O.H. 6-3-91

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IN THE SUPREME COURT OF FLORIDA

RICHARD L. DUGGER, Secretary,
Department of Corrections,

Petitioner,

v. **Case No. 76,801**

JEFFREY RODRICK,

Respondent.
_____/

REPLY BRIEF OF PETITIONER

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Argument

Point I.

Respondent asserts that in Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990), this Court repudiated its earlier analysis in Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988), and "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." (Answer Brief at 3.) Petitioner counters that this Court did not intend for the Waldrup decision to have such an effect, either explicitly or implicitly, and urges that the Court remain firm in its earlier decision in Blankenship.

The arguments before this Court are truly an exercise in semantics. Respondent insists that Petitioner's argument in the instant cased is the same argument made and rejected by this Court in Waldrup. While Petitioner does argue the same law, it is applied to circumstances distinguishable from those in Waldrup. Respondent contends that the meting out of early release awards -- in this instance, administrative gaintime -- is the equivalent to the award of incentive and basic gaintime. Except for the general reference to both as "gaintime", the two are vastly different in purpose and effect. Regardless of whether the early release awards are called "gaintime" or "credits" or "allotments", they are not the functional equivalent of basic and incentive gaintime awards. The focus should not be upon whether the effect of early release awards is to shorten the length of time in custody, but whether in enacting the early release statutes the Florida legislature created

definition of crimes, defenses, or punishments. See Youngblood v. Collins, ___U.S.___, 111 L.Ed 2d 30, 40-41 (1990).

As pointed out in the Initial Brief on the merits, the United States Supreme Court has recently held that the terms "substantial protections" and "personal rights" should not be construed to exceed the boundaries of the Ex Post Facto Clause as it was understood at the time of the adoption of the Constitution. Id. at 44. In announcing its decision in Youngblood, the Supreme Court specifically receded from its earlier decision in Kring v. Missouri, 107 U.S. 221 (1883):

> The Court's departure [in Kring] from Calder's explanation of the original understanding of the Ex Post Facto Clause was, we think, unjustified.

Youngblood, ___U.S. at ____, 111 L.Ed 2d at 43.

In Kring, the Court had defined an ex post facto law as:

> [O]ne in which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage.

Kring, 107 U.S. at 228-229 (quoting United States v. Hall, 26 F.Case 84 86 (No. 15,285)(D. Pa. 1809)). (Emphasis added.)

The Supreme Court has made clear that shifting the focus of ex post facto analysis from the original understanding of the Ex Post Facto Clause is impermissible and that the language cited in Kring should was never intended "to mean that the Constitution prohibits retrospective laws, other than those encompassed by the Calder categories, which 'alter the situation of a party to his

disadvantage.'" Youngblood, ___U.S. at ___, 111 L.Ed.2d at 43-44.

> The holding in Kring can only be justified if the Ex Post Facto Clause is thought to include not merely the Calder categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases. We accordingly overrule Kring.

Id. at 44.

Similarly, in receding from its decision in Thompson v. Utah, 170 U.S. 343 (1898), the Supreme Court noted that:

> The right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause. To the extent that Thompson v. Utah rested on the Ex Post Facto Clause and not the Sixth Amendment, we overrule it.

Youngblood, ___U.S. at ___, 111 L.Ed.2d at 45.

Respondent contends that "[t]he only relevant question is whether the new law causes the prisoner to serve a longer sentence." (Answer Brief at 10.) Under Youngblood, this question falls short of providing a full answer when conducting an ex post facto analysis. The fact that Respondent may feel disadvantaged by being excluded from early release prompted by prison overcrowding, when considered alone, is insufficient to trigger the prohibitions of the Ex Post Facto Clause. Respondent must also show that the State's procedural mechanism to relieve prison overcrowding through early release credits creates a "substantial personal right" related to the definition of crimes, defenses, or punishments.

Obviously, these statutes do not retroactively create new criminal offenses nor do they deprive a defendant of defenses. Thus the sole question is whether Florida's early release statutes "change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

The United States Supreme Court has also given guidance in determining whether a statute is punitive or penal in nature. In Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), the Supreme Court described the standards traditionally applied:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of **scienter**, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id.

The underlying purpose of the early release statutes thus becomes of critical importance in determining whether the statutes are procedural or substantive in nature, or whether they operate to increase the "quantum of punishment" merely because they afford early release from a sentence already imposed. There can be no dispute that the sole purpose of the early release statutes is to provide a mechanism to alleviate prison overcrowding. The statutes

were not designed nor enacted to promote the traditional aims of punishment -- that is, retribution and deterrence. The statutes were enacted to address the singular problem of overcrowding -- they were never intended to operate as an incentive to reduced imprisonment or to become a consideration in the sentencing forum.

Respondent attempts to liken the awards of early release credits to the basic gaintime addressed in Weaver v. Graham, 450 U.S. 24 (1981) and the incentive gaintime addressed in Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989) and Waldrup v. Dugger, supra. However, the similarities are limited to the nomenclature. Both basic and incentive gaintime relate to the sentence imposed, and a release date reduced by these awards can be reasonably predicted, based upon length of the term meted out. Basic gaintime is applied as a lump sum award to reduce the overall length of sentence the day the prisoner enters the prison gates. While not necessarily a part of the sentence in a technical sense, the award of basic gaintime is a quantifiable determinant of a prisoner's overall term, which, as the Supreme Court recognized in Weaver, may operate as a "factor . . . [in] the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Similarly, the potential to earn incentive gaintime for labor performed and constructive activities, although contingent upon performance and good behavior, is also quantifiable based upon length of sentence imposed. Thus, to the extent that these two types of "gaintime" operate in tandem with the length of sentences imposed, they affect the "quantum of punishment" which attaches at

the time the crime is committed. Conversely, the eligibility and receipt by a prisoner of early release awards, whether those awards are called "gaintime", "credits", "allotments", etc., is in no way tied to overall length of sentence. The need for and application of such awards are contingent upon many outside variables which contribute to prison overcrowding. There is no relationship to the original penalty assigned to the crime at the time it was committed nor to the ultimate punishment meted out. The sole purpose of the early release statutes is to provide a temporary mechanism to alleviate the administrative crisis created by prison overcrowding while continuing to protect the public from violent offenders. The statutes are procedural in nature -- their purpose directed to alleviating the administrative crisis of prison overcrowding not to the traditional purposes of punishment. Consequently, Florida's early release statutes create no "substantial personal rights" relating directly to the definition of crimes, defenses, or punishments, as defined and limited by the Supreme Court's decision in Youngblood. Therefore, this Court must reject the holding of the Second District Court of Appeal in Rodrick and affirm the decision of the First District in Miller.

Point II.

As a second point in the answer brief, Respondent contends that, even if the ex post facto argument developed in Point I of the Answer Brief is rejected by this Court, he nevertheless had a continuing liberty interest in receiving

benefits under the administrative gaintime statute after the repeal of the statute and that the Department had a continuing obligation to provide them whenever the inmate population reached 98 percent of lawful capacity. (Answer Brief at 16.) Petitioner points out that this issue was never raised in the tribunals below. Moreover, since the purpose of the proceeding before this Court is to resolve the conflict between the First and Second District Courts of Appeal as to the decisions in Miller and Rodrick, specifically with regard to their respective holdings on the issue in Point I, and since the Second District did not consider this point on appeal, Petitioner asserts that the issue presented in Point II should not be entertained by this Court. Finally, even assuming the issue was properly before this Court, Respondent's argument is without merit.

The Department has conceded that Mr. Rodrick would have been eligible to receive awards of administrative gaintime under Section 944.276, Florida Statutes (1987), if he had been received into custody and met the statutory prerequisites prior to the statute's repeal. There is no dispute that Mr. Rodrick committed his crimes in April 1987, after the enactment of the administrative gaintime statute. There is also no dispute that Mr. Rodrick was not received into custody until June 1988. Consequently, Mr. Rodrick could not meet the statutory prerequisites to receive any awards of administrative gaintime prior to the repeal of the statute, effective July 1, 1988. Nevertheless, Respondent contends that a liberty interest accrued to him simply because Section 944.276 had been implemented. Respondent overextends the holdings

in both Waldrup and Blankenship to reach this conclusion.

Respondent Rodrick possesses no constitutionally-based liberty interest in early release through administrative gaintime. However, a state may create a protected liberty interest through its laws and regulations, which employ "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates [which] demands a conclusion that the State has created [such an interest]." See Hewitt v. Helms, 459 U.S. 460, 472 (1983). Rodrick asserts that the decision in Blankenship supports a conclusion that a liberty interest was created when the Department implemented the administrative gaintime statute. This is not so. In Blankenship, the petitioner argued that section 944.598 gave him a liberty interest, and that the Department of Corrections, when it implemented section 944.276, and not the older statute, deprived him of this interest without due process of law. Blankenship, 521 So.2d at 1099. This Court concluded that Section 944.598 did not create a liberty interest because it was never implemented, and Blankenship had no right to require the statute to be implemented. Id. Whether a liberty interest could be created by Section 944.598 is dependent upon whether the language contained in the statute essentially eliminates any discretion in its application. There is no doubt from the language in Section 944.598 that the Department would be compelled to award emergency gaintime if the 99 percent triggering level is reached, certified and verified. As this Court acknowledged in Blankenship, the requisite triggering level was never reached and, therefore, the

statute was never implemented. In comparison, Section 944.276 does not require that the secretary of the Department of Corrections make awards of administrative gaintime whenever the triggering percentage is reached. On the contrary, the statute left to the full discretion of the Secretary of the Department the decision on whether the statute would be implemented:

> 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 . . . .

§ 944.276(1), Fla. Stat. (1987). (Emphasis supplied.)

Because the secretary of the Department retained full discretion on whether the statutory provisions would be implemented under the administrative gaintime statute, Respondent Rodrick never accrued a continuing liberty interest in receiving benefits under its provisions. See Francis v. Fox, 838 F.2d 1147, 1149 (11th Cir. 1988) (when the statute is framed in discretionary terms there is not a liberty interest created).

Moreover, Rodrick has no vested right in receiving or continuing to receive early release awards in the form of administrative gaintime. As the Respondent pointed out in the Answer Brief, this Court has recently held that:

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

Waldrup, 562 So.2d at 694.

However, this should not be read to mean that Respondent could have accrued a vested right to future awards of administrative gaintime merely because he may have received a single award under the statute while the statute was in effect. Respondent merely would have a vested right in the awards he had already received.

Finally, even assuming Respondent were correct in his contentions that he has a vested right or continuing liberty interest in receiving benefits under Section 944.276 and that the Department had a continuing obligation to provide them whenever the inmate population reached 98 percent of lawful capacity, Rodrick could not have received a single award of administrative gaintime after July 1, 1988. By operation of Section 944.277, which was triggered at the level of 97.5 percent of lawful capacity, the higher level required to trigger the administrative gaintime statute was never reached.[1]

Petitioner first submits that Rodrick's secondary argument to support the decision of the Second District Court of Appeal in this case is not properly before this Court and, therefore, should not be entertained; second, that the argument

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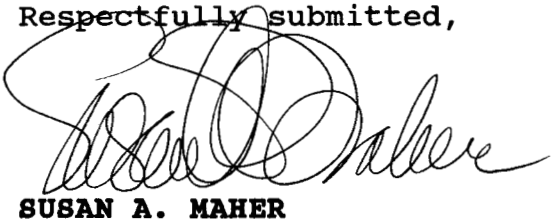
[1] As the record reflects, Rodrick was released for expiration of sentence in August 1990. Between the enactment of Section 944.277, Florida Statutes (1988 Supp.), effective July 1, 1988, and Rodrick's release, the triggering percentage was 97.5% of lawful capacity. The triggering percentage of 98% of lawful capacity did not become effective until October 1, 1990. See Ch. 90-77, Laws of Fla. Thus, even assuming that Rodrick is correct as to his contention that a liberty interest had somehow been created, under the factual circumstances of this case, the triggering percentage which would have required the Department to award administrative gaintime was never reached.

impermissibly extends the holdings in Blankenship and Waldrup and lends no support for Rodrick's contention that the Second District correctly followed the precedents of this Court; and finally, even assuming a continuing liberty interest had somehow accrued to Rodrick, the specific facts of this case reveal there is no case or controversy to be decided on this point.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioner respectfully requests that the decision of the Second District Court of Appeal in this cause be disapproved, and the decisions in Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988), and Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990), be reaffirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** has been furnished by U.S. Mail to **RICHARD A. BELZ, ESQUIRE**, Florida Institutional Legal Services, Inc., 924 N. W. 56th Terrace, Suite A, Gainesville, Florida 32605-6413, on this 20 day of May, 1991.

SUSAN A. MAHER

Rodrick.Rep/sam