

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES WILLIAM BURNEY
Petitioner,

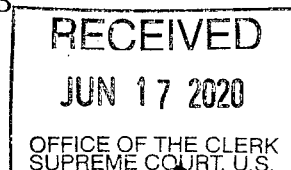
v.

STATE OF FLORIDA
Respondent.

On Writ of Certiorari to Florida's
Second District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

James W. Burney # 034208
Sumter Correctional Institution
9544 County Road 476-B
Bushnell, FL 33513



QUESTION PRESENTED

In 2018, Florida's citizens voted to remove the state constitutional prohibition on the retroactive application of sentencing laws. Petitioner then moved for resentencing under a current and mollified sentencing statute. The court denied his claim reasoning that enactment legislation was required for the constitutional provision to become effective and until then the law in effect at the time he committed his crime controlled. The appellate court affirmed. The questions presented are:

Whether the Fourteenth Amendment Due Process and Equal Protection protections requires enactment legislation for a state constitutional provision to become effective.

Whether the state courts denied Petitioner's Fourteenth Amendment Due Process and Equal Protection right to be resentenced to contemporary law in keeping with the voter's intent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Burney respectfully petitions for a writ of certiorari to review the judgment of the Second District Court of Appeal of Florida in this case.

OPINIONS BELOW

The opinion of the Second District Court of Appeal of Florida is unreported. App., *infra*, 1a. The decision of the Thirteenth Judicial Circuit Court, Hillsborough County of Florida is unreported. App., *infra*, 26a.

JURISDICTION

The judgment of the Second District Court of Appeal of Florida was entered on 3/25/2020. This Court's jurisdiction rests on 28 U.S.C. § 1257(a) since this petition was filed within 90 days of the final judgment from the highest state court with jurisdiction.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The Fourteenth Amendment Section 1. to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article X Section 9 of the Florida Constitution (amended, general election, Nov. 6, 2018)

Repeal of a criminal statute shall not affect prosecution for any crime previously committed before such repeal.

Article X Section 9 (2018) of the Florida Constitution

Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

Amendment 11 Ballot Initiative Summary, Florida (2018) states in pertinent part:

Amendment 11 bundles a proposal ... deleting a provision that amendment of a criminal statute will not affect prosecution or penalties for a crime committed before the amendment (while retaining a provision allowing prosecution of a crime committed before the repeal of a criminal statute)....¹

Florida law 813.011 (1970) states:

Whoever, by force, violence or assault or putting in fear, feloniously robs, steals and takes away from the person or custody of another, money or other property which may be the subject of larceny, shall be guilty of a felony of the *first degree* punishable by imprisonment in the state prison for life or a lesser term of years, at the discretion of the court.

Florida law 812.13 (2018)² provides in relevant part:

(1) Robbery means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2)(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the *second degree*,³ punishable, as provided in s. 775.082, s. 775.083, or s. 775.084.

¹ See *Detzner v. Anstead*, 256 So.3d 820, 822 n. 3 (Fla. 2018)(Ballot summary approved by the Florida Supreme Court)

² Formerly s. 813.011

³ A second degree felony carries a maximum of 15-years in prison unless enhanced or reclassified.

STATEMENT

The Florida Constitution in Article XI designates four different methods to change the state constitution: Section 1. Proposal by legislature, Section 2. Revision commission, Section 3. [Citizen] Initiative, and Section 4. Constitutional convention. The Constitutional Revision Commission created the amendment to the constitution subject to this petition known then as Amendment 11.⁴ App., *infra*, at 36a. The amendment contained three changes to the state constitution, but at issue here is the change in the Savings Clause, also known as the Ex Post Facto Clause, in Article X Section 9 of the Florida Constitution.

Florida voters passed Amendment 11 in the 2018 election cycle. Its provisions became effective as amendments on January 8, 2019 as required by Article XI Section 5(e) of the state constitution. App., *infra*, at 32a. The amendment removed the prohibition on retroactive application of punishment statutes but retained the prohibition on laws related to prosecution. *Infra.*, at 2.

Petitioner was sentenced to life in 1972 after a jury trial for an unarmed robbery he committed in 1971 when he was 17 years old. App., *infra.*, at 26a. This sentence may sound harsh but the law in effect at the time, section 813.011, Florida Statutes, provided for up to a life sentence regardless whether the robbery was unarmed or not. *Infra.*, at 2. The state legislature change the robbery statute in 1975 and segmented robberies into different categories carrying different sentences

⁴ Article XI, section 2 of the Florida Constitution provides that a constitution revision commission shall be established and convened every 20 years to "examine the constitution of the state, hold public hearings, and, not later than one hundred eighty days prior to the next general election, file with the custodian of state records its proposal, if any, of a revision of this constitution or any part of it." *Id.* 2(c).

from 15-years up to life. The current unarmed robbery statute with a 15-year maximum sentence is the penalty petitioner moved the trial court to resentence him to days after Amendment 11 became effective. App., *infra*. at 30a. Petitioner's legal position for resentencing was that when the amendment became effective the current robbery statute immediately became controlling.

The trial court denied the motion based on two premises: that enactment legislation was still required for the current robbery statute to apply, and therefore the statute in effect at the time Petitioner's crime was committed still controlled. App., *infra*. at 29a - 30a.

Petitioner timely appealed this decision to Florida's Second District Court of Appeal. He then moved the appellate court under Florida Rules Appellate Procedure 9.125 to certify his appeal as a matter affecting the proper administration of justice to the Florida Supreme Court. App., *infra* at 19a. The appellate court denied the motion and affirmed the trial court's decision without an opinion on 3/25/2020. App., *infra*, 1a. An appellate court decision with no opinion does afford the Petitioner a lawful way to seek review by the Florida Supreme Court; thus this Court is his last resort.

During the pendency of the Petitioner's appeal, the Florida Legislature passed section 775.022, Florida Statutes (2020) which states in relevant part:

(3) Except as expressly provided in an act of the Legislature or as provided in subsections (4) and (5), the reenactment or amendment of a criminal operates prospectively and does not affect or abate any of the following:

* * *

(c) A prior penalty, prior forfeiture, or prior punishment incurred or imposed under the statute.

The constitutionality of this statute was not argued in state court, but it is cited in this petition because it can reasonably be stated that the state will raise the issue if this Court grants review.

SUMMARY OF ARGUMENT

This case essentially comes down to the intent of Florida's voters. The ballot summary the voters considered is key to this petition even more so than the few words that changed in the provision. If this Court reads the ballot summary and the change in the provision from the position of a lay voter, it can also determine that their intent is for changes in punishment statutes to apply retroactively.

Petitioner contends that his federal right to due process and equal protection attached to the amended Savings Clause when Amendment 11 became effective. His maximum sentence thus became that of current law. And when the state courts denied Petitioner's right to be resentenced they not only violated his rights under the Fourteenth Amendment, they usurped the will of the electorate.

REASONS FOR GRANTING THE PETITION

Prior to the passage of Amendment 11, Florida was the only state in which the state constitution explicitly forbade retroactivity of amendments to criminal statutes. This initiative was in response to changes in criminal punishments such as a defendant who committed certain drug offenses on June 30, 2014 would serve five times longer in prison than a defendant who committed that same offense one day later; App., *infra*, at 37a., or a defendant who shot into the air to scare someone on June 30, 2016 would serve a mandatory 20-years in prison versus a 5-year maximum today.

As argued on appeal, the voter's intent when they checked 'Yes' to approve Amendment 11 ballot summary was to "delet[e] a provision that amendment of a criminal statute will not affect prosecution or penalties for a crime committed before the amendment (while retaining a provision allowing prosecution of a crime committed before the repeal of a criminal statute)...." App., *infra*, at 13a-14a. Assuming common voters have limited legal knowledge, one can reasonably read the ballot summary that the amendment of a criminal statute *will affect* the penalty for a crime committed before the amendment. The operation of *will affect* appears to be a command with instant application from the perspective of someone who has never heard of implementing or enacting legislation that the state courts say is required. App., *infra*, at 15a. Neither the state nor the federal constitutions require enactment legislation. App., *infra*, at 12a.

The bulk of this Court's ex post facto jurisprudence involved claims that a law has inflicted "a greater punishment, than the law annexed to the crime, when

committed." *Calder v Bull*, 3 Dall 386, 390, 1 L.Ed 648 (1798)(emphasis deleted). The Court explained that such laws implicate the central concerns of the Ex Post Facto Clause: "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v Graham*, 450 US 24, 30, 67 L.Ed.2d 17, 101 S.Ct. 960 (1981).

To fall within the ex post facto prohibition, a law must be retrospective-that is, "it must apply to events occurring before its enactment" and it "must disadvantage the offender affected by it," *id.*, at 29, 67 L.Ed.2d 17, 101 S.Ct. 960, by altering the definition of criminal conduct or *increasing* the punishment for the crime, see *Collins v. Youngblood*, 497 US 37, 50, 111 L.Ed.2d 30, 110 S.Ct. 2715 (1990). See also *Lynce v. Mathis*, 519 US 433, 137 L.Ed.2d 63, 117 S.Ct. 891 (1997)

Article I, 10, of the Federal Constitution provides that "[n]o State shall ... pass any ... ex post facto Law." In his opinion for the Court in *Beazell v Ohio*, 269 US 167, 70 L.Ed 216, 46 S.Ct. 68 (1925), Justice Stone explained:

"The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, *to the disadvantage of the accused.*"

Id., at 170, 70 L.Ed 216, 46 S.Ct. 68.

The ex post facto clauses of the federal and state constitutions prevent new punishments "to a crime already consummated, to the detriment or material

disadvantage of the wrongdoer," but there is no constitutional limitation on retroactive application of criminal legislation which mollifies criminal sanctions. App., *infra*, at 37a.

The trial court's decision cited the following phrase from the accompanying legislative materials in the motion for resentencing: "A repeal of the Savings Clause will allow to the legislature to retroactively apply lesser sentencing to prisoners currently in prison." App., *infra*, at 28a. This is a constricted reading of the entire clause that also states: "However, the removal of the punishment provision could allow courts to consider altering punishment in light of a statute being repealed or amended." *Id.* at 37a. This phrase is more consistent with the ballot summary than an extra measure the legislature would conceivably have to take to activate the constitution.

The Florida legislature disapproved of this constitutional amendment even more so than the Petitioners' trial and appellate courts. During the pendency of his appeal, the state congress enacted Florida Statute 775.022. When one reads the following subsection it becomes clear that the legislature usurped Florida voters by adding back the prohibition on the retroactive application of sentencing laws the voters chose to remove:

(3) Except as expressly provided in an act of the Legislature or as provided in subsections (4) and (5), the reenactment or amendment of a criminal operates prospectively and does not affect or abate any of the following:

* * *

(c) A prior penalty, prior forfeiture, or prior punishment incurred or imposed under the statute.

The constitutionality of this statute was not argued in the state courts. It was not law at the time the Petitioner filed his appeal. Petitioner mentions it here to demonstrate how cavalier Florida's elected officials feel about their citizen's vote to reduce the sentences they deemed excessive. The sentiment from the Florida Supreme Court is precisely why this Court should grant review in this case:

It is not for us to judge the wisdom of the constitutional amendments enacted or the change in public policy pronounced through those amendments, even in instances where the change involves abrogation of long-standing legislation that establishes and promotes an equally or arguably more compelling public policy.

Hence, what the Legislature has given through its enactments and the courts have enforced through their decisions, the people can take away through the amendment process to our state constitution.

Florida Hospital Waterman, Inc v. Buster, 984 So.2d 478, 494 (Fla. 2008)(App., infra at 16a.)

Moreover, what the people provide in their constitution, the Legislature and the courts may not take away through subsequent legislation or decision. When they do, as in the Petitioner's case, they violate a person's due process and equal protection rights guaranteed by the Fourteenth Amendment.

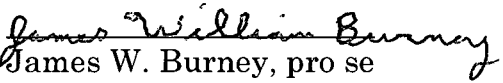
This case is no different than the following: the electorate of the United States votes to enact the First Amendment, a citizen speaks out against the government, a court tells him he cannot, months later the Congress passes a law restricting speech against the government. Now he has been muted by both the judicial and legislative branches that stripped away the very right he voted for.

Both scenarios are repugnant to our system of democratic self determination. Petitioner prays this Court will restore the vote of Florida's citizens and in so doing prevents other governments from overriding the vote of their citizens.

CONCLUSION

The judgment of Florida's Second District Court should be reversed.

Respectfully submitted,


James W. Burney, pro se