (g) 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) (Emphasis added).

Reviewing the statute and the holding in Anderson, one can see that apparently the First District thought the Legislature meant to prohibit out-of-state Habitual Offenders from receiving Provisional Credits regardless of when the Habitual Offender sentencing occurred and regardless of which sentence they were currently serving for in-state Habitual Offenders, the Legislature wanted these offenders kept in prison ONLY if they were currently serving their Habitual

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601 So. 2d 1335 (Fla. 2d DCA 1992). McBride v. State does not conflict with the 2d DCA's decision in Downs since it was a pre-McBride v. Moore decision holding (similarly to Downs) that an Habitual Offender can still be awarded prison overcrowding gain time on earlier imposed non-Habitual Offender sentences. It was the 1992 decision in McBride v. State, that Downs originally relied on as his basis for asserting that he was eligible for prison overcrowding gain time despite his Habitual Offender sentence. The Second District specifically relied on Anderson v. Duggar, 593 So. 2d 1134 (Fla. 1st DCA 1992), for its decision in McBride v. State. In its 2001 decision in McBride v. Moore, the First District **explicitly** receded from Anderson. Since Anderson is no longer good law, McBride v. State should not be considered good law either.

Offender sentences. Clearly this makes no sense. Why would the Legislature want to ensure that the out-of-state Habitual Offenders did not get out early but the in-state Habitual Offenders could be released early?

Immediately after the erroneous Anderson decision, **and in fact because of the decision**, the Florida Legislature added additional language to **further clarify its original intent** that Habitual Offenders not be released early from prison. The Legislature added the following language (underlining indicates new language), indicating an inmate is not eligible for Provisional credits if he or she:

> [i]s sentenced, or has previously been sentenced, or has been sentenced at any time under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender.

§ 944.277(1)(g), Fla. Stat. (Supp. 1992); Ch. 92-310, § 12, at 2967, Laws of Fla.

Shortly thereafter, the Fifth District took notice of this clarification in Mamone v. Dean, 619 So. 2d 36 (Fla. 5th DCA 1993), and stated:

> Based upon the case of Dugger v. Anderson, 593 So. 2d 1134 (Fla. 1st DCA 1992), Mamone contends he is entitled to the credit against the 3 1/2 -year [non-habitual] term. We disagree. After Anderson (and, indeed, because of it), the Florida Legislature remedied the language of section 944.277(1)(g), Florida Statutes, to show its clear intent that an inmate is precluded from receiving provisional credits once sentenced as a habitual offender.

Mamone, 619 So. 2d at 36.

In the Second District's decision under review (Downs), the court appeared to recognize that the First District had, in its 2001 decision in McBride v. Moore, essentially receded from Anderson v. Duggar based on 1992 legislation clarifying that the Legislature had always rendered Habitual Offenders ineligible for Provisional Credits - even on non-Habitual Offender sentences such inmates may also be serving. The Second District also recognized that the Fifth District[6] had also held that applying this clarifying legislation retroactively "does not violate the Ex Post Facto Clause." Downs, 874 So. 2d at 648. Nevertheless, the Second District disagreed with the First and the Fifth Districts and decided to follow the reasoning of the First District's prior, (now-receded-from) decision in Anderson. In fact, the Second District instructed the lower court to apply the First District decision in Anderson. See Down, 874 So. 2d at 650.

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[6] See Mamone v. Singletary, 619 So. 2d 36 (Fla. 5th DCA 1993) (the 1992 amendments to section 944.277(1)(g) negated the effect of the Anderson decision because the Legislature **clarified its** intent that inmates who had 'been sentenced at any time' as an Habitual Offender were not entitled to receive administrative gain-time or provisional credits)

D. Mamone Is Still Good Law & Mcbride v. Moore Does Not Depend on The Now Invalid Decision in Rodrick.

Obviously, the Fifth District's decision in Mamone was issued before the United States Supreme Court decision in Lynce v. Mathis, 519 U.S. 433 (1997) (overruling this Court's previous decisions holding that prison overcrowding gain time was not subject to the Ex Post Facto Clause). The Fifth District also cited to a case that is clearly no longer good law (Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991)). Nonetheless, a close reading of Mamone reveals that there were really two holdings in Mamone: (1) the Legislature had merely clarified the old law when it amended the Provisional Credits statute; (2) overcrowding credits are not subject to the Ex Post Facto Clause under Rodrick. See Mamone, 619 So. 2d at 36 ("[w]e find no merit in the appellant's other arguments.") (emphasis added). While holding (2) is clearly no longer valid under Lynce, holding (1) was not based on Rodrick and is still good law.

By referring to Mamone, the First District was certainly not ignorant of Florida's recent changes[7] in its gain time jurisprudence. On the contrary, since it

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[7] See Gomez v. Singletary, 733 So. 2d 499 (Fla.1998), State v. Lancaster, 731 So. 2d 1227 (Fla. 1998), Thomas v. Singletary, 729 So. 2d 369 (Fla.1998), Meola v. Department of Corrections, 732 So. 2d 1029 (Fla. 1998).

In Meola, this Court specifically mentioned Rodrick. It stated:

considered the amendments to be a clarification of the original intent of the prior version, there was really no retroactive application of any NEW law.[8] If the Legislature is merely clarifying what it always meant to say, then the law has always meant what the Legislature now makes more clear. If that is the case, the state is applying the old law. In order for there to be an ex post facto violation in the gain time arena this Court has recognized in Winkler v. Moore, 831 So. 2d 63

> Prior to the Supreme Court's recent decision in Lynce, this Court had always held that Administrative Gain Time and Provisional Credits were not subject to the Ex Post Facto Clause because the award of overcrowding gain time was based on unpredictable prison overcrowding. See Griffin v. Singletary, 638 So. 2d 500 (Fla.1994); **Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991)**. The decision in Lynce, however, made clear that, like other forms of gain time, prison overcrowding gain time can constitute one determinant of a prisoner's sentence because a "prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.

Meola, 732 So. 2d at 1031-1032 (internal citations omitted) (emphasis added).

[8] The First District's decision in McBride v. Moore was issued some four (4) years after the decision in Lynce and approximately two (2) years after issuance of this Court's four (4) December 24, 1998 overcrowding gain time decisions applying Lynce, including this Court decision in Meola which specifically noted the invalidity of its prior decision in Rodrick, the First District cited to and quoted from Mamone in McBride v. Moore 780 So. 2d 221 (Fla. 1st DCA 2001). The First District agreed with the Fifth District that the Legislature had merely clarified its prior intent with the 1992 amendments. Thus, it held that retroactive application of the clarifying language did not violate the Ex Post Facto Clause.

(Fla. 2002) that the law:

> (1) [] must be retrospective, that is, "it must apply to events occurring before its enactment; " and (2) it must "disadvantage the offender affected by it."

Winkler v. Moore 831 So. 2d 63, 67-68 (Fla. 2002) (quoting from Lynce v. Mathis, 519 U.S. at 441 (1997) (internal citations omitted).

This Court explained that:

> the appropriate "event" for ex post facto purposes is the commission of the offense and the rights the offender had on the date he or she committed the offense. That means, for example, that if at the time of the criminal offense, inmate A had a right to receive 20 days per month of gain time and then later the Legislature **changed** the gain time to five days per month and applied that **change** retrospectively to inmate A's earlier occurring offense (the relevant "event"), then there would be an ex post facto violation.

Winker, 831 So. 2d at 67 (emphasis added).

However, if the 1992 amendments to the Provisional Credits statute was merely a clarification of the original law, the original law is the one that is being applied. Thus, there is no "**change**" in the law, only a correction of the original, proper meaning. Since the 1992 amendments only clarified the old law, there is no retroactive application of any later-enacted law.

This Court has previously held that a court may look to a statutory amendment to determine the intent of the prior version of that statute if the amendment "is enacted soon after controversies as to the interpretation of the

original act arise." Lowry v. Parole & Prob. Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985); State v. Cotton, 769 So. 2d 345, 349 (Fla. 2000) ("Although the 1997 statute applies to these appeals, we accept the 1999 amendment as clarification of the Legislature's intent"); Finley v. Scott, 707 So. 2d 1112, 1116 (Fla. 1998) ("Although the 1993 statute applies to this case, we accept the addition of this sentence to the statute as clarifying legislative intent" as to how the trial court should calculate the guidelines).

When Mamone was pending in the lower court, DOC submitted, as part of the record, a copy of the House of Representative's Bill Analysis and Economic Impact statement for Bill PCB COR 92-03, which was the precursor of the 1992 clarifying legislation. The Bill Analysis specifically mentioned the First District's erroneous interpretation of the Provisional Credits Habitual Offender disqualification in Anderson and was one of the main reasons for the clarifying legislation. Reviewing this information, the Fifth District was able to see that, as in the case of Lowry, the clarifying legislation was enacted soon after controversies as to the interpretation of the original act had arisen. The First District also saw this in its 2001decision in McBride v. Moore and stated:

> [T]he 1992 amendment makes it clear that the intent of the prior law was to preclude an award of provisional release credits if the defendant is sentenced as a habitual offender at any time. As the court explained in Mamone v. Dean, 619 So. 2d 36 (Fla. 5th DCA 1993),

the legislature actually amended section 944.277(1)(g) as a reaction to the Anderson decision.

McBride v. Moore, 780 So. 2d at 222 (emphasis added).

The Eleventh Circuit has held that when clarifying legislation is enacted to remedy a mistaken interpretation of the original legislation, the retroactive application of the now-corrected interpretation does not violate the Ex Post Facto Clause. See Metheny v. Hammonds, 216 F.3d 1307, 1310-1311 (11th Cir. 2000). In Metheny, the Georgia parole board had previously interpreted a law which made certain types of recidivist offenders ineligible for parole to be unconstitutional. This was done in accordance with two Georgia Attorney General's Opinions. When another somewhat similar law was found by the Georgia Supreme Court to be constitutional in the case of Freeman v. State, 440 S.E. 2d 181 (1994), the parole board reinterpreted the parole law and enacted new rules that retroactively made Metheny ineligible for parole. The case made it to the Georgia Supreme Court, which agreed with the parole board. Metheny eventually appealed to the Eleventh Circuit which also upheld the parole board. Similar to what this Court held in Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996),[9] the Eleventh Circuit concluded that the parole board's rules were "laws"

[9] In Gwong, this Court stated that "[s]imply because the amendment is an administrative regulation rather than a law does not alter the application of the ex

for purposes of the Ex Post Facto Clause but that no ex post facto violation had occurred. It stated:

> In this case, the state law--the statute--has remained unchanged. The new Board regulation denying parole opportunities did not change the law. The new regulation was a correction. The new regulation corrected an erroneous interpretation by the Board of a statute which clearly and without ambiguity had always precluded the grant of parole to recidivists. A new regulation which just corrects an erroneous interpretation (even if the error was a reasonable one) by an agency of a clear pre-existing statute does not violate the Ex Post Facto Clause.

Metheny v. Hammonds, 216 3d 1307, 1310 (11th Cir. 2000).[10]

The same is true here as well. While the Second District in Downs seemed to agree that the Legislature had always meant for the Provisional Credits Habitual

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post facto clause." 683 So. 2d at 114.

[10] See also Stephens v. Thomas, 19 F.3d 498, 500 (10th Cir. 1994) (concluding no ex post facto violation when department of corrections stopped applying good-time-credit statute to prisoners with life sentences after state attorney general informed department that this application was clearly prohibited by statute); accord Cortinas v. United States Parole Comm'n, 938 F.2d 43, 46 (5th Cir. 1991) (determining new regulation reflecting proper interpretation of statute did not violate Clause, and agreeing with Second Circuit that agency's misinterpretation cannot support an ex post facto claim); Glenn v. Johnson, 761 F.2d 192, 194-95 (4th Cir. 1985) (concluding that parole commission's change of regulation to conform with opinion of the state attorney general was no change in the law but merely a correction of an erroneous interpretation of the law: the statute unambiguously precluded the old regulation); Caballery v. United States Parole Comm'n, 673 F.2d 43, 47 (2d Cir. 1982) (holding no ex post facto claim where new regulation merely corrected a practice by parole commission that was contrary to a preexisting statutory provision).

Offender disqualification to apply regardless of which sentence the offender was currently serving and regardless of whether the Habitual Offender sentencing occurred before or after receipt of the Non-Habitual Offender sentences, it seemed convinced that it could only apply the correction prospectively based on this Court's decision in State v. Smith, 547 So. 2d 613 (Fla. 1989). The Second District recognized that:

> Generally, a court may look to a statutory amendment to determine the intent of the prior version of that statute if the amendment "is enacted soon after controversies as to the interpretation of the original act arise." Lowry v. Parole & Prob. Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985). However, the amendment may not be considered to impliedly overrule case law interpreting the statute if the retroactive application of the amendment violates the Ex Post Facto Clause. State v. Smith, 547 So. 2d 613, 616 (Fla. 1989).

Downs, 874 So. 2d at 650-651.

In Smith, this Court held that the retroactive application of the legislature's amendment of a statute in response to a court decision would violate the Ex Post Facto Clause. This Court stated:

> First, it is a function of the judiciary to declare what the law is. Although legislative amendment of a statute may **change the law** so that prior judicial decisions are no longer controlling, it does not follow that court decisions interpreting a statute are rendered inapplicable by a subsequent amendment to the statute.

State v. Smith, 547 So. 2d 613, 615 (Fla. 1989) (Emphasis added).

Unfortunately, however, that only applies if the law is a true **CHANGE.** If it was always the intent of the Legislature that its legislation mean something in particular and it is a reasonable conclusion, then the law is not a CHANGE, it is merely a clarification of the original law and it is the original law that is really being applied.

E. Can the Legislature Correct Judicial Misinterpretations of Its Legislation?

To be sure, the Legislature should not be allowed to retroactively **change the law** by simply asserting that it is "clarifying its intent" every time a court issues an opinion it does not like. See e.g. Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989) (subsequent legislatures, in the guise of "clarification" cannot nullify retroactively what a prior legislature **clearly** intended); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995) (Lowry is still good law but "[i]t would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent"); Parole Com'n v. Cooper, 701 So. 2d 543, 544-545 (Fla. 1997) (while "we did state in Lowry that a subsequent amendment could be used to construe legislative intent if the amendment was enacted soon after the controversy arose . . . . it is inappropriate to use an amendment enacted ten years after the original enactment

to clarify original legislative intent.");

When there is a true change in legislative law, that change should not be applied retroactively (if it increases punishment). This is not such a case, however. In this case, the original law could easily and should really have been read to exclude all Habitual Offenders regardless of when the offender received the Habitual Offender sentence and which sentence he or she was serving at the time. The First District was simply wrong in its interpretation and the amendment was put forth to correct that misinterpretation. While it is an elementary concept that the Legislative Branch makes "the law" and the Judicial Branch interprets "the law," separation of powers principles compel the conclusion that if a court has completely misinterpreted law written by the Legislative Branch, the Legislative Branch should be permitted to correct that misinterpretation.

F. Legislative Changes in "the Law" vs. Case Law Changes in "the Law"

The Second District seemed to feel that it was constrained to find an ex post facto violation based on this Court's decision in State v. Smith, 547 So. 2d 613 (Fla. 1989). Nevertheless, the Second District misunderstood this Court's decision in Smith because it failed to appreciate the difference between a true change in legislation (one type of a change in "the law") and a change in case law (another type of change in "the law").

The Second District thought that this Court in Smith had prohibited courts from correcting improper interpretations of pre-existing statutory law. In Smith, this Court prohibited the retrospective application of new case law based on true changes to statutory legislation (or new case law based on new statutory legislation). In other words, if a court interprets a statute correctly but the Legislature does not like the result and changes the statute to change the result, that is a true change in legislative law. When the court again looks at the statute (as amended) and sees that it is now means something different, that court's decision should not be applied retroactively (if it increases punishment) because that would be applying new law to people and things that should be controlled by the old law.

In this case, while there was new case law (the First District issued a new opinion - McBride v. Moore), there was no new statutory law - simply a clarification of old law that had been improperly interpreted in the first place.

Further, to the extent Smith could be read to prohibit the retroactive application of any new court decision, this Court has already implicitly receded from that holding in Mayes v. Moore, 827 So. 2d 967, 973 (Fla. 2002).

In Mayes, this Court recognized, in accordance with recent United States Supreme Court precedent that " the Ex Post Facto Clause of the United States

Constitution does not generally apply to case law. . . . [unless] . . . it results in an "unforeseeable enlargement of a criminal statute."). Id. The Supreme Court has now made clear that unlike legislation, court decisions are not governed by the Ex Post Facto Clause but rather by the Due Process Clause. Further, all that is required under the Due Process Clause is that the judicial change be foreseeable. Rogers v. Tennessee, 532 U.S. 451, 458-459 (U.S. 2001) (Bouie only restricted the retroactive application of judicial interpretations of criminal statutes to those that are unexpected and indefensible by reference to prior law); see also Marks v. United States, 430 U.S. 188, 191(1977) (the clause applies to a judicial opinion only when it results in "an unforeseeable enlargement of a criminal statute.") (*quoting* Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964)).

In Mayes, this Court examined whether retrospective application of its decision in State v. Lancaster, 731 So. 2d 1227 (Fla. 1998), might violate the Ex Post Facto Clause based on an allegation of unforeseeability. In Lancaster, the inmate argued that DOC did not have statutory authority to forfeit a certain type of gain time (Provisional Credits) upon probation revocation. While section 944.28(1), Florida Statutes had authorized DOC to forfeit all "gain time" upon probation revocation since 1988, DOC had not interpreted the term "gain time" to include Provisional Credits. This Court ruled that DOC's interpretation was

incorrect and that it had actually had statutory authority to forfeit the gain time for many years. This Court stated:

> [L]ike other types of gain time, the State must have statutory authority to forfeit overcrowding gain time upon supervision revocation . . . . It appears that the State believes that neither of those sections includes Provisional Credits . . . . We believe, however, that sections 944.28(1) and 948.06(6) do provide the State with such authority but they can only be invoked for inmates whose underlying offenses were committed on or after October 1, 1989 (the effective date of the amendments providing for such forfeitures). Lancaster's original offense was committed before that date and thus the State cannot forfeit his Provisional Credits or Administrative Gain Time under those statutes."
>
> State v. Lancaster, 731 So. 2d 1227, 1230-31 (Fla. 1998).

Thereafter, DOC applied Lancaster to inmates whose offenses had been committed after the effective date of the statute. These inmates sued, however, arguing that the "retrospective application" of the 1998 decision in Lancaster to allow the forfeiture of gain time for offenses committed prior to the date Lancaster was decided was a violation of the Ex Post Facto Clause. This court rejected that argument stating:

> [T]he [1998] Lancaster decision did not create the statutory authority for the forfeiture of overcrowding gain time upon supervision revocation. That authority has been in effect since 1988, and it has provided for the forfeiture of "all gain time" upon conditional release supervision revocation. . . . Prior to Lancaster, the Department had not considered most types of overcrowding credits to be gain time. In Lancaster, this Court corrected that misinterpretation and made clear that the Department always had the authority to forfeit such credits--

at least with regard to those inmates whose offenses were committed on or after the pertinent date in 1988. [citations omitted]

Lancaster's interpretation of the gain time forfeiture statutes was not an unforeseeable enlargement of that statute. The Department had long considered administrative gain time to be forfeitable upon supervision revocation, and this Court had previously held that provisional credits were essentially the same as administrative gain time. [citations omitted] Therefore, we conclude that the portion of the holding in Lancaster concluding that all types of gain time (including overcrowding credits) are forfeitable under the general gain time forfeiture statutes was not unforeseeable and thus there is no ex post facto violation.

Mayes, 827 So. 2d at 973 (emphasis added). Like the correction of DOC's interpretation of the gain time forfeiture statutes in Lancaster, when the Legislature advised the First District that it had mistakenly interpreted the Provisional Credits statute in Anderson in 1992, the First District graciously accepted the correction, held that the law had always excluded Habitual Offenders from receiving Provisional Credits and acknowledged that its prior decision in Anderson was no longer good law. See McBride v. Moore, 780 So. 2d at 222 ("Our decision in Anderson is of no benefit to McBride, however, because the 1992 amendment makes it clear that the intent of the prior law was to preclude an award of provisional release credits if the defendant is sentenced as a habitual offender at any time."). The Second District should have done the same in Downs.

That the First District would correct its prior interpretation in Anderson of the Provisional Credits disqualification and recede from it in McBride v. Moore,

was completely foreseeable. As discussed above, the Legislature tailored each overcrowding program more narrowly than the preceding program to ensure that only the least dangerous inmates would be released early when prison overcrowding occurred. The Legislature, in creating an Habitual Offender disqualification, recognized that Habitual Offenders present a greater risk to the public than non-Habitual Offenders. When and where a person is sentenced as an Habitual Offender does not lessen the risk associated with releasing them early under an overcrowding statute. By including the Habitual Offender disqualification as part of the Provisional Credits statute the Legislature intended to keep the most dangerous offenders off the streets and meant to preclude DOC from awarding provisional credits to all inmates sentenced as Habitual Offenders.

Like the gain time statute this Court interpreted in Mayes, a corrected interpretation of the Provisional Credits statute was completely foreseeable. Accordingly, retrospective application of the 1992 clarifying legislation to pre-1992 offenses does not violate the Ex Post Facto Clause.

CONCLUSION

The Legislature has always intended that when prison overcrowding forces the early release of prison inmates, Habitual Offenders should not be among them. This was the intent of the Legislature in 1988 when it enacted the Provisional Credits statute, and the Legislature did not "change" the intent or substance of the disqualification when it amended the statute in 1992 to clarify its original intent and correct the prior erroneous interpretation of the statute by the First District in Anderson. In McBride v. Moore, the First District recognized its error and properly receded from Anderson, and held that Habitual Offenders are ineligible to receive Provisional Credits on any of their sentences. The Ex Post Facto clause does not prohibit the retrospective application of clarifying amendments. Thus, when the Second District refused to apply the 1992 clarification, it erred.

Accordingly, this Court should quash the Second District's decision in Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004) and approve the First District's decision in McBride v. Moore , 780 So. 2d 221 (Fla. 1st DCA 2001). This Court should also remand this case to the Second District for further proceedings in accordance with its decision approving McBride v. Moore.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response is submitted in New Times Roman 14-point font in accordance with the Fla. R. App. P. 9.210(a)(2).

BARBARA DEBELIUS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER DEPARTMENT OF CORRECTIONS' MERITS BRIEF has been furnished by U.S. Mail on this 2nd day of January, 2005, to:

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