IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.

Appellant,

v. CASE NO. 74,663

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF ON CROSS APPEAL

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL
FLA. BAR #410519
210 N. Palmetto Avenue
Suite 447
Daytona Beach, Florida 32114
(904) 238-4990

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE:

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

POINT ON CROSS APPEAL

APPLICATION TO THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE TO ZEIGLER IS NOT AN EX POST FACTO VIOLATION 1

CONCLUSION 3

CERTIFICATE OF SERVICE 3

TABLE OF AUTHORITIES

CASES: PAGES:

Buenoano v. Dugger,
No. 90-473-Civ-Orl-19 (M.D. Fla. June 33, 1990)........1,2

Stano v. Dugger,
No. 88-425-Civ-Orl-19 (M.D. Fla. May 18, 1988)...........1

POINT ON CROSS APPEAL

APPLICATION TO THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE TO ZEIGLER IS NOT AN EX POST FACTO VIOLATION.

The United States District Court Middle District of Florida, recently held in Buenoano v. Dugger, No. 90-473-Civ-Orl-19 (M.D. Fla. June 33, 1990), that application of the Florida Capital sentencing statute, enacted in 1973 approximately two years after the charged offense was committed, did not constitute an ex post facto violation. Judge Fawsett, the same judge who authored Stano v. Dugger, No. 88-425-Civ-Orl-19 (M.D. Fla. May 18, 1988), appeared to recede from Stano by stating:

> Petitioner argues that the Florida capital sentencing statute, enacted in 1973 approximately two years after the charged offense was committed, was applied retrospectively in her case and thereby constituted an ex post facto penalty. Petitioner contends that the death penalty statute, as it existed at the time of the alleged murder in September of 1971, had significant advantages over the later enacted statute, including an explicit grant of authority to the sentencing jury to recommend mercy in its sentencing verdict and the complete absence of statutory aggravating factors which, if found to exist, could justify the death sentence under the subsequently enacted 1973 statute. Although Petitioner admits that the United States Supreme Court, in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), essentially has addressed the issue she presently raises in this proceeding, she contends that the subsequent Supreme Court analysis of ex post facto laws as set forth in

> Miller v. Florida, 107 S.Ct. 2446 (1987), has cast the Dobbert holding into doubt.
>
> This Court will not question binding Supreme Court precedent. In Dobbert v. Florida, 97 S.Ct. 2290 (1977), the Supreme Court held that the revision in the Florida capital sentencing statute of which Petitioner now complains merely altered the procedure of determining whether a death sentence would be imposed and did not change the quantum of punishment attached to the crime Id. at 2298. Moreover, the new statute provided capital defendants with more, rather than less, judicial protection. Id. at 2299. Hence, "viewing the totality of the procedural changes wrought by the new statute, [the Supreme Court concluded] that the new statute did not work an onerous application of an ex post facto change in the law." Id. at 2230.
>
> Petitioner's challenges to the application of the 1973 Florida capital sentencing statute to her crime are subsumed under Dobbert. In fact, Dobbert was cited as the seminal case on ex post facto law in the Miller opinion. See Miller, 107 S.Ct. at 2450-2254. Petitioner's present claim, therefore, is without merit. (Emphasis added).

Buenoano, supra at 68-70.

The application of the cold, calculated aggravating factor would not be an ex post facto violation, and this aggravating factor should have been applied to Zeigler.

CONCLUSION

Based on the above and foregoing arguments and authorities, appellee respectfully requests that this court affirm the order of the trial court imposing the death penalty and reverse the decision of the trial court finding the application of the cold, calculated and premeditated aggravating factor to be ex post facto application.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #410519
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief on Cross Appellee has been furnished by U.S. Mail to Samuel W. Murphy, Jr., Davis, Markel & Edwards, 100 Park Avenue, New York, New York, 10017; and Steven L. Winter, Yale Law School, 401A Yale Station, New Haven, Connecticut 06520, this 28 day of June, 1990.

Barbara C. Davis
Of Counsel