

IN THE SUPREME COURT OF FLORIDA
CASE NUMBER 77,855

047
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ANTONIO R. FELK,)
)
 Appellant,)
)
 vs.)
)
 RICHARD L. DUGGER, ETC.,)
)
 Appellee.)
 _____)

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

APPELLANT'S REPLY BRIEF

Respectfully submitted,
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ARGUMENT

CHANGES IN GAINTIME LAWS CANNOT BE CHARACTERIZED AS MERELY PROCEDURAL WHEN THEY INCREASE THE TIME A PRISONER REMAINS INCARCERATED

The appellee argues that the changes to the overcrowding gaintime laws are merely procedural and that, therefore, the changes do not violate the prohibition on *ex post facto* laws. To the contrary, no law the direct effect of which is to increase the period of incarceration, can fairly be characterized as procedural. *Collins v. Youngblood*, ___ U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) stands for the principle that any law "which makes more burdensome the punishment for a crime, after its commission" contravenes the *ex post facto* prohibition. 110 S.Ct. at 2719, citing *Beazell v. Ohio*, 269 U.S. 167, 169-170, 46 S.Ct. 68, 69, 70 L.Ed. 216 (1925).

The provisional credits law certainly increases the actual amount of punishment inflicted on Antonio Felk. That, in fact, is precisely what the State intended to do when it decided that those who committed certain types of crimes deserved to serve a greater percentage of their sentence.

The Secretary tells us that the underlying purpose of the provisional credits law, like the administrative gaintime and emergency release gaintime laws before it, is to relieve prison overcrowding. True. But it does not follow, as the Secretary suggests, that the evolution of the laws from the emergency

release provisions, through administrative gaintime, to provisional credits, does not increase the quantum of Antonio Felk's punishment. The inescapable fact is that Antonio Felk must serve more time as a result of laws enacted subsequent to his crimes.

The Secretary argues that:

Unlike basic gaintime, the subject of the decisions in Raske and Waldrup, no early release statute automatically attaches and becomes incorporated as an integral part of the sentence at the time the offense occurs. Rather the awards of such credits are totally contingent on the many outside and often unanticipated variables which contribute to prison overcrowding. There is no relationship to the original penalty assigned to the crime at the time it was committed or the ultimate punishment meted out. No greater punishment is imposed by operation of these statutes -- indeed, the original sentence is not increased at all.

Appellee's Brief, pp. 10-11.

The Secretary made precisely the same arguments in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); *Raske v. Martinez*, 876 F.2d 1496 (11th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 543, 107 L.Ed.2d 540 (1989); and *Waldrup v. Dugger*, 562 So.2d 687 (Fla. 1990). Those cases primarily involved incentive -- not basic -- gaintime. Incentive gaintime is not available as a matter of right. Instead, it is awarded "to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services." § 944.275(1), *Fla. Stat.* (1989). As with overcrowding gaintime, actual receipt of incentive gaintime is "totally contingent on . . . many outside and often unanticipated variables." For example, first of all the

prisoner must have a job or school assignment.¹ Many prisoners do not.² Second, under the current gaintime law, the prisoner must perform the job in an above-satisfactory or better manner.³ Many prisoners do not. Third, some prisoners, because of institutional conduct or custody classification, are not eligible for incentive gaintime.⁴ Fourth, the actual number of incentive gaintime days awarded (currently from 1 to 20), will vary with the [subjective] evaluation of the prisoner's work supervisor and classification officer.⁵ Many prisoners do not receive the maximum number of days available. Because of these factors, and others, no prisoner has any guarantee that he or she will actually receive any incentive gaintime.

Incentive gaintime laws, just like overcrowding gaintime laws, bear "no relationship to the original penalty assigned to the crime at the time it was committed or the ultimate punishment

1. See Fla. Admin. Code Rule 33-11.0065(2) (1991).

2. Prisoners may lack job or school assignments because none are available at the prison in which they are incarcerated. Or, a prisoner's health may prevent a job assignment. Although the applicable rule suggests some allowance for those who, through no fault of their own, cannot work, the rule is not written in mandatory terms. Fla. Admin. Code Rule 33-11.0065(2) (1991). Moreover, those without work assignments are only entitled to 4 days per month. Fla. Admin. Code Rule 33-11.0065 (3)(d) (3) (1991).

3. Fla. Admin. Code Rule 33-11.0065(5) (1991). Under the gaintime law considered in *Waldrup*, the prisoner could earn incentive gaintime if he performed in a satisfactory and acceptable manner. § 944.275, *Fla. Stat.* (1978).

4. Fla. Admin. Code Rule 33-11.0065(5) (1991).

5. Fla. Admin. Code Rule 33-11.0065(3) (b) (1991).

meted out." Similarly, under either incentive or overcrowding gaintime laws, "[n]o greater punishment is imposed by operation of these statutes -- indeed, the original sentence is not increased at all." That is certainly true. The original sentence is reduced by the incentive gaintime laws. So too, the original sentence is reduced by the overcrowding gaintime laws.

The Secretary also argues that "[a]t best, Petitioner possesses no more than a 'mere expectancy' that he fortuitously might obtain early release as a result of prison overcrowding. (Appellee's Brief, page 11). This argument is identical to the arguments rejected in *Weaver, Raske* and *Waldrup*. The "mere expectancy" argument simply cannot rescue an *ex post facto* law.

Finally, the Secretary argues that ". . . because it is wholly within the discretion of the Department of Corrections to decline to exercise its authority to make awards of provisional credits" (Appellee's Brief, page 11), the *ex post facto* clause is somehow not implicated. Nothing could be further from the truth. One supposes that those involved in the long-pending Costello v. Dugger state-wide prison conditions litigation would be very surprised to learn that controlling overcrowding is a matter of discretion. Clearly, it is not. The State has solemnly agreed that its prisons will not house more inmates than they can hold, in accordance with applicable criteria.

Why, if a reduction in sentence-reducing incentive gaintime laws violates the *ex post facto* prohibition does it not follow that a

reduction in sentence-reducing overcrowding gaintime laws also violates the prohibition? There is no principled distinction to be made. Analytically, incentive gaintime and overcrowding are like peas in a pod. Even more than overcrowding gaintime which, after-all, was forced on the system by the *Costello* litigation, incentive gaintime exists solely for the convenience of the correctional system. It is the time-honored method of prisoner control -- the proverbial carrot and stick approach. Without it, a prison system would be totally unmanageable.

A minor modification to the Secretary's Summary of Argument will demonstrate that, for purposes of ex post facto analysis, incentive and overcrowding gaintime cannot be distinguished:⁶

The purpose of Florida's *incentive gaintime* ~~early-release~~ statute is to *control the* ~~relieve~~ prison population ~~overcrowd-~~
~~ing~~. These statutes do not automatically attach and become incorporated as an integral part of a prisoner's sentence at the time the offense occurs. Neither do these statutes increase the original penalty assigned to a crime when committed. As such, these statutes cannot be construed as creating any "substantial personal rights" relating directly to the definition of crimes, defenses, or punishments, as contemplated by the ex post facto clauses of the United States Constitution.

Appellee's Brief, page 3.

So long as *Weaver, Raske* and *Waldrup* remain the law of the land, there is no way to distinguish incentive gaintime from overcrowding gaintime insofar as ex post facto analysis is concerned. *Blankenship v. Dugger*, 521 So.2d 1097 (Fla. 1988) cannot stand. It should be overruled.

6. Additions in italics, deletions struck through.

In *Collins* the Court reminded us that "by simply labelling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause." 110 S.Ct. at 2721. Yet that, in a nutshell, is the state's position.


WHEREFORE, appellant respectfully requests that this matter be reversed and remanded 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).

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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 June 17, 1991.



By: Peter M. Siegel