

**IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA**

DAVID M. COFFIELD,
Appellant/Petitioner

**Appeal No: 1D08-906
L.T. Case No: 07-125CA**

vs.

WALTER A. McNEIL,
SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS,
Appellee/Respondent.

**PETITIONER COFFIELD'S MOTION FOR REHEARING AND
REHEARING EN BANC OR IN THE ALTERNATIVE, REQUEST FOR
WRITTEN OPINION PURSUANT TO RULE 9.330(a) AND REQUEST THAT
QUESTION BE CERTIFIED UNDER RULE 9.030(a)(2)(A)(vi), FLORIDA
RULES OF APPELLATE PROCEDURE**

The Petitioner, DAVID M. COFFIELD, by and through the undersigned counsel, pursuant to Rule 9.330, Fla.R.App.P., moves this Honorable Court for rehearing and rehearing *en banc* of the *per curiam* affirmed decision without written panel opinion dated August 25, 2008, denying Coffield's petition for writ of certiorari. In the alternative, Coffield requests this Honorable Court issue a written opinion pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure and certify the question to the Florida Supreme Court as being in direct conflict with a decision of another district court of appeal as provided by Rule 9.030(a)(2)(A)(vi), Fla.R.App.P.

We respectfully request the panel reconsider or the *en banc* court consider the

following question raised in Petitioner Coffield's petition for certiorari review:

WHETHER THE CIRCUIT COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN DENYING PETITIONER COFFIELD PROVISIONAL RELEASE CREDITS BASED ON AN APPLICATION OF AN AMENDED VERSION OF THE PROVISIONAL RELEASE CREDIT STATUTE WHICH VIOLATES THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION?

FACTS AND PROCEDURAL HISTORY UPON WHICH PETITIONER RELIES AND REASONS TO GRANT REHEARING AND REHEARING *EN BANC*

The facts in this matter are not in dispute. Petitioner Coffield was sentenced to Florida State Prison on March 16, 1990 to seventeen years imprisonment. Coffield escaped in 1991, was recaptured, and sentenced on September 17, 1991 for charges arising out of the escape to a total additional term of twelve years imprisonment, to run consecutive to the 1990 seventeen year sentence. Coffield was sentenced as a habitual offender on the 1991 offenses but not on the 1990 offense.

At the time of Coffield's original 1990 sentencing, Florida Statutes, § 944.277(1)(g) prohibited provisional release credits for habitual offender sentences, but only as to the habitual offender sentence itself or to sentences imposed subsequent to an offenders prior habitualization. The statute provided as follows:

[T]he 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, or has been sentenced at any time in another jurisdiction as a habitual offender.

Florida Statutes, § 944.277(1)(g) (1989).

In 1992, this Court held in *Dugger v. Anderson*, 593 So.2d 1134 (Fla. 1st DCA 1992), that a defendant's subsequently imposed habitual offender sentence did not adversely affect his right to provisional credits on an earlier imposed sentence, interpreting the above language to not exclude provisional release credits against an original non-habitual offender sentence even when the inmate later sustained a habitual offender sentence, as is the case with Coffield:

Dugger v. Anderson, 593 So.2d 1134 (Fla. 1st DCA 1992), in which this court held that, under section 944.277(1)(g), the defendant's habitual offender status did not adversely affect his right to provisional credits on an earlier imposed sentence. We reasoned that, "because the appellee's [original sentence] was imposed prior to [his habitual offender sentence], it is not within the temporal sequence suggested by the statutory language." *Anderson*, 593 So.2d at 1134-1135.

McBride v. Moore, 780 So.2d 221, 222 (Fla. 1st DCA 2001) (explaining *Dugger v. Anderson*'s holding).

Consistent with the plain language of the statute and this Court's decision in *Dugger v. Anderson*, Coffield received provisional release credits under § 944.277 on the original seventeen year 1990 sentence for the first ten years of his imprisonment.

Coffield continued to receive provisional release credits under Florida Statutes, § 944.277 until his *Gomez*¹ review in the year 2000. At that point, the Department of Corrections for the first time applied an amended version of § 944.277(1)(g) that had been adopted in 1992 (after Coffield's 1990 non-habitual offender original seventeen year sentence), that added language to § 944.277(1)(g), which had the effect of prohibiting provisional release credits against sentences for persons who had been sentenced as habitual offenders *at any time*, not just at the time of the sentence in question.

The subsequently amended statute read:²

[T]he 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, *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;

Florida Statutes, § 944.277(1)(g) (1993) (language added by amendment italicized and underlined).

At his year 2000 *Gomez* review, the Department of Corrections applied the

¹ *Gomez v. Singletary*, 733 So.2d 499 (Fla. 1998), revised (May 20, 1999).

² The Historical and Statutory Notes to § 944.277 state simply: "Laws 1992, c. 92-310, § 12, eff. July 6, 1992, in subsec. (1), . . . in par. (g), inserted "or has been sentenced at any time"; and added the last sentence of the subsection.

1992 amendment to § 944.277(1)(g) *retroactively* and took back from Coffield all of the provisional release credits the Department of Corrections had previously awarded under § 944.277(1)(g) for the preceding ten years.

Coffield sought administrative review of that decision, which was affirmed by the Department of Corrections, then petitioned the Circuit Court for Wakulla County for mandamus. The Circuit Court noted a conflict in the District Courts of Appeal between this Court's decision in *McBride v. Moore*, 780 So.2d 221 (Fla. 1st DCA 2001), and the decision of the Second District Court of Appeal in *Downs v. Crosby*, 874 So.2d 648 (Fla. 2nd DCA 2004).

In *McBride v. Moore* this Court concluded that its prior decision in *Dugger v. Anderson* had been legislatively overruled by the 1992 amendment in question. *McBride v. Moore* relied upon *Dugger v. Rodrick*, 584 So.2d 2 (Fla. 1991), to deny McBride's *ex post facto* challenge to the retroactive application of the 1992 amendment, quoting *Rodrick*'s holding that:

[C]hanges to the early release statute did not violate the *ex post facto* clause. This is because the statute is not substantive in nature but merely provides "administrative procedural mechanisms for controlling prison over-crowding."

In *Downs v. Crosby*, on the other hand, the Second District Court of Appeal held that retroactive application of the 1992 amendment to § 944.277(1)(g) violates

the Ex Post Facto Clause and is prohibited.

In Coffield's case, the Wakulla Circuit Court noted that *Downs* was in direct conflict and that under *Downs*, Coffield was entitled to relief, but held that it was bound by the decision of its own First District Court of Appeal in *McBride v. Moore*. On the basis of *McBride v. Moore* the Wakulla Circuit Court denied Coffield relief.

Coffield then petitioned this Court for certiorari, arguing that the Circuit Court's affirmance of the Department of Corrections's retroactive application of the 1992 amendment to § 944.277(1)(g) departed from the essential requirement of law, because it violated the Ex Post Facto Clause of the Constitution.

Coffield pointed out that *McBride v. Moore* was no longer controlling precedent in light of the Florida Supreme Court's subsequent acknowledgment in *Winkler v. Moore*, 831 So.2d 63, 65-66 (Fla. 2002), that *Rodrick* had been overruled in 1997 by *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997):

In 1997, the United States Supreme Court ruled in *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997), that the State had violated the *Ex Post Facto* Clause when it retroactively canceled overcrowding gain time because such credits, like regular gain time, were subject to ex post facto analysis. The decision essentially overruled this Court's previous decisions holding that overcrowding gain time was not subject to *ex post facto* analysis. See, e.g., *Blankenship v. Dugger*, 521 So.2d 1097 (Fla.1988); *Dugger v. Rodrick*, 584 So.2d 2 (Fla.1991); *Griffin v. Singletary*, 638 So.2d 500 (Fla.1994).

Winkler v. Moore, 831 So.2d 63, 65-66 (Fla. 2002).

The Second District explained in *Downs* that irrespective of the legislature's intent in amending the statute in response to *Dugger v. Anderson*, that amendment could not be applied retroactively without violating the *ex post facto* rule.

In response to this District's decision in *Anderson*, the legislature amended section 944.277(1)(g) to provide that provisional credits may not be awarded to any inmate who:

[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. (1993); Ch. 92-310, § 12, at 2967, Laws of Fla.

The legislature has made clear that at least as of the date of the 1992 amendment it did not intend for inmates who are sentenced as habitual felony offenders after they receive guidelines sentences to receive provisional credits. *McBride v. Moore* held that the amendment impliedly overruled its decision in *Anderson*, so that *Anderson* would be "of no benefit" to the defendant. *McBride*, 780 So.2d at 222.

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).

In evaluating whether a statute violates the *Ex Post Facto* Clause, the court must consider (1) whether the law is retrospective, or whether it applies to events that occurred prior to its enactment, and (2) whether it disadvantages the petitioner. *Green v. State*, 839 So.2d 748, 750 (Fla. 2d DCA), reversed on other grounds, *State v. Green*, 887 So.2d 1089 (Fla. 2004).

In *Smith*, the Florida Supreme Court held that the retroactive application of the legislature's amendment of a statute to clarify the statute's intent in response to *Carawan v. State*, 515 So.2d 161 (Fla.1987), would violate the *Ex Post Facto* Clause. 547 So.2d at 616. The court held:

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. Instead, the nature and effect of the court decisions and the statutory amendment must be examined to determine what law may be applicable after the amendment. Secondly, it is firmly established law that the statutes in effect at the time of the commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed. Finally, the amended statute, if given retroactive effect as urged by the state, would result in additional punishment for appellant, thus running afoul of the *Ex Post Facto* Clauses of the state and federal

constitutions.

547 So.2d at 616 (quoting *Heath v. State*, 532 So.2d 9, 10 (Fla. 1st DCA 1988)) (citations omitted).

Based on these principles, the court held that the interpretation of the statute in *Carawan* controlled for defendants whose crimes were controlled by the prior version of the statute.

Similarly, in *State v. Miranda*, 793 So.2d 1042, 1044 (Fla. 3rd DCA 2001), the Third District held that the retroactive application of an amendment to section 775.082(9)(a)(1), Florida Statutes, violated the Ex Post Facto Clause. 793 So.2d at 1044. Section 775.082(9)(a)(1) was amended by the legislature in response to the supreme court's decision in *State v. Huggins*, 802 So.2d 276 (Fla.2001), which interpreted § 775.082(9)(a)(1) to exclude convictions for burglary of an unoccupied dwelling from its sentencing scheme. The amended statute provided for sentencing under § 775.082(9)(a)(1) for burglary of an unoccupied dwelling. Because the retroactive effect of the statute would have been to require enhanced sentencing under § 775.082(9)(a)(1) for the defendant, the court found that a retroactive application of the amended statute would violate the Ex Post Facto Clause. 793 So.2d at 1044; see also *State v. Eldredge*, 801 So.2d 965, 967 (Fla. 4th DCA 2001) (refusing to apply section 775.082(9)(a)(1) retroactively), review denied, 823 So.2d 126 (Fla.2002).

In Coffield’s case, the circuit court's holding that the Department appropriately denied his petition for provisional credits is based upon the retroactive application of § 944.277(1)(g), Florida Statutes (1993). The lower court relied on this Court’s decision in *McBride v. Moore* to reach its conclusion that the retroactive application of the statute does not violate the Ex Post Facto Clause.

But as Coffield argued below, *McBride v. Moore* itself is no longer controlling precedent because it relied exclusively on the Florida Supreme Court's decision in *Dugger v. Rodrick*, 584 So.2d 2 (Fla.1991), which was overruled in *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997).³ In *Rodrick*, the Florida Supreme Court held that the retroactive application of section 944.277 did not violate the Ex Post Facto Clause because it was procedural and not substantive in nature. 584 So.2d at 2. The court based its conclusion that the statute was procedural on the

³ Although *Lynce* had been decided at the time this Court decided *McBride v. Moore*, so to that extent this Court had the benefit of *Lynce*, this Court nevertheless was bound by *Rodrick* until the Florida Supreme Court acknowledged that *Rodrick* was no longer good law. “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).” quoted in *Bottoson v. Moore*, 833 So.2d 693, 695 (Fla. 2002). This Court was not free to disregard *Rodrick* just because it might have considered *Rodrick* of doubtful validity after *Lynce*. Instead, this Court was required to await the Florida Supreme Court’s own determination that *Lynce* had overruled *Rodrick*.

fact that it dealt with provisional credits based on overcrowding, which is “not directed toward the traditional purposes of punishment.” *Id.* at 4.

In *Lynce*, the Supreme Court held that a statute that cancelled provisional credits based on overcrowding was subject to ex post facto analysis, 519 U.S. at 449, 117 S.Ct. 891, thus impliedly overruling *Rodrick*. That implied overruling was expressly acknowledged by the Florida Supreme Court in *Winkler v. Moore*, 831 So.2d 63 (Fla.2002). Because *McBride v. Moore* relied exclusively on *Rodrick* to overcome McBride’s Ex Post Facto clause objection, in light of *Winkler*’s subsequent holding that *Lynce v. Mathis* overruled *Rodrick*, *McBride v. Moore* is no longer controlling upon this Court.

The Department’s decision to deny Coffield provisional release credits on his 1990 non-habitual offender sentence relies upon a retroactive application of the 1992 amendment to his prior (1990) sentence. This retroactive application of the amendment disadvantages Coffield by precluding him from receiving provisional release credits thus requiring a longer term of incarceration. Therefore, the circuit court's retroactive application of the amendment to § 944.277(1)(g) violates the Ex Post Facto Clause and was an application of the incorrect law.

Indeed, *Winkler v. Moore*, 831 So.2d 63, 75 (Fla.2002), controls Coffield’s case. In *Winkler*, the Florida Supreme Court expressly held:

[A]s we have previously indicated, 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.

Winkler v. Moore, 831 So.2d 63, 68 (Fla. 2002).

McBride v. Moore is not simply a matter of a later court recognizing in light of a legislative statement that an earlier interpretation of a statute was incorrect. When *McBride* stated that the legislature had impliedly overruled *Dugger v. Anderson* and had expressed its intent that § 944.277(1)(g) apply to all habitual offender sentences, no matter when imposed, *McBride* did not mean to imply that this was the meaning of the statute *before the amendment*. *McBride* was merely stating the legislative intent at the time of the amendment. We know this because *McBride* did not cite any legislative history -- committee reports or floor debate or otherwise -- from either the original enactment or the amendment to suggest that the legislature's *original* intent was to apply the provision broadly, or if so, that there were any ambiguity in the statutory language which would allow resort to legislative history and intent. The legislature made no statement as to what its original intent was. The Court cannot simply infer such intent from an amendment to the statute.

When a state law has been applied using different interpretations, the proper inquiry in an Ex Post Facto challenge is whether the current interpretation was foreseeable. See *Stephens v. Thomas*, 19 F.3d 498, 500 (10th Cir. 1994) (“[W]hen the current interpretation of a statute is foreseeable, there can be no Ex Post Facto Clause violation.”). See also *Bouie v. City of Columbia*, 378 U.S. 347, 352-53, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (applying foreseeability test as principle underlying Ex Post Facto Clause in due process analysis); *Fultz v. Embry*, 158 F.3d 1101, 1103 (10th Cir.1998) (same); *Lustgarden v. Gunter*, 966 F.2d 552, 553-54 (10th Cir.1992) (same); *Devine v. New Mexico Dep't of Corrections*, 866 F.2d 339, 342 (10th Cir.1989) (same). This analysis comports with the Supreme Court's pronouncement in *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) that “lack of fair notice” is a critical element in ex Post Facto relief. 450 U.S. at 30, 101 S.Ct. 960.

It is clear that the 1992 amendment is more than an expression of original intent, instead it adds entirely new language to § 944.277, without which there would be no sound argument that it applied to all sentences of habitual offender inmates, irrespective of the temporal sequence of the habitualization. The legislature clearly changed the scope of the statute by adding the clause “*or has been sentenced at any time.*” Prior to the amendment the Department had consistently interpreted the

original provision to not prohibit provisional credits against sentences imposed before an inmate was habitualized.

The changed interpretation was not foreseeable. First, because the original language did not permit this construction. The state has cited no regulation, attorney general opinion or other regulatory authority prior to the amendment to suggest that the Department ever interpreted the original statute other than to provide credits to Coffield and similarly situated inmates.

Second, for a period of at least ten years the original meaning of the statute was applied to Coffield's sentence and to those similarly situated. This was not an isolated application to Coffield alone, but was applied in the same manner to inmates systemwide.

Coffield could not reasonably be said to have foreseen the new interpretation of the statute in effect at the time of his 1990 offense. Therefore, under the due process analysis mandated by *Bouie*, the retroactive application of the amendment to Coffield's sentence violates the Ex Post Facto clause and Coffield's petition for certiorari must be granted.⁴

⁴ See also *Knuck v. Wainwright*, 759 F.2d 856, 858 (11th Cir. 1985) (holding that in case of an ambiguous statute, the Florida Department of Corrections first interpretation of the statute was reasonable, and therefore retrospective application of subsequent interpretation was Ex Post Facto violation).

CONCLUSION AND REQUIRED CERTIFICATION

Petitioner Coffield respectfully requests this Honorable Court either grant rehearing or rehearing *en banc* based on the authorities cited above, or alternatively, issue a written opinion explaining the *per curiam* affirmance in the event it is predicated on a dispute with the above cited authorities and certify conflict to the Florida Supreme Court.

I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review because the decision of this Court apparently was based upon the prior decision of the First District Court of Appeal in *McBride v. Moore*, 780 So.2d 221 (Fla. 1st DCA 2001), which is in direct conflict with the decision of the Second District Court of Appeal in *Downs v. Crosby*, 874 So.2d 648 (Fla. 2nd DCA 2004).

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express, next day delivery, to Assistant Attorney General Maximillian J. Changus, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399, this the 14th day of October, 2008.

William Mallory Kent