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IN THE SUPREME COURT OF FLORIDA

DONALD WALDRUP,

Petitioner,

vs. CASE NO. 74,012

RICHARD DUGGAR, Secretary,
Florida Department of
Corrections,

Respondent.

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# BRIEF OF PETITIONER

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BRIEF OF PETITIONER

STATEMENT OF THE CASE AND FACTS

In **1983** the Florida legislature changed the state's work or incentive gain-time law to reduce potential work or incentive gain-time from thirty-seven days per month to twenty days per month. The Florida Department of Corrections has applied this **1983** provision to all prisoners, including those whose crimes were committed prior to the effective date of the **1983** law.

On April **7, 1989,** petitioner, a prisoner serving an overall sentence of fifteen years in the Florida prison system for crimes committed in **1980** and **1982,** filed a pro se petition for writ of habeas corpus in this Court. The petition contended that the **1983** law, as applied to petitioner, was violative of the ex post facto prohibition of the United States Constitution.

On July 10, **1989,** this Court appointed the undersigned counsel to represent petitioner.

## SUMMARY OF ARGUMENT

As early as 1798 the United States Supreme Court recognized that one of the evils forbidden by the ex post facto prohibitions of the United States Constitution was a "law that changes the punishment and inflicts a greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798)

The Supreme Court has prescribed two critical elements which must be present for a criminal or penal law to be ex post facto: 1) it must be retrospective, that is, it must apply to events occurring before its enactment, and 2) it must disadvantage the offender affected by it. Calder, supra, at 390, 1 L.Ed. 648 (1798).

In Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the Supreme Court was confronted with a factual situation and legal issue very similar to that in the present case. The Florida legislature had enacted a statute reducing the basic gain-time available to prisoners and the state was endeavoring to apply the statute to prisoners whose crimes occurred prior to the enactment of the statute. The Supreme Court found both critical elements to be clearly established, and found the statute in question to be ex post facto as applied prisoners whose crimes occurred prior to the enactment of the statute.

In the present case, as in Weaver, the Court is faced with a gain-time statute which is more onerous than its predecessor, but which the state is endeavoring to apply to prisoners whose

crimes were committed prior to the effective date. Under the principles and holding of Weaver, this Court should hold the gain-time statute to be ex post facto as applied to such prisoners.

The Eleventh Circuit, United States Court of Appeals, recently issued its opinion in a case raising the identical issue presented herein. Following Weaver, the Eleventh Circuit held the gain-time provisions complained of herein to be ex post facto as applied to prisoners serving sentences for crimes which occurred prior to the effective date of the provisions. Raske v. Martinez, Docket No. **88-3101** (11th Cir. decided July 11, **1989).**

## ARGUMENT

### ISSUE PRESENTED

WHETHER THE 1983 AMENDMENT OF SECTION 944.275, FLORIDA STATUTES, REDUCING WORK OR INCENTIVE GAIN-TIME FROM A POTENTIAL THIRTY-SEVEN DAYS PER MONTH TO A POTENTIAL TWENTY DAYS PER MONTH, VIOLATES THE EX POST FACTO PROHIBITION OF THE UNITED STATES CONSTITUTION WHEN APPLIED TO A PRISONER SERVING A SENTENCE FOR A CRIME WHICH OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE 1983 AMENDMENT.

The ex post facto prohibition was so important to the Constitutional Convention that it is found twice in the Constitution. Article I, Section 9, prohibits the Congress from passing any ex post facto law, and Article I, Section 10, places the same limitation upon the states. The United States Supreme Court first considered the scope of the ex post facto prohibition in Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648 (1798), wherein Justice Chase explained his understanding of what fell "within the words and the intent of the prohibition" as follows:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id., at 390, 1 L.Ed. 648 (emphasis added). Accord, Beazell v. Ohio, 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216 (1925);

Dobbert v. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); and Miller v. Florida, 482 U.S. , 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

The Justices opinions in Calder, supra, as well as other early authorities, make it clear that an important objective of the framers of the Constitution in including the ex post facto prohibitions was to require legislative enactments to give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. Calder v. Bull, supra, at 387-388, 1 L.Ed. 648 (Chase, J.); id., at 396, 1 L.Ed. 648 (Patterson, J.); 1 W. Blackstone, Commentaries *46; Kring v. Missouri, 107 U.S. 221, 229, 2 S.Ct. 443, 449, 27 L.Ed. 506 (1883); Dobbert v. Florida, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977); Weaver v. Graham, 450 U.S. 24, 28-29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); and Miller v. Florida, 482 U.S. ____, 107 S.Ct. 2446, 96 L.Ed.2d 351, 359-360 (1987). In accordance with this important objective, it was early recognized that "[t]he enhancement of a crime or penalty, seems to come within the same mischief as the creation of a crime or penalty" after the fact. Calder v. Bull, supra, at 397 1 L.Ed. 648 (Paterson, J.). See also Fletcher v. Peck, 6 Cranch 87, 138, 3 L.Ed. 162 (1810)("An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed"); Weaver v. Graham, 450 U.S. 24, 28,20, 101 S.Ct. 960,964, 67 L.Ed.2d 17 (1981) ("Critical to relief under the ex post facto clause is not an individual's right to less punishment, but the lack of fair notice

and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated."); and Miller v. Florida, 482 U.S. , 107 S.Ct. 2446, 96 L.Ed.2d 351, 360 (1987) ("Thus, almost from the outset, we have recognized that central to the ex post facto prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.").

In accordance with these principles, the decisions of the United States Supreme Court have prescribed two critical elements which must be present for a criminal or penal law to be ex post facto: 1) it must be retrospective, that is, it must apply to events occurring before its enactment, and 2) it must disadvantage the offender affected by it. Calder v. Bull, supra, at 390, 1 L.Ed. 648 (1798); Lindsey v. Washington, 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937); Weaver v. Graham, supra, at 29, 67 L.Ed.2d 17, 101 S.Ct. 960 (1981); and Miller v. Florida, 482 U.S. , 107 S.Ct. 2446, 96 L.Ed.2d 351, 360 (1987).

In Weaver, supra, the petitioner sought a writ of habeas corpus on the ground that a 1978 revision of Florida's basic gain-time law was ex post facto as applied to him since it was more onerous than the basic gain-time provision in effect when his crime was committed in 1976. The gain-time statute in effect prior to 1978 provided basic gain-time at the rate of five days per month off the first two years of a sentence, ten

days per month off the next two years of a sentence, and fifteen days per month off all remaining years of a sentence. Section 944.27, Florida Statutes (1975). The 1978 revision reduced basic gain-time to three days per month off the first two years of a sentence, six days per month off the next two years of a sentence, and nine days per month off the remaining years of a sentence, a forty percent reduction of potentially available basic gain-time. Section 944.275, Florida Statutes (1979). The Supreme Court found the critical element of retroactivity to be present since the 1978 statute was being applied to prisoners serving sentences for crimes committed prior to the effective date of the 1978 statute. On this issue Justice Marshall wrote for the Court as follows:

> ... The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, the question can be recast as asking whether Fla. Stat. Section 944.275(1), (1979) applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative. The respondent concedes that the state uses Section 944.275(1), which was implemented on January 1, 1979, to calculate the gain time available to petitioner, who was convicted of a crime occurring on January 31, 1976. Thus the provision attaches legal consequences to a crime committed before the law took effect.

Weaver v. Graham, supra, at 31.

The second critical element, that the challenged law must disadvantage the person affected by it, was also found to be satisfied. As to this element, Justice Marshall wrote:

> Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question... The inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual . . . Under this inquiry, we conclude Section 944.275(1) is disadvantageous to petitioner and other similarly situated prisoners. On its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. By definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison.

Weaver v. Graham, supra, at 33. Both critical elements being satisfied, the Supreme Court held the 1978 statute to be ex post facto as applied to prisoners serving sentences for crimes which occurred prior to the 1978 statute's effective date.

The facts in Weaver are on all fours with the facts of the instant case. The work or incentive gain-time provision in effect when appellant's crimes were committed read as follows:

> (2)(b) The department is authorized to grant additional gain-time allowances on a monthly basis, as earned, up to 1 day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished, in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.
>
> . . .
>
> (3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and

> above that which may normally be expected of him, against whom no disciplinary report has been filed within the preceding 6 months, and whose conduct, personal adjustment, and individual effort towards his own rehabilitation show his desire to be a better than average inmate or who diligently participates in an approved course of academic or vocational study may be granted, on an individual basis, from 1 to 6 days per month extra gain-time to be deducted from the term of his sentence.
> . . .

Section **944.275,** Florida Statutes **(1981).** However, in **1983** the Florida legislature changed the work or incentive gain-time provisions of Section **944.275,** Florida Statutes, to read as follows:

> . . .
> (4)(b) For each month in which a prisoner works diligently, participates in training, uses time constructively, or otherwise engages in positive activities, the department may grant up to **20** days of incentive gain-time, which shall be credited and applied monthly.
> . . .

Section **944.275,** Florida Statutes **(1983).**

Therefore, the **1983** amendment to the statutes had the effect of reducing potentially available work or incentive gain-time from thirty-seven days per month to twenty days per month, a forty-six percent reduction in potentially available work or incentive gain-time. Here, as in Weaver, supra, the Court is faced with a gain-time statute which, on its face, is more onerous than its predecessor, but which the state is endeavoring to apply to prisoners whose crimes were committed

prior to its effective date. Under the principles and holding of Weaver, this Court should hold the **1983** statute to be ex post facto as applied to such prisoners.

A case even closer factually to the present case than Weaver is the recent Eleventh Circuit, United States Court of Appeals case, Raske v. Martinez, Docket No. **88-3101** (11th Cir., decided July 11, **1989**). A copy of the slip opinion was attached to Respondent's Notice of Decision In Raske v. Martinez, filed herein on July **24, 1989**. Raske presented the identical issue for decision which is presented in the present case. Finding the principles announced by the Supreme Court in Weaver, supra, to be controlling, the Eleventh Circuit held the work or incentive gain-time provisions of the **1983** amendment of Section **944.275,** Florida Statutes, to be ex post facto as applied to a prisoner serving a sentence for a crime which occurred prior to the effective date of the **1983** amendment.

## CONCLUSION

The authorities cited herein lead to the inescapable conclusion that the **1983** revision of the work or incentive gain-time law is ex post facto as applied to prisoners serving sentences for crimes which occurred prior to the **1983** revisions. Petitioner is such a prisoner. The petition for writ of habeas corpus should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner has been furnished to Susan A. Maher, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32399-1050 and to Donald Waldrup, #637862, Box 350, Avon Park Correctional Institution, P. O. Box 1100, Avon Park, Florida 33825-1100, this 3 day of August, 1989.

MICHAEL E. ALLEN