

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

versus

CASE NO. 68,949

JOSEPH A. YOST,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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Weaver v. Graham,
450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) 2, 4

OTHER AUTHORITY:

Section 27.3455, Florida Statutes (1985) i, 1, 2, 5
Section 27.3455(1), Florida Statutes (1985) 2, 3, 4
Section 38.22, Florida Statutes (1985) 3
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SUMMARY OF ARGUMENT

Under pre-existing law, the granting of credit for gain-time by the Department of Corrections was mandatory and its forfeiture was subject to findings made in compliance with procedural safeguards. Section 27.3455, Florida Statutes (1985), provides for the automatic withholding of gain-time so long as court costs are not paid or until community service following incarceration is ordered. The automatic denial of gain-time for nonpayment of court costs imposes a burden and an additional penalty on Respondent which did not exist prior to its enactment, and the application of Section 27.3455 in this case therefore violates the ex post facto provisions of the Florida and United States Constitutions.

ARGUMENT

THE APPLICATION OF SECTION 27.3455,
FLORIDA STATUTES (1985), TO CRIMES
COMMITTED PRIOR TO THE EFFECTIVE
DATE OF THE STATUTE VIOLATES THE
EX POST FACTO PROVISIONS OF THE
CONSTITUTIONS OF THE UNITED STATES
AND OF THE STATE OF FLORIDA.

Article I Section 10 of the Florida Constitution prohibits the passage of any ex post facto law. Even if a statute merely alters penal provisions accorded by grace of the legislature--such as gain time--it violates the ex post facto clause of the United States Constitution if it is both retrospective and more onerous than the law in effect on the date of the offense. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); Art. I §9 Cl. 3, U. S. Const. In Weaver, Section 944.275, Florida Statutes (1975), was declared unconstitutional because it reduced the amount of gain time which could be earned by prisoners whose crimes occurred before the statute's effective date. The Supreme Court held that the statute in that case was not merely procedural simply because it did not alter punishment prescribed for the offense. Likewise, the application of Section 27.3455(1), Florida Statutes (1985), to defendants whose crimes occurred prior to July 1, 1985, the effective date of the new statute, violates the ex post facto provisions of the United States and Florida Constitutions.

Section 944.275(4) (a), Florida Statutes (1983), provided that the Department of Corrections shall grant basic gain-time at the rate of ten days for each month of each sentence imposed on a prisoner. Sections 944.275(5) and 944.28 provided that gain-time may be forfeited or shall be subject to forfeiture for violations of the laws of Florida or the rules of the Department

of Corrections.

Petitioner argues that because of the pre-existence of provisions for forfeiture of gain-time, in Sections 944.275(5) and 944.28, Section 27.3455(1) imposes no new penalty or additional punishment. Petitioner says that, by the enactment of Section 27.3455(1), it is not gain-time which is changed but only the procedure by which it is credited. See, Petitioner's Brief on the Merits, Page 7. This contention overlooks the very clear and material distinction between the pre-existing provisions for forfeiting accrued gain-time and the new law which does not allow gain-time to be granted until the new requirements are met. The withholding of gain-time awards, moreover, is automatic so long as Section 27.3455(1) is not complied with, whereas the former provisions for forfeiting gain-time required that there be findings of guilt made, §944.275(5), Fla. Stat. (1983), and that a particular method for declaring a forfeiture of gain-time be followed. §944.28(2)(c), Fla. Stat. (1983). Petitioner also cites the pre-existing law that refusal to obey a court order may constitute contempt, in order to argue that failure to pay court costs pursuant to Section 27.3455(1), being the nonpayment of a court-ordered fee, is the equivalent of a violation of the law of this State. See, Petitioner's Brief on the Merits, Page 8. §944.28(2)(a), Fla. Stat. (1985). Again, this argument fails to distinguish between a finding that a prisoner has violated a law, with its attendant procedural safeguards, and Section 27.3455(1)'s automatic withholding of gain-time. See, §38.22, Fla. Stat. (1985) (Power and proceeding to punish contempt); Rules 1.570(c), 1.982, F.R.Civ.P. (Civil contempt power and proceeding).

As the District Court found herein, Section 27.3455(1), Florida Statutes (1985), clearly violates the constitutional prohibitions against ex post facto laws because it does not permit gain-time to accrue while the costs remain

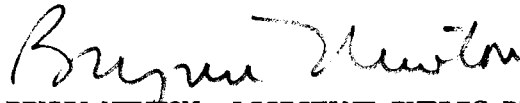
unpaid or, as to indigent defendants, it requires the court to impose a sentence of community service after incarceration. It is not merely procedural because an additional penalty is being imposed by the new statute against defendants who do not or cannot pay these costs. Petitioner acknowledges that Section 27.3455(1) is being applied retroactively in this case, to sentences for crimes which occurred prior to July 1, 1985. See, Petitioner's Brief on the Merits, Pages 5, 6-7. The elements which render a penal law ex post facto --that it apply to events occurring before its enactment and that it disadvantage the offender affected by it--are present in this case. Weaver v. Graham, supra. The District Court's decision to reverse that portion of the trial court's judgment imposing court costs of two hundred dollars in each case should be affirmed.

CONCLUSION

For the reasons expressed herein, Respondent respectfully requests that this Honorable Court affirm the District Court's decision to reverse that portion of the trial court's order imposing court costs herein, and answer the certified question by finding that the application of Section 27.3455, Florida Statutes (1985), to crimes committed prior to July 1, 1985, violates the ex post facto provisions of the Constitutions of the United States and of the State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by hand delivery; and by mail to Mr. Joseph A. Yost, P. O. Box 158, Trenton, Florida 32693, this 10th day of September, 1986.



ATTORNEY