IN THE FLORIDA SUPREME COURT

WILLIE C. HENRY,

Petitioner,

vs.

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

Respondent.

CASE NO. 77,028

PETITIONER'S BRIEF

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SUMMARY OF ARGUMENT

The Petitioner agrees with the 1st DCA that his 10 year sentence for sexual battery has expired, and with the Respondent that to apply the 1988 amendment (s. 944.277) to the Petitioner violates the ex post facto clause. Conversely, the Petitioner disagrees with the 1st DCA where it states the 1988 can be applied retroactively to Petitioner, and he disagrees with the Respondent where it states that his 10 year sentence for sexual battery is still "active."

PRELIMINARY STATEMENT

WILLE C. HENRY, Appellant below, will hereinafter be referred to as the "Petitioner."

RICHARD L. DUGGER, Secretary, Florida Dept. of Corrections, Appellee below, will hereinafter be referred to as "Respondent."

JURISDICTION

This Court has jurisdiction to review the decision of the district court below. Article V, s. 3(b)(3), Florida Constitution.

STATEMENT OF THE CASE AND FACTS

The Petitioner is presently incarcerated in the Florida Dept. of Corrections serving a total of 65 years for kidnapping and robbery (the Petitioner also received, while incarcerated, a 30 day term for possession of a weapon by a state prisoner). Prior to his present convictions for kidnapping and robbery, the Petitioner was convicted of sexual battery (case number 76-4213, Broward County, Florida) and sentenced to 10 years in prison. The above 65 years incarceration for kidnapping and robbery was ordered to run consecutively to said 10 year term for sexual battery.

It is noted herein that on June 30, 1978, the Petitioner was returned to Broward County for a court appearance in Case No. 76-4619 (false imprisonment and sexual battery) wherein the state attorney announced a nolle prosequi of the case and the court discharged the Petitioner from that case. In error, as the state points out below, official at the Broward County Jail released the Petitioner even though his sentence for Case No. 76-4213 was still active. Rearrested on November 2, 1978, and charged with kidnapping and robbery.

The Petitioner originally filed a petition for writ of mandamus in the Second Judical Court, in and for Leon County, Florida, alleging that is was/is entitled to all administrative gain time pursuant to Florida Statute 944.276 (1987), because the sentence that excluded from receiving this gain time expired before the advent of administrative gain time and, therefore, that

sentence could not be used to deny the Petitioner gain time under section 944.276, F.S. On October 2, 1989, the 2nd Judicial Circuit Court denied the petition and the Petitioner filed a timely appeal to the First District Court of Appeal.

Therein, the Petitioner again alleged that he was being unlawfully denied administrative gain time, even though is was not presently serving a sentence that would exclude him from receiving this gain time. The Respondent, Florida Dept. of Corrections, contends that the 10 year sentence imposed in Case No. 76-4213 for sexual battery is still "active" and, thus, cause to deny Petitioner gain time under F.S. 944.276. The court determined that the sentence in Case No. 76-4213 had in fact expired, but that the Petitioner was nevertheless excluded from receiving administrative gain time because section 944.276 was amended and since the above statute did not create any substantive rights, and was just procedural in nature, the ex post facto clause was not offended by applying the 1988 amendment to the Petitioner. Opinion rendered August 8, 1990.

Thereafter, the Petitioner and Respondent both filed motions for rehearing. On November 6, 1990, the First District Court of Appeal filed an amended opinion wherein the court added a footnote on page 2, but still affirming the lower court and denying both motions for rehearing. This proceeding timely follows.

ARGUMENT

THE RESPONDENT IS ERRONEOUSLY DENYING THE PETITIONER ADMINISTRATIVE GAIN TIME PURSUANT TO SECTION 944.276, F.S. BASED ON A PRIOR SEXUAL BATTERY CONVICTION WHICH EXPIRED BEFORE THE EFFECTIVE DATE OF s. 944.276, F.S.

The case before this honorable court involves a dispute regarding the proper interpretation of section 944.276, F.S., which governed entitlement to administrative gain time to relieve overcrowding in the Florida Dept. of Corrections. The Petitioner alleges that he is being improperly denied administrative gain time because he is no longer serving an active sentence for sexual battery, which, if still active, would have prohibited the award of administrative gain time. The Respondent on the otherhand, contends that the sentence imposed in Case No. 76-4213 is still active as part of an overall commitment and regardless where the Petitioner's sexual battery conviction fell within his overall commitment, he is still not entitled to administrative gain time unless, it should be noted, the Petitioner has successfully completed a treatment program pursuant to section 917.012(1).

The State's argument is patently without merit. First, as the 1st DCA stated in its decision "Thus, similiar to the defendant in Miller, appellant has fully served his sentence for his sexual battery conviction." See Dugger v. Miller, 538 So.2d 1286 (Fla. 1st DCA), review denied, 547 So.2d 1209 (Fla. 1989).

The 1st DCA agreed with the Petitioner that he would have been entitled to gain time under section 944.276, F.S., but that statute was amended in 1988 (Section 944.277, F.S. (Supp. 1988)), and the amendment precluded the Petitioner from receiving gain time to relieve overcrowding in the Florida Dept. of Corrections. The court went on to say that because the new law, like its 1987 predecessor, awards gain time purely for the administrative convenience of the DOC and is thus precedural in nature; therefore, the statute may be applied retrospectively, even though it disadvantages Petitioner.

On this point, the Petitioner agrees with the Respondent where it states in its motion for rehearing that the court's ex post facto analysis, as applied to the Petitioner, is not "sound." To void retroactively gain time which the court has stated Petitioner is entitled violates the ex post facto clause of the Florida and U.S. Constitutions.

In Dugger v. Miller, supra, on which the Petitioner relies, the court held that the provision in the statute (944.276, F.S.) denying sex offenders any overcrowding gain time applies only to persons convicted for sex offenses who would be subject to treatment pursuant to section 917.012, F.S. Because the statute does not contemplate screening a convict for MDSO treatment when that person has already fully served his sentence for the sex crime, that conviction cannot be used to prevent the prisoner from accruing gain time pursuant to section 944.276, F.S.

Moreover, the applicability of section 917.012, F.S. to sex convictions is moot because the treatment program has been a-

bolished by the legislature. Thus, the Petitioner agrees with the 1st DCA that his 10 year sentence for sexual battery has expired, and with the Respondent that to apply the 1988 amendment to section 944.276 to the Petitioner violates the ex post facto clause. Conversely, the Petitioner disagrees with the 1st DCA where it states the 1988 amendment can be applied retroactively to Petitioner, and he disagrees with the State where it states that his 10 year sentence for sexual battery is still "active."

CONCLUSION

WHEREFORE, since the Petitioner is no longer serving an active sentence for sexual battery and since the 1988 amendment to section 944.276, F.S. cannot be applied retroactively to Petitioner, the decision below should be vacated and the writ should issue compelling the Florida DOC to award the Petitioner all administrative gain time to which he is entitled. IT IS SO PRAYED.

Respectfully submitted,

/s/ Willie C. Henry

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Susan A. Maher, Asst. Attorney General, Dept. of Legal Affairs, The Capitol, Suite 1502, Tallahassee, FL 32399-1050 by U.S. Mail this 6 day of February, 1991.

/s/ Willie C. Henry
Petitioner, pro se