IN THE SUPREME COURT OF FLORIDA

JAMES V. CROSBY, JR., Secretary,
Florida Department of Corrections, **Case No.: SC04-1153**
L.T. Case No. 2D03-4364

Petitioner,

vs.

CLARENCE W. DOWNS, DC# 251539

Respondent.

PETITIONER DEPARTMENT OF CORRECTIONS' MERITS REPLY BRIEF

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

BARBARA DEBELIUS
FLORIDA BAR NO. 0972282
ASSISTANT GENERAL COUNSEL
DEPARTMENT OF CORRECTIONS
2601 BLAIR STONE ROAD
TALLAHASSEE, FL 32399-2500
(850) 488-2326

ATTORNEY FOR PETITIONER,
JAMES V. CROSBY, JR., SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

In reality, there are only two things that must be decided in this case:

(1) Whether the amendment at issue was a true CHANGE in the law **or** merely a corrected interpretation of the original law, and;

(2) If the amendment was merely a corrected interpretation, whether the correction can be applied retroactively to the date of the original law.

If the amendment was a true CHANGE in the statutory law enacted because the Legislature did not like the result obtained when a court interpreted its legislation, then this Court should uphold the Second District=s decision in Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004), and disapprove the First District=s decision in Mcbride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001).

If, on the other hand, the amendment was simply an effort on the part of the Legislature to correct what it perceived to be a mistaken interpretation of the original legislation by the Judiciary, then it must decide whether principles of separation of powers and the equality of the three branches of government compel it to allow the Legislative Branch to correct that original mistaken judicial interpretation. If this Court rules that a corrected interpretation can only be applied prospectively, in essence, this Court will be saying that the Legislature does not have the power to correct mistaken original judicial interpretations, only write new, even clearer laws for future cases. If

that is the case, this Court is really saying that once a court has spoken, its interpretation cannot be wrong - at least not for the people and cases presently at issue.

Fortunately, this Court has already said that a court may indeed 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) (AAlthough 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) (AAlthough 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).

The fact that this case has to do with Provisional Credits, the same type of early-release credits at issue in the United States Supreme Court=s 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), should not deter this Court from following its prior case law on this point.

As the First District did in Mcbride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001), this Court should look to the process undertaken by the Fifth District in Mamone v. Dean, 619 So. 2d 36 (Fla. 5th DCA 1993). There, the court reviewed the

House of Representatives Bill Analysis and Economic Impact statement for Bill PCB COR 92-03, which was the precursor for the amendments at issue in this case. The Bill Analysis specifically mentioned the First Districts erroneous interpretation of the Provisional Credits Habitual Offender disqualification in Anderson and noted that it 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 (llth Cir. 2000).

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 . . . . 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).1

The same should be true here as well. The fact that it was the Judiciary that erroneously interpreted the legislation - instead of an Executive Branch agency - should not change the equation. While the Second District in Downs seemed to agree that the Legislature had always meant for the Provisional Credits Habitual 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. This reasoning does not make sense

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1 See also Stephens v. Thomas, 19 F.3d 498, 500 (10th Cir. 1994) (concluding no ex post facto violation when DOC 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).

because that would mean that the Legislature cannot have any say over its own original legislation once a court has said what it thinks it means.

This Court should make it clear that due respect should be given the Legislative Branch and that in those cases where it is clear that a court misinterpreted legislative intent, but later corrected itself, the Acorrection@ will be applied to all cases, not just future ones.[2]

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 that intent did not change the Legislature 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 earlier error and properly receded from Anderson, holding that Habitual Offenders are

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2 As was mentioned in the initial brief, of course 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) ("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.

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.

Because of the conflicting decisions in the First and Second districts, DOC must apply one set of criteria to inmates in one district and another set to inmates in another. This creates confusion and inequality of treatment at both DOC and the trial courts alike. A decision from this Court is necessary to remedy this situation. DOC respectfully submits that the Second District erred in Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004).

CONCLUSION

For the reasons expressed above, this Court should quash the Second District=s decision in Downs 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.[3]

[3] DOC cannot agree with counsel for Respondent that this case is moot as to Mr. Downs since DOC did not appeal the intervening order granting the writ that the trial court issued after remand from the Second District. DOC's motions to stay were denied and thus, all remedies were sought. DOC contends that it is not necessary to appeal the order on remand after mandate if you are already appealing the order from which the mandate was issued.

Respectfully submitted,

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BARBARA DEBELIUS
Assistant General Counsel
Florida Bar No. 0972282
Department of Corrections
2601 Blair Stone Road
Tallahassee, FL 32399-2500
850-488-2326

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).

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BARBARA DEBELIUS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER DEPARTMENT OF CORRECTIONS' REPLY BRIEF ON THE BRIEF has been furnished, in accordance with the agreement of the parties and to save the State money, by email on this 25th day of April, 2005, to:

Deborah Brandstatter Marks, Esq.
Attorney for Respondent Clarence W. Downs
999 Brickell Bay Drive
Suite 1809
Miami, FL 33131-2933

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BARBARA DEBELIUS