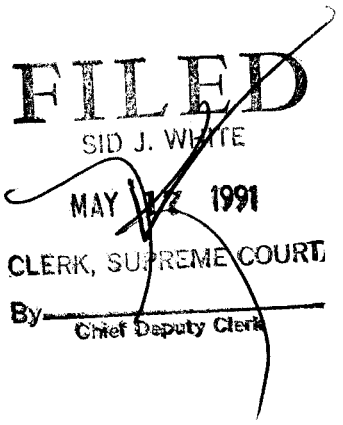

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 77,855

ANTONIO R. FELK,

Appellant,

vs.

RICHARD L. DUGGER, ETC.,

Appellee.

Certified Question
First District Court of Appeal
Case Number 90-2499

APPELLANT'S INITIAL BRIEF

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision of the First District Court of Appeal affirming an Order of the Circuit Court for Leon County dismissing appellant's Petition for Writ of Habeas Corpus or in the Alternative, Writ of Mandamus. Pursuant to Florida Rule of Appellate Procedure 9.0309(a)(2)(A)(v), it certified as a question of great public importance the following:

> Does Section 944.277(1), Florida Statutes (Supp. 1988), violate the Ex Post Facto Clauses of the Florida and United States Constitutions when applied to an inmate whose offenses occurred prior to the effective date of that section and whose sentence could be shortened by application instead of that section's predecessor, in effect when the offenses occurred?

At issue in this case is whether appellant is entitled to an award of that type of gaintime awarded to control prison overcrowding in accordance with the overcrowding gaintime law in effect on the date of his crimes. There are no facts in dispute. Appellant's verified petition alleged that he entered a plea of guilty to the crimes of armed kidnapping and armed robbery on September 5, 1986, (Record, p. 2), the offenses having occurred on April 18, 1986 (Record, p. 19). He was sentenced to fifteen years on each charge, including a three year minimum mandatory, as required by section 775.087(2), Florida Statutes (1985) (Record, pp. 16-18). With credit for time served, he completed the minimum mandatory portion of his sentence on April 21, 1989 (Record, p. 125).

At the time of appellant's crime, the "Emergency Release of Prisoners Act, section 944.598(2), Florida Statutes (1985),

authorized the award of overcrowding gaintime whenever the prison population reached 98% of lawful capacity. It provided that:

> (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 percent of the lawful capacity of the system . . . 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 percent of lawful capacity of the system.

After plaintiff's crimes, but before sentencing, section 944.598(2) was amended to raise the overcrowding trigger to 99% of capacity. Ch. 86-46, § 1, *Laws of Fla.*, effective June 2, 1986.

While plaintiff was incarcerated, section 944.276, Florida Statutes (1987) was adopted, providing for "administrative gaintime" to control prison overcrowding. It provided that:

> 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

A year later, the administrative gaintime law was replaced by section 944.277, Florida Statutes (Supp. 1988), which provided for the award of "provisional credits" to control prison overcrowding. The overcrowding trigger was reduced to 97.5 percent

of capacity but a wide range of crimes which would disqualify an inmate from receiving overcrowding gaintime were added.

Plaintiff is not eligible for 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." § 944.277(1)(e), *Fla. Stat.* (1987). If the statute in effect at the time of appellant's crimes applies, he would not be disqualified.

SUMMARY OF ARGUMENT

Since 1983, to control prison overcrowding, Florida laws have provided for additional gaintime to be awarded when the prison system nears capacity. In 1986, when appellant committed his crimes, he was eligible for overcrowding gaintime should the award of overcrowding gaintime become necessary. In 1987, and again in 1988, the laws governing overcrowding gaintime were changed. Under the revised laws, plaintiff is not eligible for overcrowding gaintime because of the nature of his crimes.

The State has, after the fact, decided to treat more harshly those who commit certain types of crimes. 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* Clauses: "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).

Any law, not just an increase in the sentence permitted, 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. Thus, a law which adversely restricts gaintime availability — thereby increasing the quantum of punishment — is an *ex post facto* law. "*[E]ven 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, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981) (emphasis added).

The Department of Corrections will undoubtedly rely on *Blankenship v. Dugger,* 521 So.2d 1097 (Fla. 1988), for the proposition that overcrowding gaintime statutes are procedural, not substantive in nature, and that gaintime awarded to reduce overcrowding is only an expectancy, not a vested right. Not so. In *Waldrup* this Court repudiated the erroneous analysis it used in *Blankenship.* It put to rest once and for all its discredited rationale that after-the-fact reductions in the availability of discretionary gaintime awards do not violate the *ex post facto* Clauses.

Because appellant is disadvantaged as the result of subsequently enacted, and more restrictive legislation, he is entitled to the granting of the requested relief to compel the Department of Corrections to apply the gaintime law in effect at the time of his crimes.

ARGUMENT

CHANGES IN GAINTIME LAWS WHICH INCREASE THE TIME A PRISONER REMAINS INCARCERATED, WHEN ENACTED SUBSEQUENT TO THE DATE OF OFFENSE, VIOLATE THE PROHIBITION ON EX POST FACTO LAWS

The issue before this Court is whether appellant is entitled to that gaintime awarded Florida prisoners as a means of controlling prison overcrowding. A Writ of Habeas Corpus or, alternatively, a Writ of Mandamus, should issue because application of the disqualification provisions of section 944.277, Florida Statute (1989), provisions which were enacted subsequent to appellant's crimes, violates the *ex post facto* prohibition of Article I, Section 10 the Constitution of the United States, which provides that: "No State shall . . . pass any . . . ex post facto Law. . . "[1]

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,

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1. "So much importance did the Convention attach to [the ex post facto prohibition], that it is found twice in the Constitution." *Kring v. Missouri,* 107 U.S. 221, 227, 2 S.Ct. 443, 448, 27 L.Ed. 506 (1883), *overruled, Collins v. Youngblood,* ___ U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). It is found at U.S. Const., Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. It is also found in the Florida Constitution, Art. I, § 10, Fla. Const.

> 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.(Dall.) 386, 390, 1 L.Ed. 648 (1978) (emphasis in original), cited as controlling in *Collins v. Youngblood,* ___ U.S. ___, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990).

The changes in the Florida statutes governing overcrowding gaintime serve to inflict greater punishment on Antonio Felk 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, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987), citing *Weaver v. Graham,* 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). The Department of Corrections will not award overcrowding gaintime to appellant, relying on section 944.277(1)(e), Florida Statute (Supp. 1988). That statute was enacted after appellant's crimes. The Department of Corrections is applying a 1988 statute to events occurring long before its enactment. The 1988 statute disadvantages appellant because it causes him to remain incarcerated for a substantially longer period of time. When applied to Antonio Felk, section 944.277(1)(e) is an *ex post facto* law.

The argument here advanced is straightforward. On the date appellant committed his crimes, he was eligible for any gaintime that might be awarded to reduce prison overcrowding. As a result of subsequently enacted legislation, he is no longer eligible. The State has, after the fact, decided to treat more harshly those who commit certain types of crimes. 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* Clauses: "The law must apply to events occurring before its enactment, and it must disadvantage the offender." *Waldrup v. Dugger,* 562 So.2d at 691.

The "Emergency Release of Prisoners" Act, section 944.598, Florida Statutes (1983), with amendments not here relevant, was in effect on the date of appellant's crimes. It authorized the awarding of gaintime whenever the population of the prison system reached 98 percent of capacity. At that point:

> "all inmates in the system who are eligible to earn gain-time shall be reduced by the credit of up to 30 days gaintime, in 5-day increments, as may be necessary to reduce the inmate population to 97 percent of lawful capacity of the system."

§ 944.598(2), *Fla. Stat.* (1985).

In 1987, section 944.276, Florida Statutes was enacted. It provided for the awarding of "administrative gain-time" to control prison overcrowding. Like the Emergency Release of Prisoners provisions, the administrative gaintime provisions were triggered whenever the prison system population reached 98 percent of capacity. The Department of Corrections was authorized to grant up to 60 days administrative gaintime to all inmates earning incentive gaintime.[2]

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2. Because appellant's crimes were committed before the enactment of the administrative gaintime provisions, and because those provisions have been repealed, petitioner is not, as a matter of *ex post facto* analysis, entitled to administrative gaintime. *Waldrup v. Dugger,* 562 So.2d at 694.

A year later, administrative gaintime was replaced by provisional credits. § 944.277, *Fla. Stat.* (Supp. 1988). The overcrowding trigger was reduced to 97.5 percent. The crimes which would lead to disqualification, however, were greatly increased. Appellant is 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." § 944.277(1)(e), *Fla. Stat.* (Supp. 1988). The Department of Corrections has applied this disqualification to appellant. In doing that, the Department 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. at 30, 101 S.Ct. at 965 (emphasis added).

Weaver squarely held that a statutory reduction in available gaintime, 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.

The Emergency Release of Prisoners Act, in effect at the time appellant committed his crimes, entitled him to up to 30 days per month gaintime whenever the prison system reached 98% of capacity. The current law prevents appellant from receiving any overcrowding gaintime. Adversely changing gaintime 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.), *cert. denied,* ___ U.S. ___ , 110 S.Ct. 543, 107 L.Ed.2d 540 (1989); *Waldrup v. Dugger,* 562 So.2d at 691-92.

The Department will undoubtedly rely on *Blankenship v. Dugger,* 521 So.2d 1097 (Fla. 1988). In *Blankenship,* this Court rejected an *ex post facto* challenge to the application of the disqualification provisions of the administrative gaintime 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 protective. *See Dobbert,* 432 U.S. [282] at 293-94, 97 S.Ct. [2290] at 2298-99, 53 L.Ed.2d 344 (1977)]. Under *Weaver,* prisoners entering the correctional system do have a statutory right under section 944.275, to "good time" gain time, and it will automati-

> cally 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.[3]

The characterization of gaintime as "administrative" or "procedural," used to sustain the disqualification provisions in *Blankenship,* was decisively rejected in *Waldrup. Waldrup* involved a change in the incentive gaintime law which, *inter alia,* reduced the total amount of incentive gaintime that a prisoner could earn each month. The Department of Corrections, taking heart from *Blankenship,* argued that since incentive gaintime was discretionary — and that as a result, an inmate might never earn any incentive gaintime — application of the revised statute did not offend the *ex post facto* clause. The Department made the same argument *sub judice*. In *Waldrup* this Court repudiated the Department'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,* So.2d 855 (Fla. 1985). In *Harris,* we

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3. The Court's factual premise is also erroneous if applied to Antonio Felk. At the time he committed his crimes the prisons were grossly overcrowded and it was foreseeable that early releases would be necessary. See Final Report & Recommendations, Corrections Overcrowding Task Force, page v (Tallahassee 1983). The Task Force, created by House Bill 37-H, stated: "As a 'safety valve' for the system, the Task Force provided in its final recommendations an emergency release mechanism" as a "method of avoiding dangerously overcrowded conditions and ensur[ing] compliance with the federal mandates imposed through the Costello v. Wainwright litigation."

had denied relief after an inmate was subjected to a retroactive gain-time statute that had reduced the maximum number of gaintime days that could be awarded to him. We held that gain time allowance is an act of grace rather that a vested right and may be withdrawn, modified or denied. *Harris,* 376 So.2d at 856.

The United States Supreme Court in *Weaver* directly overruled *Harris,* finding that:

> Contrary to the reasoning of the Supreme Court of Florida, a law need not impair a "vested right" to violate the ex post facto prohibition . . . 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 the 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, 450 U.S. at 29-31, 101 S.Ct. at 964-965. The *Weaver* Court went on to reject the state's argument that an alteration in gain-time was not actually an alteration in sentence. Gain-time, held the *Weaver* court, "is one determinant of petitioner's prison term."

The *Waldrup* Court 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, 1562 So.2d at 692 (citations omitted).

Waldrup was followed in the recent case of *Rodrick v. State,* 567 So.2d 906 (Fla. 2d DCA Aug. 24, 1990), *review granted,* March 21, 1991. In *Rodrick* the Department of Corrections chose to apply the provi-

sional gaintime statute, rather than the administrative gaintime statute. Said the Court: "*Waldrup* holds that such an application of the statute, by precluding Rodrick from receiving the gaintime to which he was entitled when his offense was committed, is improper as an ex post facto application of the law even through Rodrick had only a 'mere expectancy' in the gain time." 567 So.2d at 907. Likewise, the situation of Antonio Felk. The Department is not entitled to choose among the overcrowding gaintime statutes. It must apply the one in effect at the time appellant committed his crimes.

As *Weaver, Waldrup* and *Rodrick* make clear, the Department cannot negate an *ex post facto* claim by arguing the absence of vested rights or that the receipt of gaintime is a mere expectancy. To make that argument is to ask the wrong question. The 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 Department cannot argue that changes in the law governing overcrowding gaintime are merely procedural. For after *Collins,* it is clear that a law which 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, "increases 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), where the Court held that a change in how the Department of Corrections interpreted and applied the existing gaintime statute, where the change resulted in a lengthened period of incarceration, violated the *ex post facto* prohibition.

Most recently, the Eleventh Circuit addressed the administrative/procedural defense to *ex post facto* claims in *Akins v. Snow,* 922 F.2d 1558 (11th Cir. 1991). That case invalidated a change in Georgia's parole rules which required the Parole Board to reconsider an inmate for parole every eight years, rather than annually, the rule in effect at the time of Akins' crime. Initially, the Court held that, "for *ex post facto* purposes, parole eligibility must be considered part of any sentence." 922 F.2d at 1563. In response to the argument that prisoners do not have any entitlement or vested right to parole, the Court responded:

> Snow misconstrues the scope of the *ex post factor* clause. The Supreme Court in *Weaver v. Graham,* 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), rejected the contention that the *ex post facto* clause is violated only when the law in question affects a vested interest. The *Weaver* Court stated that "a law need not impair a 'vested right' to violate the *ex post facto* prohibition . . . The presence of absence of an affirmative, enforceable right is not relevant . . . to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Id.* at 29-30, 101 S.Ct. at 964-65 (footnote omitted).

922 F.2d at 1563.

Georgia then argued that the change was merely procedural. In response, the Eleventh Circuit said:

> The Supreme Court has held that even a retrospective law that is disadvantageous will not violate the clause if the change concerns "legislative control of remedies and modes of procedures which do not affect matters of substance." . . . However, the Court has noted that the distinction between procedural and substantive changes is often quite elusive. . . . A law that is seemingly procedural will still violate the clause if the law alters a substantive right.
>
> * * * *
>
> We . . . conclude that the Board's new rule . . . is not merely a procedural change. The elimination of a parole reconsideration hearing does not simply alter the methods employed to determine whether an otherwise eligible inmate is granted parole. A parole reconsideration hearing is both in law and in practice an important component of a prisoner's parole eligibility. The change is a substantive one that effectively disadvantages an inmate.

922 F.2d at 1564-65 (citations omitted).

The disadvantage suffered by Akins was a potentially longer period of incarceration as the result of a lessened chance to meet with the Parole Board. Likewise, in our case. Authorization for overcrowding gaintime existed when Antonio Felk committed his crimes. The change in the law directly disadvantages appellant. He must serve a longer period of incarceration. To characterize the change in the law as administrative or procedural is to ignore the fact that the change causes appellant to serve a longer sentence. That, after-the-fact, the legislature cannot do.

Statutory authorization for the award of gaintime to reduce overcrowding has existed since 1983. In 1986, when appellant committed his crimes, he was eligible for overcrowding gaintime should overcrowding gaintime become necessary. The system was overcrowded. The award of overcrowding gaintime began in early 1987. *Blankenship*, 521 So.2d at 1099. At the same time, the legislature narrowed eligibility. Appellant was partially affected — he could not receive administrative gaintime until he completed the mandatory portion of his sentence. In 1988, the legislature even further narrowed eligibility. This narrowing, which bars appellant from receiving any overcrowding gaintime, is precluded by the *ex post factor* Clauses.

Two other states have considered the application of the *ex post facto* Clauses to changes in overcrowding gaintime. In *Ex Parte Rutledge,* 741 S.W.2d 460 (Tex.Cr.App. En Banc 1987), the Texas Court of Criminal Appeals held that the list of disqualifying offenses contained in 1987 amendments to its overcrowding gaintime statute could not be applied to an inmate who committed his crimes prior to the effective date of the amendments, finding *Weaver* controlling. Said the Court:

> Moreover, in recent cases, the ex post facto clause has been held to forbid retroactive "legislation that operates to [the] 'substantial disadvantage' of prisoners, whether or not the legislation is "technically an increase in the punishment annexed to the crime'."

741 S.W.2d at 461 (citations omitted).

In reaching its decision, in addition to *Weaver,* the Texas Court relied on *Rodriguez v. United States Parole Commission,* 594 F.2d 170 (7th Cir. 1979) and *United States v. Ferri,* 652 F.2d 325 (3rd Cir. 1981). *Ferri* and *Rodriguez,* like the Eleventh Circuit decision in *Akins v. Snow,* 922 F.2d 1558, found an *ex post facto* violation inhered in the elimination of a parole release hearings, thereby effectively preventing parole consideration. "A law may be *ex post facto* regardless of whether or not it is in some technical sense part of the sentence." *Ex Parte Rutledge,* 741 S.W.2d at 461. See also, *Ex Parte Ruiz,* 750 S.W.2d 217 (Tex. Cr.App. En Banc 1988).

The Oklahoma Court of Criminal Appeals reached a contrary result in *Barnes v. State,* 791 P.2d 101 (Okl.Cr. 1990). Although it purported to follow *Weaver,* in a leap of analysis that defies logic, it held that a restrictive change in its overcrowding gaintime statute did not alter the consequences attached to Barnes' crime because the "size of the prison population cannot be seen to be a consequence attached to the crime Appellant committed." 791 P.2d at 103. The use of the term "consequence attached to the crime" finds no support in *Weaver,* and is certainly inconsistent with the definition of an *ex post facto* law, as defined in *Calder v. Bull* and affirmed in *Collins v. Youngblood.* The Oklahoma Court failed to recognize that its law, like the Texas law and the Florida law, applies retroactively and serves to disad-

vantage those to whom it applies. That is all that is necessary for an *ex post facto* violation.

Appellant is eligible for overcrowding gaintime if the law is in effect at the time of his crimes is applied. In *Weaver* the United States Supreme Court 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, . . . [§ 944.277] substantially alters the consequences attached to a crime already completed, and therefore changes "the quantum of punishment."

101 S.Ct. at 966.

Defendants, defense lawyers, prosecutors, and judges understand that the Florida prison system is overcrowded and that, as a result, prisoners can expect to serve less than half of their sentence. That is certainly part of the inducement for a plea of guilty. It is certainly part of the sentencing calculation that a defense lawyer must employ when advising his client. Indeed, failure to advise a client of lack of eligibility for gaintime may provide grounds for the withdrawal of the plea or grounds for post conviction relief premised on ineffective assistance of counsel. *Ray v. State,* 480 So.2d 225 (Fla. 2d DCA 1985) (defendant not told that minimum mandatory sentence meant no gaintime); *Netherly v. State,* 508 So.2d 524 (Fla. 2d DCA 1987) (defendant not told that escape conviction would result in loss of accumulated

gaintime); *Owen v. State,* 551 So.2d 557 (Fla. 2d DCA 1989) (defendant not told about lack of parole eligibility during minimum mandatory portion of sentence).

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* Clauses. The state "may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood,* 110 S.Ct. at 2719. Although the provisional credits law merely alters penal provisions accorded by the grace of the legislature, it violates the *ex post facto* Clauses because it is both retrospective and more onerous than the law in effect on the date of Antonio Felk's crimes. That is the teaching of *Weaver* and *Collins.* It is the rule applied in *Waldrup.*

Antonio Felk is 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 appellant's crimes to appellant's detriment. He is entitled to thirty days gaintime per month whenever overcrowding gaintime is awarded. The Department of Corrections should be required to calculate the gaintime currently owed to appellant and reduce his sentence accordingly. And, the Department should be ordered to continue to credit appellant with overcrowding gaintime for each period of time that overcrowding gaintime is awarded.

CONCLUSION

Appellant respectfully requests that the decision of the First District Court of Appeal be reversed and that this matter then be remanded to the Circuit Court for entry of a Writ of Habeas Corpus or a Writ of Mandamus directing the respondent to award appellant the gaintime to which he is entitled pursuant to section 944.598, Florida Statutes (1985).

Respectfully submitted,

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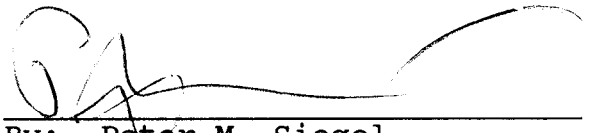

By: Peter M. Siegel
Florida Bar No. 227862

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing amended brief have been furnished to Elaine D. Hall, Assistant Attorney General, Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida 32399-2500, by United States mail, on the 15 day of May, 1991.

By: Peter M. Siegel