IN THE SUPREME COURT OF FLORIDA

JOSEPH C. BLANKENSHIP,
Petitioner,

-vs- CASE NO. 71,029

RICHARD L. DUGGER,
Respondent,

_____/

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the Petitioner Joseph C. Blankenship, pro se, and respectfully petitions this Honorable Court for a Writ of Habeas Corpus and as grounds therefore would show:

Jurisdiction

The jurisdiction of this Honorable Court is invoked pursuant to Article V, Section 3(b)(9) of the Florida Constitution.

Statement of the Facts

Petitioner is presently incarcerated in the Florida Department of Corrections, at Apalachee Correctional Institution in Sneads, Florida, of which the Respondent is the Secretary.

In April of 1985 Petitioner was sentenced to 7 years for sexual battery and concurrent sentences of 7 and 5 years respectively for false imprisonment and burglary in the Circuit Court for Dade County, Florida. These offenses occurred in August of 1984. After sentencing Petitioner was committed to the custody of the Florida Department oc Corrections.

In 1983 the Florida Legislature enacted Fla. Stat. 944.598 titled Emergency Release of Prisoners. This law was in effect at the time Petitioner's offenses occurred and it provides, inter alia, for the awarding of extra or additional gain-time credits of up to 30 days when the total state prison population exceeds 98% of the law capacity of the system. Under this statute all inmates in the system who are eligible to earn gain-time would

be awarded this gain-time. This statute was amended in June of 1986. The 98% figure was raised to 99% before awarding this additional gain-time.

In Feburary of 1987 the Florida Legislature enacted Fla. Stat. 944.276 titled Administrative Gain-Time. This law provides for the awarding of additional gain-time of up to 60 days when the total inmate population reaches 98% of the lawful capacity as defined in s. 944.598. Under s. 944.276 all inmates who are earning gain-time are eligible except inmates who are serving mandatory minimum sentences under s. 775.082(1) or 893.135; or are serving minimum mandatory portion of a sentence enhanced by s. 775.087(2); or were convicted of sexual battery of any sexual offense specified in s. 917.012(1) and has not successfully completed a program of treatment pursuant to s. 917.012; or were sentenced under s. 775.084.

In Feburary of 1987 the Respondent began awarding additional gain-time under s. 944.276. He is applying this statute to Petitioner and all inmates in the prison system without regard to when their offenses occurred. Respondent is applying this statute to Petitioner whose offense occurred before this statute was enacted.

Respondent's retroactive application of s. 944.276 to Petitioner is adversely affecting him in that under 944.598(1983) he is eligible for additional gain-time when the total inmate population exceeds 98% of the lawful capacity of the system in that the only requirement for eligibility is that an inmate be eligible to earn gain-time, which Petitioner is, and under s. 944.276 there are additional restrictions on eligibility not found in s.944.598(2)(1983), i.e., drug traffickers convicted under s. 893.135, habitual offenders convicted under s. 775.084 and in Petitioners case inmates convicted of sexual battery or any offense specified in s. 917.012.

Petitioner has exhausted his administrative remedies within the Florida Department of Corrections.(see Appendix "A").

Fla. Stat. 944.276 as applied to Petitioner is an ex posto facto law and as such violates the U.S. Constitution, Article 1, Section 10, Clause 1 and also the Florida Constitution, Article 1, Section 10 as enunciated by the United States Supreme Court in WEAVER -vs- GRAHAM, 450 U.S. 24, 101 S.Ct. 960(1981).

Fla. Stat. 944.276 as applied to Petitioner violates the due process clause of the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution.

Respondent has awarded 180 days additional gain-time under s. 944.276 from Feburary 1987 to date. That Petitioner is entitled to the 180 days gain-time under s. 944.598(1983).

Petitioner as of this date has less than 180 days left to serve on his sentences and the 180 days gain-time to which he is due would entitle him to immediate release.

Relief Sought

Petitioner prays that this Honorable Court will issus it's Writ of Habeas Corpus and:

(1) enjoin the Respondent's retroactive application of Fla. Stat. 944.276 to Petitioner.

(2) declare Fla, Stat. 944.276 as applied to Petitioner as violative of the ex posto facto clause of both the U.S. and Florida Constitutions and that it violates the due process clause of the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution.

(3) compel the Respondent to award Petitioner all additional gain-time that has been awarded since Feburary 1987 to date, 180 days, and to release him immediately from custody.

(4) and any other relief that this Honorable Court deems just and proper.

Argument

FLA. STAT. 944.276 AS APPLIED TO PETITIONER IS AN EX POSTO FACTO LAW WHICH IS PROHIBITED BY BOTH U.S. AND FLORIDA CONSTITUTIONS.

In the instant case Petitioner, whose offenses occurred in 1984, is being denied additional(administrative) gain-time under s. 944.276 which was enacted after Petitioner's offenses were committed. Petitioner sought administrative relief alleging that he is entitled to this additional gain-time under s. 944. 598(2) which was enacted in 1983 and was the law in effect at the time his offenses occurred and his request for administrative remedy was denied.(Appendix "A")

In 1983 the Florida Legislature faced with the problem of an ever increasing prison population enacted Fla. Stat. 944.598 titled Emergency Release of Prisoners. This statute provides, inter alia, for the awarding of additional gain-time above the basic and incentive gain-time already provided for by Fla. Stat. 944.275(1983). Under s. 944.598 all inmates in the Florida Prison system who are eligible to earn gain-time would be credited with up to 30 days when the total population of the system exceeded 98% of the lawful capacity of the system. The only requirement was that an inmate be eligible to earn gain-time. In 1986 this statute was amended but Petitioner is still entitled to gain-time under the 1983 statute because it was the law in effect at the time Petitioner's offenses occurred.

In Feburary of 1987 the Florida Legislature still trying to solve the overcrowding problem in the prison system enacted Fla. Stat. 944.276 titled Administrative Gain-Time. This statute provides for the awarding of additional gain-time of up to 60 days to inmates in the system when the total inmate population reaches 98% of the lawful capacity of the system as defined in s. 944.598.

However, under s. 944.276 certain classes of inmates, who are otherwise eligible to earn gain-time, are not eligible to receive this additional gain-time. They include drug traffickers sentenced under s. 893.135; habitual offenders sentenced under s. 775.084; and inmates convicted of sexual battery, as in the instant case, and any sexual offense specified in s. 917.012(1)

and has not successfully completed a program of treatment under s. 917.012.

Under s. 944.598(2) all inmates, petitioner included, who are eligible to earn gain-time shall receive the additional gain-time when the population exceeds 98% of the lawful capacity. under s. 944.276 no drug traffickers, habitual offenders, nor sex offenders, as in the instant case, are eligible to recieive this additional gain-time.

Fla. Stat. 944.276 clearly disadvantages Petitioner whose offenses occurred prior to it's enactment. Respondent is applying this statute to Petitioner and all inmates in the system regardless of when their offenses occurred. 944.276 is clearly more onerous than s. 944.598(1983) as applied to Petitioner in that under s. 944.598 he is eligible for additional gain-time when the population exceeds 98% of the lawful capacity and under s. 944. 276 he is not.

When Petitioner sought relief through administrative remedy , Respondent stated that Petitioner was convicted of a sexual offense and had not completed a program of treatment and as a result was not eligible for administrative gain-time.(Appendix "A")

Petitioner asked for additional gain-time under 944.598 and under this statute which was in effect at the time of his offense he is eligible because he is eligible and receiving basic and incentive gain-time.

The instant case is directly on point with WEAVER -vs- GRAHAM, 450 U.S. 24, 101 S.Ct. 960(1981). In WEAVER the Florida Legislature enacted a new gain-time statue which reduced the number of days of statutory gain-time inmates in the Florida Prison System could receive. This statute was applied to all inmates in the system without regard to when their offenses occurred . The new statute worked to the disadvantage of WEAVER, whose offense occurred prior to it's enactment, and he sought legal redress.

The U.S. Supreme Court in holding that Florida'a Gain-

time statute, as applied to WEAVER, was an ex posto facto law and thus prohibited by the U.S. Constitution. id. 101 S.Ct. at 968.

In their decision the U.S. Supreme Court held that two critical factors must be present for a criminal or penal law to be ex posto facto: first it must be retrospective, that is, it must apply to events occurring before its enactment and second it must disadvantage the offender affected by it. id at 965. A law need not impair a vested right to violate the ex posto facto prohibition. The presence of an affirmative right is not relevant to the ex posto facto prohibition. id at 964-65.

Justice Marshall writing for the majority stated:

> "Here, petitioner is similarly disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct. In Greenfield -vs- Scafati ... we affirmed the judgment of a three judge district court which found an ex posto facto violation in the application of a statute denying any gain-tine for the first six months after parole revocation to an inmate whose crime occurred before the statute's enactment. There, as here, the inmate was disadvantaged by the new restrictions on eligibility for release. In this vein, the three judge court in Greenfield found'no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for, and hence earn parole. Each ... materially alters the situation of the accused to his disadvantage." id at 967

The case at bar is indistinguishable from WEAVER and mandates the same result. The fact that s. 944.276, as applied to, Petitioner, has eliminated the opportunity for petitioner to have his sentenced reduced when the prison population exceeds 98% of the lawful capacity is irrefutable. Its application to Petitioner violates the ex posto facto clause of both the U.S. and Florida Constitutions.

Respondent has awarded a total of 180 days additional gain-time to which Petitioner is clearly entitled under s. 944.598.

Petitioner has less than 180 days left to serve before the expiration of his sentences and with the gain-time that he is due he is being illegally detained and entitled to immediate release.

Argument II

FLA. STAT. 944.276 AS APPLIED TO PETITIONER VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION.

Petitioner is aware that the Constitution itself does not guarantee gain-time to an inmate in prison, but where the state legislature has provided a statutory right under 944.598(2) to additional gain-time of up to 30 days when the total prison population exceeds 98% of the lawful capacity and made the only requirement that an inmate be eligible to earn gain-time Petitioner has a protected interest that is sufficiently embraced under the Fourteenth Amendment against arbitrary action by the state. WOLF -vs- McDONNELL, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed. 2d 935(1974).

The touchstone of due process is protection of the individual against arbitrary action of government. DENT -vs- WEST VIRGINIA, 129 U.S. 114, 9 S.Ct. 213, 32 L.Ed 623(1889).

First, the question is whether the state of Florida has created a right to gain-time protected by the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution.

In determining whether a state has created such a constitutional right a court must consider whether the state has placed a substantial limitation on official discretion. OLIM -vs- WAKINEKONA, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747

Fla. Stat. 944.598(1983) reads, in pertinent:

> "(1) The Department of Corrections shall advise the Governor of the existence of a state of emergency in the state correctional system whenever the population of the state correctional system exceeds 98% of the lawful capacity of the system for males, females, or both ... When the Governor verifies such certification by letter the secretary shall declare a state of emergency
> (2) Following the declaration of a state of emergency the sentences of all inmates in the system who are eligible to earn gain-time shall be reduced by the credit of up to 30 days gain-time, in 5 day increments, as may be necessary to reduce the inmate population to 97% of the lawful capacity."

It is clear from the language of s. 944.598 that there is no discretion involved in deciding whether or not a state of emergency exist. By definition of the statute , a state of emergency exist whenever the population of the prison system exceeds 98% of the lawful capacity. The criteria here is solely objective. There is no subjective decision here, nor discretion. It is a matter of mathematics.

When the Governor verifies this condition the Respondent shall declare a state of emergency. No discretion involved here.

Next, following the declaration of a state of emergency the sentences of all inmates in the system who are eligible to earn gain-time shall be reduced by credit of up to 30 days gain-time.

Respondent does not have the discretion to give or not to give the additional gain-time when the above mentioned condition exists. The discretion involved, if any, in reducing the prison population from 98% to 97% is very minimal at best.

The state legislature in enacting s, 944.598 placed a substantial limitation on Respondent's official discretion. They have created a state right to additional gain-time of up to 30 days for all inmates in the system when the population exceeds 98% of the lawful capacity of the system.

Respondent by applying s. 944.276 to Petitioner, whose offenses occurred prior to it's enactment, is depriving Petitioner of a state created right to obtaining additional gain-time under s. 944.598(2) in violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution.

Under Fla. Stat. 944.28 gain-time earned of the opportunity to earn gain-time in the future can only be forfeited for violation of the laws of this state of any rule or regulation of the department or institution.

The U.S. Supreme Court in WOLF -vs- McDONNELL, supra, set the standard for due process claims in regard to gain-time. In

their opinion the High Court stated:

> "It is true that the constitution itself does not guarantee good-time credits for satisfactory behavior while in prison. But here the state itself has only provided a statutory right to good-time, but also that it is to be forfeited only for serious misbehavior. Nebraka may have the right to create, or not, a right to a shortened prison sentence through the accumalation of credits for good behavior, and it is trus that the due process clause does not require a hearing "in every conceivable case of a government impairment of private interest'(cite omitted). But the state having created the right to good-time and itself recognizing that it's deprivation is a sanction authorized for major misconduct, the prisoners interest has real substance and is sufficeintly embraced within the Fourteenth Amendment liberty to entitle him to those minimum procedures appropriate under the due process clause to insure that the state created right is not arbitrarily abrogated." WOLF-vs- McDONNELL, supra at 558-59, 2975.

The instant case is closely analogous to WOLF. The state of Florida, like the state of Nebraska in WOLF, has created a right to additional gain-time under s. 944.598(2)(1983) to which Petitioner is entitled. The state having thus created this right to gain-time can not arbitrarily deny or refuse Petitioner this gain-time by applying s. 944.276 to him without offending the due process clauses of both the U.S and FLorida Constitutions.

Starting in Feburary of 1987 the Respondent has awarded a total of 180 days gain-time when the population reached or exceeded 98% of the lawful capacity of the system. The date and amount of gain-time awarded to date is as follows:

Feb. 16, 1987	10 days
Feb. 26, 1987	20 days
Mar. 17, 1987	15 days
Mar. 26, 1987	15 days
Apr. 16, 1987	15 days
Apr. 24, 1987	20 days
May 15, 1987	15 days
May 26, 1987	10 days
Jun. 17, 1987	15 days
Jun. 26, 1987	15 days
Jul. 16, 1987	15 days
Jul. 28, 1987	15 days
Total to date	180 days.

Petitioner is entitles to all 180 days gain-time that has been awarded. Under s. 944.598 he can receive up to 30 days gain-time and the Respondent has not awarded more than 30 days at any

one time.

When Petitioner is properly awarded the 180 days gain-time deductions from his sentences he is entitled to immediate release because he has less than 180 days left to serve on his sentences.

Conclusion

The facts and law cited herein are irrefutable. Respondent is clearly in error. Fla. Stat. 944.276 as applied to Petitioner is an ex posto facto law prohibited by the constitutions of both the United States and the State of Florida. This retroactive application is also a violation of the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution.

Due to the fact that the Petitioner has less than 180 days left to serve he is entitled to immediate release and he humbly asks that this Honorable Court act expediously in deciding the merits of this case.

Respectfully submitted,

Joseph C. Blankenship 097855-S

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VERIFICATION

STATE OF FLORIDA)
) SS.
COUNTY OF JACKSON)

BEFORE ME, the under signed authority this day personally appeared JOSEPH C. BLANKENSHIP, who, first being duly sworn deposes and says:

That he is the Petitioner in the above-styled cause.

That he has personal knowkedge of all the facts and matters contained in this Petition for Writ of Habeas Corpus and that they are true and correct.

SWORN TO AND SUBSCRIBED before me this 7 day of August 1987.

Notary Public State of Florida at Large

Notary Public, State of Florida at Large
My Commission Expires Dec. 3, 1990.

My Commission expires _____.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Habeas Corpus has been forwarded by regular U.S. Mail to Richard L. Dugger, Secretary, Florida Department of Corrections, 1311 Winewood Blvd., Tallahassee, Fl. 32301 this 7 day of August 1987.

Joseph C. Blankenship