O.A. 6-3-91 047

IN THE SUPREME COURT OF FLORIDA

RICHARD L. DUGGER, Secretary, Florida Department of Corrections,

Petitioner,

vs.

JEFFREY RODRICK,

Respondent.

CASE NO. 76,801

ANSWER BRIEF OF RESPONDENT

By: RICHARD A. BELZ
Executive Director and
Attorney at Law

Appointed Counsel for
Respondent, Jeffrey Rodrick

Florida Bar Number: 197661

Florida Institutional Legal
Services, Inc.
925 N.W. 56th Terrace, Suite A
Gainesville, Florida 32605
(904) 336-2260

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent, Jeffrey Rodrick, accepts the Statement of the Case and Facts contained in the Initial Brief of Petitioner. Respondent requests, however, that the facts contained in the Statement of the Case and Facts from Petitioner's Brief on Jurisdiction be included as well.

Respondent would also ask that the facts in this case include this Honorable Court's Order of March 21, 1991, wherein undersigned counsel was appointed to represent the Respondent.

SUMMARY OF THE ARGUMENT

Since 1983 Florida laws have provided for additional gain time to be awarded when the prison system nears capacity as a means of controlling overcrowding. When Respondent committed his crimes in 1987, he was eligible for overcrowding gain time should the award of overcrowding gain time become necessary. In 1987, and again in 1988, the laws governing overcrowding gain time were changed. Under the revised laws, Respondent was not eligible for overcrowding gain time because of the nature of his crime.

Any law which increases the quantum of punishment after the date of a crime is barred by the ex post facto clauses of the Constitutions of the United States and Florida. Further, it is well established that any law which produces adverse changes in gain time availability thereby increases the quantum of punishment and, as a result, also violates the ex post facto clauses.

The State, after the fact, decided to treat more harshly those who commit certain types of crimes. It has acted to increase the quantum of punishment. This after the fact increase in the quantum of punishment satisfies the two critical elements that must be present for a law to violate the ex post facto clause: "The law must apply to events occurring before its enactment, and it must disadvantage the offender." Waldrup v. Dugger, 562 So.2d 687, 691 (Fla. 1990).

Petitioner relies on Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988) for the proposition that overcrowding gain time stat-

utes are procedural, not substantive in nature, and that gain time awarded to reduce overcrowding is only an expectancy, not a vested right. Not so. In Waldrup, this Honorable Court repudiated the earlier analysis used in Blankenship. This Court put to rest once and for all the rationale that after-the-fact reductions in the availability of discretionary gain time awards do not violate the ex post facto clause. Further, Blankenship shows the Respondent had a continuing liberty interest in receiving administrative gain time.

Because Respondent was disadvantaged as the result of subsequently enacted, restrictive legislation, the decision of the court below, the District Court of Appeal, Second District, was correct.

ARGUMENT

I.

SUBSEQUENT LEGISLATION CONSTITUTES A PROHIBITED EX POST FACTO LAW WHEN IT REDUCES THE AMOUNT OF DISCRETIONARY GAIN TIME AN INMATE IS ELIGIBLE TO RECEIVE

The first issue before this Honorable Court is whether Respondent was entitled to that gain time awarded Florida prisoners as a means of controlling prison overcrowding pursuant to Section 944.598, Florida Statutes (1987). The decision of the court below, the District Court of Appeal, Second District, should be affirmed because application of the disqualification provisions of Section 944.277, Florida Statutes (Supp. 1988), provisions which were enacted subsequent to appellant's crimes, violates the ex post facto prohibition of Article I, Section 10 of the Constitution of the United States, which provides that: "No State shall . . . pass any . . . ex post facto Law . . .", and Article I, Section 10 of the Florida Constitution.

Mr. Justice Chase described the meaning of the ex post facto Clauses in 1798:

> 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 offence, in order to convict the offender.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis in original), cited as controlling in Collins v. Youngblood, ____ U.S. __, 110 S.Ct. 2715, 2719 (1990) and Waldrup v. Dugger, 562 So.2d 687, 691 (Fla. 1990).

The changes in the Florida statutes governing overcrowding gain time served to inflict greater punishment on Mr. Rodrick than was inflicted at the time of his crimes. "A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451 (1987), citing Weaver v. Graham, 450 U.S. 24, 31, 101 S.Ct. 960, 965 (1981). The Petitioner did not award overcrowding gain time to Respondent, relying on Section 944.277(1)(e), Florida Statutes (Supp. 1988), which was enacted after petitioner's crimes. The Petitioner applied it to events occurring long before its enactment and disadvantaged Respondent by causing him to remain incarcerated for a longer period of time. When applied to Mr. Rodrick, Section 944.277(1)(e) is an ex post facto law.

On the date Respondent committed his crimes, he was eligible for any gain time that might be awarded to reduce prison overcrowding pursuant to Sections 944.598 and 944.276, Florida Statutes (1987). As a result of subsequently enacted legislation, Respondent was no longer eligible for overcrowding gain time. The State, after the fact, decided to treat more harshly those who commit certain types of crimes and increased the quantum of punishment. This after the fact increase in the quantum of punish-

ment satisfies the two critical elements that must be present for a law to violate the ex post facto clause: "The law must apply to events occurring before its enactment, and it must disadvantage the offender." Waldrup v. Dugger, 562 So.2d 687, 691 (Fla. 1990).

Section 944.598, Florida Statutes (1987), was in effect on the date of Respondent's crimes. It authorized the awarding of gain time whenever the population of the prison system reached 99 percent of capacity. At that point:

> 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 98 percent of lawful capacity of the system.

Section 944.598(2), Florida Statutes (1987).

In 1987, Section 944.276, Florida Statutes (1987), was enacted. It provided for the awarding of "administrative gain time" to control prison overcrowding whenever the prison system population reached 98 percent of capacity. The Department of Corrections was authorized to grant up to sixty (60) days of administrative gain time to all inmates earning incentive gain time. As shown in Point II, infra, Mr. Rodrick was eligible for awards of administrative gain time, although he never received any.

A year later, administrative gain time was replaced by provisional credits. Section 944.277, Florida Statutes (Supp. 1988). The overcrowding trigger was reduced to 97.5 percent. The crimes which would lead to disqualification, however, were greatly increased. Respondent was not eligible to receive provisional

credits because he was "convicted of committing or attempting to commit kidnapping . . . and the offense was committed with the intent to commit sexual battery." Section 944.277(1)(e), Florida Statutes (Supp. 1988). The Petitioner applied this disqualification to Respondent. In doing that, the Petitioner has violated the prohibition on ex post facto laws.

For purposes of ex post facto analysis, the controlling date is the date of the offense:

> Critical to relief under the Ex Post Facto Clause in 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. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause 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, 30-31, 101 S.Ct. 960, 965 (1981).

Weaver squarely held that a statutory reduction in available gain time, when applied to an earlier offense, violated the prohibition on ex post facto laws. "The critical question is whether the law changes the legal consequences of acts completed before its effective date," 101 S.Ct. at 965, not whether the law is "an act of grace rather than a vested right." 101 S.Ct. at 963.

Section 944.598, Florida Statutes (1987), in effect at the time Respondent committed his crimes, entitled him to up to 30 days per month gain time whenever the prison system reached 99 percent of capacity. The later law prevented Respondent from

receiving any overcrowding gain time. Adversely changing gain time eligibility after the offense is a violation of the prohibition on ex post facto laws. Weaver, supra; Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 543 (1989); Waldrup v. Dugger, 562 So.2d 687, 691-92 (Fla. 1990).

The Petitioner relies on Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988). In Blankenship, this Honorable Court rejected an ex post facto challenge to the application of the disqualification provisions of the administrative gain time law to crimes committed before its enactment, holding

> Petitioner's argument that his case is controlled by Weaver is misplaced. In Weaver the Supreme Court of the United States declared that a Florida law that reduced gain time was ex post facto as applied to prisoners whose crimes were committed before the law was changed. Initially, it should be observed that Weaver is not on point; it dealt with "good time," i.e., time off a prisoner's sentence awarded for exhibiting good behavior. The statutes at issue here award gain time purely for the administrative convenience of the Department of Corrections. Moreover, since these statutes are procedural in nature, as contrasted to the substantive statute considered in Weaver v. Graham, they do not create substantive rights. A retrospective statute may work to a person's disadvantage so long as it does not deprive the person of any substantial right or protection. See Dobbert, 432 U.S. at 293-94, 97 S.Ct. at 2998-99. Under Weaver, prisoners entering the correctional system do have a statutory right under section 944.275, Florida Statutes (1985), to "good time" gain time, and it will automatically accrue to them if their behavior meets certain standards. However, when petitioner's crimes were committed, there was no guarantee that the prison population would ever reach ninety-eight percent of capacity while he was incarcerated. Petitioner had no control over the

> factors that would lead to the Department of Corrections granting administrative gain time.

521 So.2d 1099.

Waldrup, decided after Blankenship, involved a change in the incentive gain time law which, inter alia, reduced the total amount of incentive gain time that a prisoner could earn each month. The Petitioner herein, there argued that since incentive gain time was discretionary - and that as a result, an inmate might never earn any incentive gain time - application of the revised statute did not offend the ex post facto clause. The Petitioner makes the same argument in this case. This Honorable Court decisively rejected the Petitioner's position, holding that:

> Indeed, the argument advanced by the state sounds very much like the discredited analysis employed by this Court in Harris v. Wainwright, 376 So.2d 855 (Fla. 1979). In Harris, we had denied relief after an inmate was subjected to a retroactive gain-time statute that had reduced the maximum number of gain-time days that could be awarded to him. We held that 'gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified or denied. Harris, 376 So.2d at 856.'

Waldrup, supra, at 692.

The Supreme Court of the United States in Weaver directly overruled Harris and held gain time "is one determinant of" an inmate's "prison term." Weaver, supra, 101 S.Ct. at 966.

This Honorable Court in Waldrup, concluded:

> It could not be clearer that the analysis in Weaver applies as fully to discretionary gain-time as it does to 'mandatory' gain-time

> . . . Even the 'grace of the legislature', once given, cannot be rescinded retrospectively . . . The Weaver opinion makes it plain that the ex post facto clause applies with equal vigor to a retroactive reduction in DOC's discretion to grant gain-time.

Waldrup, 562 So.2d at 692 (citations omitted).

As Weaver and Waldrup make clear, the Petitioner cannot negate an ex post facto claim by arguing the absence of vested rights or that the receipt of gain time is a mere expectancy. To make that argument is to ask the wrong question. The only relevant question is whether the new law causes the prisoner to serve a longer sentence. If so, the new law violates the prohibition on ex post facto laws.

Similarly, the Petitioner cannot argue that changes in the law governing overcrowding gain time are merely procedural. For, after Collins, it is clear that a statute that lengthens the time an inmate must serve cannot be characterized as procedural. "[I]t is logical to think that the term [procedural] refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." Collins v. Youngblood, 110 S.Ct. at 2720. On the other hand, a law which, after the fact, acts to "increase the punishment" is substantive and violates the prohibition on ex post facto laws. Id., at 2721.

That increasing the time an inmate must serve is substantive, not procedural, was also made clear in Knuck v. Wainwright, 759 F.2d 856 (11th Cir. 1985). The court held that a change in how the Department of Corrections interpreted and applied the existing gain time statute, where the change resulted in a

lengthened period of incarceration, violated the ex post facto clause.

Statutory authorization for the award of gain time to reduce overcrowding has existed for many years. In 1987, when Respondent committed his crimes, he was eligible for overcrowding gain time should overcrowding gain time become necessary. The system was overcrowded and the award of overcrowding gain time began in early 1987. Blankenship, 521 So.2d at 1099. At the same time, the legislature narrowed eligibility but the Respondent was still eligible. In 1988, the legislature further narrowed eligibility and the Respondent was then ineligible. It is that narrowing, which barred Respondent from receiving any overcrowding gain time after July 1, 1988, that the ex post facto clause bars.

Respondent was eligible for overcrowding gain time if the law is in effect at the time of his crimes had been applied. In Weaver, the Supreme Court of the United States, when discussing an amendment to another gain time statute, said:

> We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.
>
> For prisoners who committed crimes before its enactment, . . . § 944.275(1) substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.'

101 S.Ct. at 966.

It does not over-simplify the analysis to say that any law enacted after the date of an offense which has the effect of

increasing the period of incarceration violates the ex post facto clause. That is the teaching of Weaver and Collins. It is the rule applied in Waldrup. It must be the law in this case.

Mr. Rodrick was entitled to the benefit of the law in effect at the time he committed his crimes. The state is not entitled to change the law in effect at the time of Respondent's crimes to Respondent's detriment. Application of Sections 944.277 and 944.598, Florida Statutes (1987), means that whenever the prison system reached its population cap, Respondent was entitled to additional gain time to help reduce overcrowding. Petitioner should have correctly calculated the Respondent's gain time and reduced his sentence accordingly.

II.

ADMINISTRATIVE GAIN TIME MUST CONTINUE TO BE GIVEN AN INMATE WHO WAS ELIGIBLE TO RECEIVE SUCH CREDITS PRIOR TO THE REPEAL OF THE STATUTE AUTHORIZING SUCH CREDITS

BACKGROUND

The 1987 Legislature created Section 944.276, Florida Statutes (1987), "Administrative Gain Time", effective February 5, 1987. Ch. 87-2, § 3, Laws of Fla. It was repealed as of July 1, 1988. Ch. 88-122, §§ 6, 92, Laws of Fla.

During the period of time the Department of Corrections considered the statute in force, i.e., February 5, 1987 - July 1, 1988, undersigned counsel believes a total of 720 days of administrative gain time was awarded to inmates eligible to receive it. These awards were based on Section 944.276, Florida Statutes (1987), which stated:

> (1) Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary may grant up to a maximum of 60 days administrative gain-time equally to all inmates who are earning incentive gain-time, unless such inmates:
> (a) Are serving a minimum mandatory sentence under s. 775.082(1) or s. 893.135;
> (b) Are serving the minimum mandatory portion of a sentence enhanced by s. 775.087(2);
> (c) Were convicted of sexual battery or any sexual offense specified in s. 917.012(1) and have not successfully completed a program of treatment pursuant to s. 917.012; or
> (d) Were sentenced under s. 775.084.
> (2) The authority granted to the secretary shall continue until the inmate population of

> the correctional system reaches 97 percent of lawful capacity, at which time the authority granted to the secretary shall cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

The Respondent, Jeffrey Rodrick, was convicted for the offenses of burglary, kidnapping with intent to commit sexual battery, and aggravated battery committed on April 17, 1987. He was received by the Petitioner as a result of these convictions in June 1988. (Petitioner's Brief on Jurisdiction, p. 2).

By the Petitioner's own admission:

> Rodrick would have been eligible to receive awards of administrative gain time under repealed Section 944.276, Florida Statutes, if he had been received into custody and met the statutory prerequisites prior to the statute's repeal.

(Petitioner's Brief on Jurisdiction, p. 2).

Thus, even if the ex post facto argument developed in Point I, supra, is rejected, the secondary issue before this Honorable Court comes down to this: did the repeal of Section 944.276, Florida Statutes (1987) on July 1, 1988 affect inmates then eligible to receive administrative gain time; or, did the repeal only affect inmates who committed their offenses after the date of the repeal?

This Honorable Court's decision in Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988), is the linch-pin of the Petitioner's argument because of the following analysis:

> Petitioner's argument that his case is controlled by Weaver is misplaced. In Weaver the Supreme Court of the United States declared that a Florida law that reduced gain time was ex post facto as applied to prisoners whose

> crimes were committed before the law was changed. Initially, it should be observed that Weaver is not on point; it dealt with "good time," i.e., time off a prisoner's sentence awarded for exhibiting good behavior. The statutes at issue here award gain time purely for the administrative convenience of the Department of Corrections. Moreover, since these statutes are procedural in nature, as contrasted to the substantive statute considered in Weaver v. Graham, they do not create substantive rights. A retrospective statute may work to a person's disadvantage so long as it does not deprive the person of any substantial right or protection. See Dobbert, 432 U.S. at 293-94, 97 S.Ct. at 2998-99. Under Weaver, prisoners entering the correctional system do have a statutory right under section 944.275, Florida Statutes (1985), to "good time" gain time, and it will automatically accrue to them if their behavior meets certain standards. However, when petitioner's crimes were committed, there was no guarantee that the prison population would ever reach ninety-eight percent of capacity while he was incarcerated. Petitioner had no control over the factors that would lead to the Department of Corrections granting administrative gain time.

Blankenship, supra, at 1099.

This analysis followed the statement that:

> Petitioner maintains that section 944.276 imposes greater punishment than that set out by law at the time he committed his crime because it takes away gain time that would have automatically accrued to him under section 944.598 as originally enacted. This argument must fail, if for no other reason than because section 944.598 has never been implemented and, therefore, cannot be said to have created any rights for petitioner. Thus, it is irrelevant which version of section 944.598 was in existence when the crimes were committed or whether any version of it was in effect. As section 944.598 does not apply, section 944.276 governs the case.

Id.

Following the analysis, this Honorable Court continued by saying:

> Petitioner also argues due process violations under both the federal and state constitutions, claiming that section 944.598 gave him a liberty interest, and the Department of Corrections, by implementing section 944.276 and not the older statute, took this interest away without due process of law. See Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). We disagree. Section 944.598 did not create a liberty interest because it was never implemented, and petitioner had no right to require it to be implemented. Petitioner cannot claim a liberty interest under section 944.276 because he is excluded from its ambit due to the nature of the crime he committed.

Id.

Here, then, is the heart of the matter because Section 944.276, Florida Statutes (1987), had been implemented by the Petitioner at the time Mr. Rodrick committed his offenses and was still being implemented when he was received into the custody of the Petitioner. Since it had been implemented, Mr. Rodrick had a continuing liberty interest in receiving its benefits and the Petitioner had a continuing obligation to provide them whenever the inmate population reached 98 percent of lawful capacity. Whether or not the Petitioner also provided provisional credits pursuant to Section 944.277, Florida Statutes (Supp. 1988), is immaterial, so long as he continued to provide administrative gain time to Mr. Rodrick after July 1, 1988. Indeed, if the proper amount of administrative gain time had been granted to all eligible inmates after July 1, 1988, the Petitioner may never have had to award any provisional credits. This would have been a

significant management tool for the Petitioner because gain time, of whatever kind, can be taken away following a disciplinary infraction. Provisional credits, on the other hand, vest completely once awarded. There is no way, under the Florida Statutes, to take away provisional credits in case of a disciplinary infraction.

Simply put, it is Mr. Rodrick's contention that the repeal of Section 944.276, Florida Statutes (1987) on July 1, 1988 did not deprive him of the ability to obtain administrative gain time. The repeal could, and did, only affect inmates who committed their offenses after July 1, 1988.

In Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990), this Honorable Court pointed out that:

> gain-time statutes do not create vested rights until gain-time actually is awarded, subject to all other applicable statutory conditions.

Id., at 694. Again, as this Honorable Court's analysis in Blankenship, supra, makes plain, the fact that Section 944.276, Florida Statutes (1987), had been implemented by the Petitioner at the time Mr. Rodrick committed his offenses and was still being implemented when he was received into the custody of the Petitioner harmonizes the decisions of this Honorable Court and the decision of the court below. Rodrick v. State, 567 So.2d 906 (Fla. 2nd DCA 1990).

Accordingly, under the specific facts of Mr. Rodrick's case, the District Court of Appeal, Second District, correctly followed the precedents of this Honorable Court and must be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Susan A. Maher, Esquire, Assistant General Counsel, Florida Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida 32399-2500, this 24th day of April, 1991.

RICHARD A. BELZ