OA 2-8-95

BEFORE THE FLORIDA SUPREME COURT

R.M. OROSZ,

Petitioner,

v.

CASE NO.: 83,487

HARRY K. SINGLETARY, JR.,

Secretary, Department of Corrections,

Respondent.

_____/

INITIAL BRIEF OF PETITIONER

ORIGINAL PROCEEDING FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

STATUTES:

FLORIDA LAWS

FLORIDA ADMINISTRATIVE CODE

FLORIDA ATTORNEY GENERAL OPINIONS

CONSTITUTION

OTHER AUTHORITIES

PREFACE

In this brief, the Petitioner, R. M. OROSZ, will be referred to as "Petitioner"; the Respondent, HARRY K. SINGLETARY, will be referred to as the "Respondent."

Citations to the Petition for Writ of Mandamus will be referred to as "Petition" followed by the appendix number, if applicable, and page number where the reference can be found.

Citations to the Response To Order To Show Cause will be referred to as "Response" followed by the appendix number, if applicable, and page number where the reference can be found.

Citations to the Reply To Response will be referred to as "Reply" followed by the page number where the reference can be found.

Administrative gain-time under section 944.276, Florida Statutes (1987) will be referred to as "administrative credits" in this Brief to avoid confusion with basic and incentive gain-time.

STATEMENT OF THE CASE AND FACTS

On March 4, 1975 Petitioner was adjudicated guilty of a robbery committed on August 15, 1974. (Response, App. B4). Petitioner was sentenced to 35 years for the offense less 193 days jail credit. (Response, App. B-1, B-4).

On June 25, 1979, while serving the 1975 sentence, Petitioner was adjudicated guilty of aggravated battery committed on October 31, 1978. (Response B8-B10). Petitioner was sentenced to 10 years imprisonment to run consecutive to Petitioner's 1975 robbery sentence. (Response B8-B10).

On January 18, 1991 Petitioner completed his 1975 sentence. (Response, App. A, 3,4).

In calculating completion of the 1975 sentence, Respondent awarded Petitioner actual time served, 4,669 net days basic and incentive gain-time pursuant to § 944.27 and § 944.29, Florida Statutes (1973), 490 days administrative credit pursuant to § 944.276, Florida Statutes (1987) and 1,628 days provisional credit pursuant to former § 944.277, Florida Statutes (1991). (Response, App. A).

Petitioner began service of his 1979 sentence for aggravated battery immediately following completion of the 1975 sentence on January 18, 1991. Between January 1991 and May 1993 Petitioner earned 1,200 days basic gain-time, 533 days "Waldrup" incentive gain-time and 12 days provisional credits. (Response, App. A, 4-5).

Petitioner's provisional release date was June 16, 1993. (Response, App. A., 4).

Two years, five months later, on May 20, 1993, Respondent retroactively revoked all 1,628 days provisional credit awarded to the completed 1975 sentence and current 1979 sentence on the asserted authority of Florida Attorney General Opinion 92-96. (Response, App. A, 4). On July 20, 1993 Respondent retroactively revoked all 490 days administrative credit awarded to the completed 1975 sentence under the asserted authority of § 944.278, Florida Statutes (1993). (Response, App. A, 4). Respondent suspended service of the 1979 sentence and reinstated Petitioner's 1975 sentence into service. Respondent completely voided 1,200 days of basic gain-time and 533 days "Waldrup" incentive gain-time already earned on the 1979 sentence. (Response, App. A, 4). Respondent accounted for the voided gain-time by reducing the 1975 sentence by 486 days incentive gain-time. (Response, App. A, 4).

Petitioner's tentative release date is enhanced to August 31, 2001. (Response, App. A, 5).

Respondent concedes "[t]he instant case presents no issue of forfeiture of previously awarded gaintime but rather an issue of eligibility for previously awarded gaintime based upon changes that affect the length of an individual sentence component in an overall term comprised of consecutive sentences." (Response at 7).

On March 28, 1994 Petitioner filed an original petition for mandamus with this Court. On June 21, 1994 Respondent filed its response. On July 11, 1994 Petitioner filed a reply.

On October 26, 1994 this Court ordered briefing on the petition for writ of mandamus.

STATEMENT OF JURISDICTION

This Court has jurisdiction in this case under Article V, § 3(b)(8), Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(3).

SUMMARY OF ARGUMENT

1. Respondent lacks authority to void all basic and "Waldrup" incentive gain-time already awarded on the 1979 sentence. Petitioner loses all already awarded basic and "Waldrup" incentive gain-time on the 1979 sentence by Respondent's action. Neither chapter 944 nor the Safe Streets Initiative of 1994, codified as § 944.278, Florida Statutes (1993) give Respondent statutory authority to void earned and awarded basic and incentive gain-time.

Respondent's act is also contrary to the doctrine of credit for time served because Respondent has voided earned and awarded basic and "Waldrup" incentive gain-time and not given Petitioner credit for such service.

Finally, Respondent's act is contrary to the double jeopardy protection against multiple punishments in the United States and Florida constitutions because it upsets Petitioner's reasonable expectation of finality in the length of his sentence once service began.

2. Respondent lacks authority to interrupt Petitioner's service on the 1979 sentence after 2 years, 5 months of service, and then reinstate service of the 1975 sentence because such act causes Petitioner to serve both sentences "in bits and pieces" contrary to this Court's rulings. Petitioner is entitled to serve each sentence in one stretch.

Respondent lacks authority under Florida Attorney General Opinion 92-96 to cancel the administrative and provisional credits

awarded against the 1975 sentence based on the alleged ineligibility of the 1979 sentence for provisional credits. Petitioner's 1975 robbery sentence is eligible for award of provisional credits under section 944.277(1), Florida Statutes (Supp. 1992).

Respondent lacks authority to combine the 1975 and 1979 sentences into one overall Mandatory Release Date and Tentative Release Date for both sentences. Petitioner completed the 1975 sentence when he served time and accumulated credits equal to the sentence imposed by the court. Insofar as Respondent relies upon § 944.275(2)(a), (b), Florida Statutes, as authority to combine the sentences, such law is an unconstitutional *ex post facto* law as applied to Petitioner's 1975 sentence.

3. Assuming *arguendo* that Respondent possesses authority for its acts, Respondent's voiding of Petitioner's basic and incentive gain-time for the 1979 sentence without advance notice or opportunity for hearing violates procedural due process of the United States and Florida constitutions. Petitioner has a vested liberty interest in the basic incentive gain-time awarded to the 1979 sentence.

Petitioner also has a vested liberty interest created by the Florida Statutes in the administrative and provisional credits awarded to his 1975 and 1979 sentences. Respondent's summary cancellation of these credits without advance notice or opportunity for hearing violates procedural due process of the United States and Florida constitutions.

4. Insofar as Respondent relies on either Florida Statute section 944.278 (1993) or retroactive application of section 944.27(1)(h) (1991) as authority for its action, such legislative acts are facially unconstitutional bills of attainder and are also unconstitutional *ex post facto* laws facially and as applied in this case.

Florida Statute section 944.278 (1993) and retroactive application of section 944.27(1)(h) (1991) are unconstitutional bills of attainder because they inflict punishment against identifiable individuals, incarcerated persons, without judicial trial.

Florida Statute section 944.278 (1993) and retroactive application of section 944.27(1)(h) (1991) are unconstitutional *ex post facto* laws as applied because they are retroactive and disadvantage Petitioner by voiding earned basic and incentive gain-time on Petitioner's 1979 sentence. The Florida Statutes awarding administrative and provisional credits are not purely procedural laws, contrary to prior holdings of this Court, because they have the same effect on substantive rights that this Court held makes incentive gain-time a protected liberty interest. Florida Statute section 944.278 (1993) is an unconstitutional *ex post facto* law facially and as applied because it cancels all administrative and provisional credits which Petitioner earned by good prison conduct.

ARGUMENT

At issue is whether Respondent can void basic and incentive gain-time earned and awarded to a sentence in service by forcing an earlier, completed sentence back into service through cancellation of administrative and provisional credits.

The chronology of pertinent events is as follows. On August 15, 1974 Petitioner committed robbery and was sentenced in 1975 to 35 years incarceration. On October 31, 1978 Petitioner committed aggravated battery while in prison and was sentenced in 1979 to another 10 years incarceration consecutive to the 1975 sentence.

On June 21, 1990 this Court issued its ruling in Waldrup v. Dugger, that inmates would receive up to 37 days per month incentive gain-time on offenses committed between July 1, 1978 and June 16, 1983. Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990). The "Waldrup" incentive gain-time rate is the highest monthly rate available to inmates. Petitioner earns the higher "Waldrup" incentive gain-time on the 1979 sentence.

On January 18, 1991 Petitioner completed his 1975 sentence and began service on his 1979 sentence. Petitioner earned and was awarded 490 days administrative credit and 1,628 days provisional credit in completing the 1975 sentence.

On December 29, 1992 the Florida Attorney General issued an opinion stating that the exclusions from provisional credit eligibility contained in § 944.277, Florida Statutes (Supp. 1992) were retroactive. Op. Att'y Gen. Fla. 92-96 (1992).

The Florida Legislature enacted the Safe Streets Initiative of 1994 effective June 17, 1993 that provided in relevant part: "All awards of administrative gain-time under s. 944.276 and provisional credits under s. 944.277 are hereby canceled for all inmates serving a sentence or combined sentences in the custody of the department . . . ." Ch. 93-406, §§ 35, 44, at 2967, 2974, Laws of Fla.

Between May and July, 1993 Respondent summarily reinstated Petitioner's 1975 sentence into service, a full 2 years, 5 months after completion. Respondent reinstated the 1975 sentence by retroactively revoking the administrative and provisional credits awarded to the 1975 sentence.

Importantly, Respondent also voided a total of 1,200 days basic and 533 days "Waldrup" incentive gain-time already earned by Petitioner under service of the 1979 sentence. Respondent reduced the 1975 sentence by a total of only 486 days representing only incentive gain-time for the same period. Petitioner lost 1,200 days basic gain-time and an estimated 47 days incentive gain-time under Respondent's arbitrary substitution.

Through these maneuvers Respondent sets Petitioner to again serve an already completed sentence like the punishment of Sisyphus in the ancient Underworld:

> Then I witnessed the torture of Sisyphus, as he tackled his huge rock with both his hands. Leaning against it with his arms and thrusting with his legs, he would contrive to push the boulder up-hill to the top. But every time, as he was going to send it toppling over the crest, its sheer weight turned it back, and the misbegotten rock came bounding down again to level ground. So once more he had to wrestle with the thing and push it

up, while the sweat poured from his limbs and the dust rose high above his head.

Homer, The Odyssey Book XI 187 (E.V. Rieu trans. 1946).

ARGUMENT I: RESPONDENT LACKS AUTHORITY TO VOID BASIC AND "WALDRUP" INCENTIVE GAIN-TIME ALREADY EARNED

Assuming *arguendo* Respondent has authority to revoke administrative and provisional credits, Respondent lacks statutory and constitutional authority to void the 1,200 days basic gain-time and net 47 days "Waldrup" incentive time earned on the 1979 sentence.

The Florida Statutes limit Respondent's authority to revoke gain-time. State v. Green, 547 So. 2d 925, 926 (Fla. 1989) ("Section 944.28, Florida Statutes (1987) governs forfeiture of gain-time.") Basic and incentive gain-time is revocable for misconduct in prison or on supervised release. § 944.28, Fla. Stat. (1993). Provisional credits were not revocable for prison misconduct, but were revocable for violation of provisional release conditions. § 944.277(7),(8), Fla. Stat. (Supp. 1988). Administrative credits were not revocable for prison misconduct. § 944.276, Fla. Stat. (1987). Respondent is otherwise without statutory authority to revoke basic and incentive gain-time.

The plain language of the Safe Streets Initiative of 1994, codified as § 944.278, Florida Statutes (1993), does not destroy Petitioner's right in earned basic or "Waldrup" incentive time on the 1979 sentence. That statute section was directed solely against

administrative and provisional credits. § 944.278, Fla. Stat. (1993).

When Petitioner earned the "Waldrup" incentive gain-time for the 1979 sentence, his right to it vested subject only to forfeiture for misconduct: "[W]e held in Waldrup that the prohibition against ex post facto law applies to basic and incentive gain time and that inmates had a vested right in such gain time once it was awarded." Griffin v. Singletary, 638 So. 2d 500, 501 (Fla. 1994). Accord, Waldrup v. Dugger, 562 So. 2d 687, 694 (Fla. 1990); Brown v. Mayo, 156 Fla. 144, 23 So. 2d 273, 274 (1945) (an inmate "is entitled to credit on his sentence for gain time as and when he earns it."), cert. denied, 327 U.S. 768, 6 S. Ct. 815, 90 L. Ed. 998 (1946).

This assertion is supported by this Court's long-held rule that an inmate will receive credit for time already served, including gain-time, when resentenced. E.g., Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957); Tilghman v. Mayo, 82 So. 2d 136 (Fla. 1955). Respondent voided the 1979 sentence. Petitioner is entitled to receive earned credits on that sentence.

More recent decisions of this Court confirm Petitioner should receive credit for time served on the 1979 sentence. In the 1989 case State v. Green this Court held that an inmate must receive credit on a split sentence for all time spent in prison, including gain-time. State v. Green, 547 So. 2d 925, 926 (Fla. 1989). This Court analyzed the status of gain-time credits by holding "accrued gain-time is the functional equivalent of time spent in prison." Id. Thus, "[a] prisoner who is released early because of gain-time

is considered to have completed his sentence in full." Id. This Court correctly held that otherwise the "denial of credit for gain-time already accrued" would be "a retroactive forfeiture of gain-time." Id.

One year later this Court again reaffirmed in Heuring v. State that all credits reducing an incarcerative sentence were the functional equivalent of time spent in prison and that "once a prisoner is released from the remaining period of incarceration due to gain-time, that remaining period of the sentence is extinguished." Heuring v. State, 559 So. 2d 207, 208 (Fla. 1990). See also, Bradley v. State, 631 So. 2d 1096, 1097, n.2 (Fla. 1994) (Green applies to offenses committed before October 1, 1989); compare Tripp v. State, 622 So. 2d 941, 942, n.2 (Fla. 1993) (dictum that administrative and provisional credits not included in credit for time served) with Kelly v. State, 552 So. 2d 1140 (Fla. 5th DCA 1989) (administrative credits included in credit for time served).

Petitioner's loss of basic and "Waldrup" incentive gain-time is squarely within the rationale of Green. Respondent may not void Petitioner's basic and "Waldrup" incentive gain-time awarded on Petitioner's good behavior and grounded on his reasonable expectation of finality in the 1975 and 1979 sentences. Petitioner must receive credit for this service.

This conclusion is constitutionally required by the protection against multiple punishments in the double jeopardy and due process provisions of the Florida and United States constitutions. Amends. V, XIV, U.S. Const.; Art. I, § 9, Fla. Const.

An alteration in the amount of sentence reduction is an alteration in sentence: "[G]ain time . . . in fact is one determinant of petitioner's prison term--and that his effective sentence is altered once this determinant is changed." Weaver v. Graham, 450 U.S. 24, 32, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981) (cited with approval by Waldrup v. Dugger, 562 So. 2d 687, 691 (Fla. 1990)); see also, Superintendent, Mass. Correctional Instit., Walpole v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985) ("Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment.") The increase sentence length is the determinative factor for double jeopardy: "The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given to that action." United States v. DiFrancesco, 449 U.S. 117, 142, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980).

The double jeopardy clauses of the United States and Florida constitutions protect against multiple punishments for an offense by upsetting a defendant's expectation of finality in the sentence imposed. Jones v. Thomas, 491 U.S. 376, 385, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989); Carawan v. State, 515 So. 2d 161, 164 (Fla. 1987); see also, Davis v. State, 560 So. 2d 1231, 1232 (5th DCA 1990), appv'd, 581 So. 2d 893 (Fla. 1991) (double jeopardy protection of federal and Florida constitutions comparable). Double jeopardy protects a defendant's legitimate expectation that a

sentence will not be increased after service on the sentence begins. United States v. Jones, 722 F.2d 632, 638 (11th Cir. 1983).

Petitioner has a legitimate expectation in the length of his 1979 sentence based on the written law as it existed when the gain-time accrued, Petitioner's good conduct which qualified him eligible for gain-time, and Respondent's act of recording commencement of the 1979 sentence. Respondent must credit Petitioner for time served, including the reduction in sentence for basic and "Waldrup" incentive gain-time. See North Carolina v. Pearce, 395 U.S. 711, 718-719, n.13, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

As this Court trenchantly observed in a related context: "[A prisoner] should not be required to serve one day beyond his sentence . . . . He is required to pay only one debt to society, and that without interest." Adams v. Wainwright, 275 So. 2d 235, 237 (Fla. 1973).

This Court should issue the writ of mandamus and require Respondent to credit Petitioner with all basic and "Waldrup" incentive time actually earned.

ARGUMENT II: RESPONDENT LACKS AUTHORITY TO REINSTATE THE 1975 SENTENCE AFTER COMPLETION

Assuming *arguendo* that Respondent has authority to revoke administrative and provisional credits earned against the completed 1975 sentence, then Respondent's implementation of that authority is in error on at least three bases.

Interruption of Service on 1979 Sentence

Respondent's interruption of service on Petitioner's 1979 sentence is contrary to law because the interruption forces Petitioner to serve both the 1975 and 1979 sentences in segments. Respondent's self-initiated split of the 1979 sentence flies in the face of this Court's "oft-repeated holdings that a prisoner is entitled to pay his debt to society in one stretch, not in bits and pieces." Segal v. Wainwright, 304 So. 2d 446, 448 (Fla. 1974). District Court opinions are in accord. E.g., Massey v. State, 389 So. 2d 712, 713 (Fla. 2d DCA 1980) ("[O]ur courts have on several occasions observed that a prisoner is entitled to pay his debt to society in one stretch rather than in bits and pieces."); Rozmestor v. State, 381 So. 2d 324, 325 (Fla. 5th DCA 1980) ("Whether consecutive or concurrent the prisoner must be allowed to serve his sentence *seriatim* and in one stretch rather than in bits and pieces.")

Here the Respondent sandwiches the 1975 sentence into the middle of Petitioner's 1979 sentence defeating Petitioner's reasonable expectation of finality in the service of both sentences.

1975 Sentence Eligible For Provisional Credits

Respondent lacks statutory and constitutional authority to cancel the provisional credits awarded to the 1975 sentence based on the alleged ineligibility of the 1979 sentence for provisional credits. Respondent asserts its authority to revoke the administrative and provisional credits rests in part on Attorney General Opinion 92-96. (Response at 3).

The 1975 robbery sentence is eligible for provisional credits. Petitioner was convicted of an offense contrary to section 813.011, Florida Statutes (1973). (Response, App., B-2). Section 813.011, Florida Statutes, now § 812.13(1), is not an offense made ineligible for provisional credits. § 944.277(1)(a-j), Fla. Stat. (Supp. 1992). Likewise, former section 813.011, Florida Statutes (1973) for robbery contained no minimum mandatory sentence. §§ 775.082(4)(b), 813.011, Fla. Stat. (1973).

Under section 944.277(1), Petitioner does not lose the administrative and provisional credits awarded to the 1975 sentence because of the alleged ineligibility of the later, 1979 sentence. See e.g., Dugger v. Anderson, 593 So. 2d 1134, 1134-1135 (Fla. 1st DCA 1992); Dominguez v. State, 606 So. 2d 757 (Fla. 1st DCA 1992). Therefore Florida Attorney General Opinion 92-96 does not provide authority to forfeit Petitioner's provisional credits.

No Authority To Combine Sentences Into One Release Date

Respondent lacks the authority to combine the 1975 and 1979 sentences into one overall Maximum Release Date and Tentative Release Date for both sentences.

Respondent claims it is able to reach back into the 1975 sentence under § 944.275(2)(a), (b), Florida Statutes, which establishes Maximum and Tentative release dates for consecutive sentences. (Response at 7). That contention is quickly disposed of. Section 944.275(2) is inapplicable to Petitioner's 1975 and 1979 sentences under the Correctional Reform Act of 1983 which had an effective date of June 16, 1983. Ch.83-131, § 8, 43, at 442-443, 463, Laws of Fla. The Act was not expressly retroactive and "[t]he presumption against retroactive application of a law that affects substantive rights, liabilities, or duties is a well established rule of statutory construction." Arrow Air, Inc. v. Walsh, 19 Fla. L. Weekly S592, S593 (Fla. November 17, 1994); see also, § 775.021(1), Fla. Stat. (1993) (rule of lenity regarding punishment). There is no authority to make the application retroactive.

Finally, retroactive application of § 944.275(2) (1983) to the 1975 and 1979 sentences results in an *ex post facto* law which disadvantages Petitioner by increasing the quantum of punishment. The quantum of punishment is increased when Respondent substitutes less incentive gain-time toward the 1975 sentence, 486 days, than the 1,200 basic and 533 "Waldrup" incentive gain-time days Petitioner already earned toward the 1979 sentence. Petitioner's

overall quantum of punishment is also increased when Respondent voids a known amount of basic and incentive "Waldrup" incentive gain-time already earned by Petitioner for the speculative chance that sufficient work or programs will be available for Petitioner to again "re-earn" a comparable amount of incentive gain-time at a future date. § 944.275(4)(b), Fla. Stat. (1979) (incentive gain-time requires participation in positive activity); Fla. Admin. Code R. 33-11.0065 (listing factors); see Raske v. Martinez, 876 F.2d 1496, 1499, 1500, n.11 (11th Cir.) (same), cert. denied, 493 U.S. 993, 110 S. Ct. 543, 107 L. Ed. 2d 540 (1989).

Petitioner's 1975 sentence is governed instead by Florida Statute section 944.27(2) (1973) which was in effect at the time of the August 15, 1974 offense. That statute provides in relevant part that: "When a prisoner is under two or more cumulative sentences, he shall be allowed gain time as if they were all one sentence and his gain time, including any extra gain time allowed him under § 944.29, shall be subject to forfeiture as though such sentence were all one sentence." § 944.27(2), Fla. Stat. (1973).

Section 944.27(2) (1973) provides the narrow authorization for Respondent to combine consecutive sentences for purposes of computing basic and incentive ("extra") gain-time and to forfeit basic and incentive gain-time for misconduct.

Joiner v. Sinclair, 110 So. 2d 12 (Fla. 1959), is apparently the only case from this Court interpreting a gain-time statute preceding § 944.28(2) (1973). In Joiner the inmate finished the first of two consecutive sentences when the inmate escaped and was

recaptured. Joiner, 110 So. 2d at 13. This Court held the Department of Corrections could forfeit all accumulated basic gain-time for both sentences under the statute. Id. Quoting a California decision, this Court stated its rationale:

> [I]t would be inconsistent to say that a prisoner under consecutive sentences is regarded as undergoing one continuous term of confinement rather than a series of distinct terms, for the purpose of earning credits, yet the same prisoner, when he commits an offense causing those same credits to be forfeited, is to be regarded as serving a series of distinct terms, the earlier ones of which have been completed and the sentences thereon expiated.

Id. (citation omitted).

The First District followed the Joiner reasoning when construing § 944.27(2) and held: "[C]onsecutive sentences are treated as a single sentence for gain-time purposes and a prisoner has not served the first of two consecutive sentences until he has served it exclusive of gain-time." Kimmons v. Wainwright, 338 So. 2d 239, 240 (Fla. 1st DCA 1976), cert. denied, 346 So. 2d 1249 (Fla.), cert. denied, 434 U.S. 843, 98 S. Ct. 142, 54 L. Ed. 2d 107 (1977). Accord, Nelson v. Wainwright, 374 So. 2d 1172 (Fla. 1st DCA 1979). Importantly, the Kimmons panel of judges emphasized the same rationale as this Court: "[T]he Legislature has given a bonus of gain-time to prisoners who receive consecutive sentences, but along with this bonus goes the responsibility of doing nothing that would cause a gain-time forfeiture." Kimmons, 338 So. 2d at 240.

Unlike Joiner and Kimmons this case does not involve forfeiture due to prisoner misconduct. Instead, the matter is Respondent's implementation of retroactive legislation. The legislative intent

and policy rationale of taking the "bonus of gain-time" with the "responsibility of doing nothing that would cause a gain-time forfeiture" is inapplicable under former § 944.27(2) in this situation.

For the above reason, the writ of mandamus should be granted and Respondent required to return Petitioner to service of the 1979 sentence with full award of accrued basic and incentive gain-time.

ARGUMENT III: RESPONDENT'S REINSTATEMENT OF THE COMPLETED 1975 SENTENCE VIOLATES DUE PROCESS

"Prisoners . . . may not be deprived of life, liberty, or property without due process of law." Wolff v. McDonnell, 418 U.S. 539, 556, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). The Due Process clauses of the United States and Florida constitutions mandate that Petitioner receive the procedural minima of notice, opportunity to be heard and written explanation for action taken before being deprived of a liberty interest. Amend. XIV, U.S. Const.; Art. I, §§ 2, 9, Fla. Const.; Wolff, 418 U.S. at 563-567.

The State of Florida created a protected liberty interest in basic and incentive gain-time, as well as administrative and provisional credits awarded to both Petitioner's 1975 and 1979 sentences. "Stated simply, a State creates a protected liberty interest by placing substantive limitations on official discretion." Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 462, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989) (citation and internal quotation marks omitted).

One way a State creates a liberty interest is by establishing "substantive predicates," that is, standards or rules in statutes or regulations, to govern decision-making. Thompson, 490 U.S. at 462. The statutes or regulations must "contain explicitly mandatory language, *i.e.*, specific directives to the decisionmaker that if the regulation's substantive predicates are present, a particular outcome must follow . . . ." Thompson, 490 U.S. at 455 (internal quotation marks omitted).

Basic and Incentive Gain-time

Chapter 944, Florida Statutes, specifies the standards or rules governing award and forfeiture of basic and incentive gain-time. §§ 944.275(4)(a), 944.275(4)(b-c), Fla. Stat. (1991). The same statute sections direct specific outcomes upon certain conditions. §§ 944.275(2)(a), 944.275(3)(a), 944.291, Fla. Stat. (1991).

This Court recognizes a statutory liberty interest in basic gain-time: "[P]risoners 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." Blankenship v. Dugger, 521 So. 2d 1097, 1099 (Fla. 1988); accord, Griffin v. Singletary, 638 So. 2d 500, 501 (Fla. 1994) ("[W]e held in Waldrup that . . . inmates had a vested right in [basic and incentive] gain time once it was awarded.") There is a similar recognition for a statutory interest in incentive gain-time. Griffin v. Singletary, 638 So. 2d 500, 501 (Fla. 1994); Waldrup v. Dugger, 562 So. 2d 687, 694 (Fla. 1990); see Raske v. Martinez, 876 F.2d 1496, 1499, n.6 (11th Cir.), cert. denied, 493 U.S. 993, 110 S. Ct. 543, 107 L. Ed. 2d 540 (1989); §§ 944.275(2)(b-c, e), Fla. Stat. (Supp. 1978).

That established, the United State Supreme Court has plainly held on this point: "Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily." Superintendent,

Mass. Correctional Inst., Walpole v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985).

The main purpose of due process "is to minimize the risk of erroneous decisions." Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 13, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). Respondent's summary interruption of service on Petitioner's 1979 sentence, reinstatement of the completed 1975 sentence, and cancellation of earned basic and "Waldrup" incentive time is the erroneous and arbitrary act procedural due process protects against. Respondent's confused and changing explanation of Petitioner's remaining sentence is ample proof of the need for an adequate pre-deprivation hearing. (Petition, App. A-I).

Respondent, of course, gave no such hearing. Petitioner's right to procedural due process was accordingly abridged.

Administrative and Provisional Credits

Petitioner also possesses two distinct liberty interests in his administrative and provisional credits. Petitioner has a liberty interest in administrative and provisional credits actually earned. Second, Petitioner has a liberty interest in the written procedures for revoking those interests.

Chapter 944, Florida Statutes, specifies the standards or rules governing award and forfeiture of administrative and provisional credits. Upon the occurrence of overcrowding and good behavior by an inmate, Florida Statutes authorized Respondent to grant administrative credits. § 944.276, Fla. Stat. (1987). Section 944.276(1) (1987) mandated Respondent award the administrative

credits "equally to all inmates who are earning incentive gain-time" unless sentence was for specific, listed offenses not at issue here.

Award of provisional credits was similar. Upon the occurrence of overcrowding and good behavior by an inmate, Florida Statutes authorized Respondent to grant provisional credits. § 944.277(1), Fla. Stat. (Supp. 1988). Section 944.277(4) (Supp. 1988) mandated that "any eligible inmate who is incarcerated on the effective date of an award of provisional credits shall receive such credits." (emphasis added); see also, Fla. Admin. Code R. 33-28.0019(1) (eligible inmate shall be awarded provisional credits).

The same statute sections directed specific outcomes once administrative or provisional credits were granted. Award of administrative credits reduced an inmate's Tentative Release Date and resulted in earlier release. § 944.275(3)(a), Fla. Stat. (1987).

Regarding provisional credits, section 944.277(3) (Supp. 1988) mandated that when provisional credits are granted Respondent "shall establish a provisional release date for each eligible inmate." (emphasis added). Section 944.277(5) mandated that any inmate receiving thirty or more days of provisional credits "must be released" on the provisional release date. (emphasis supplied); see also, § 921.001(10), Fla. Stat. (1987) (inmate shall be released upon attaining provisional release date).

Those outcomes are enforceable in Florida courts. E.g., Dominguez v. State, 606 So. 2d 757 (Fla. 1st DCA 1992); Dugger v. Anderson, 593 So. 2d 1134 (Fla. 1st DCA 1992).

The statutes and agency rules created a liberty interest in earned administrative and provisional credits. Then, clearly:

> [T]he State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). Revocation of that liberty interest requires procedural due process notice, opportunity to be heard and written justification. Superintendent, Mass. Correctional Instit., Walpole v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985).

Nothing in Blankenship v. Dugger is to the contrary. This Court found in that case there was no protected liberty interest under former statute section 944.598 because that statute was never implemented, and there was no liberty interest under former administrative credits statute section 944.276 because of the prisoner's ineligibility. Blankenship v. Dugger, 521 So. 2d 1097, 1099-1100 (Fla. 1988). Former section 944.598 is not at issue here; Petitioner is eligible for administrative credits against the 1975 sentence. Blankenship is inapposite.

This Court should hold Respondent's summary revocation of basic and incentive gain-time, as well as administrative and provisional credits, violates the procedural due process requirements of the Florida and United States constitutions and grant the writ of

mandamus requiring Respondent to return Petitioner to his status *quo ante* until a satisfactory hearing is held.

ARGUMENT IV: FLORIDA STATUTE SECTIONS 944.278 (1993) AND 944.277(1) (1991) ARE PROSCRIBED BILLS OF ATTAINDER AND UNCONSTITUTIONAL *EX POST FACTO* LAWS

This past term, Justice Stevens succinctly cataloged the repugnance in American law to retroactive legislation:

> It is . . . not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl. 1 prohibits States from passing another type of retroactive legislation, laws 'impairing the Obligation of Contracts.' The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.' The prohibitions on 'Bills of Attainder' in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application.

Landgraf v. USI Film Products, 114 S. Ct. 1483, 1497, 128 L. Ed. 2d 229, 252-253 (1994) (internal citations omitted) (cited with approval in Arrow Air, Inc. v. Walsh, 19 Fla. L. Weekly S592, S592 (Fla. November 17, 1994)).

Florida Statute section 944.278 (1993) and retroactive application of the exclusions in former section 944.277(1) (1991) are proscribed Bills of Attainder contrary to Article I, § 10, United States Constitution and Article I, § 10, Florida Constitution. Florida Statute sections 944.278 (1993) and 944.277(1) (1991) are also unconstitutional *ex post facto* laws under Article I, § 10, United States Constitution and Article I, § 10, Florida Constitution facially and as applied in this case.

Bill of Attainder

Article I, § 10, United States Constitution, provides that "[n]o state shall . . . pass any Bill of Attainder . . . ." The Florida Constitution similarly provides: "PROHIBITED LAWS. No bill of attainder . . . shall be passed." Art. I, § 10, Fla. Const. A legislative act is a bill of attainder if it (1) inflicts punishment, (2) against identifiable individuals, (3) without judicial trial. Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 846, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984).

The summary cancellation of Petitioner's earned administrative and provisional credits by retroactive application of Florida Statute § 944.278 (1993) is just such punishment against prisoners without judicial trial.

Cancellation of Petitioner's administrative and provisional credits is clearly punishment. An act is punishment under the bill of attainder if it either: (1) falls within the historical category of punishment, (2) functionally furthers no non-punitive legislative purposes, or (3) the legislative history show a motivational intent to punish. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 473-484, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977). Retroactive cancellation of administrative and provisional credits is a historical category of punishment imposed through lengthening the term of incarceration. See Weaver v. Graham, 450 U.S. 24, 31-32, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). The presence of an announced preventative purpose for the law does not change its

analysis as a Bill of Attainder. See United States v. Brown, 381 U.S. 437, 456-458, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

The retroactive cancellation of administrative and provisional credits is also directed against only the identifiable individuals consisting of Department of Corrections inmates. Both the Attorney General's 1992 opinion interpreting § 944.277(1), Florida Statutes (1991) and the Safe Streets Initiative of 1994 were political responses directed against the unpopularity of prisoner early release. Attorney General Opinion 92-96 was a response to the then-pending release of one Donald McDougall, who was convicted of the torture and murder of a five-year old girl. Op. Att'y Gen. Fla. 92-96, at 283. See also, Roger Handberg and N. Gary Holten, Reforming Florida's Sentencing Guidelines 82 (1993) (discussing political response to McDougall controversy); Barbara Walsh, Inmates Identify A Secret State Rounding Up Wrongly Released, Sun-Sentinel, January 15, 1993, at 1B (quoting Attorney General Butterworth: "The McDougall case woke everybody up. Society has no use for violent offenders.") The Safe Streets Initiative of 1994 was the response to public pressure against early release of prisoners. Roger Handberg and N. Gary Holten, Reforming Florida's Sentencing Guidelines 90-92 (1993).

Finally, it is patent that Florida Statute section 944.278 retroactively cancelled administrative and provisional credits, and concomitantly lengthened prison terms, without judicial trial. The cancellation of credits occurred without the procedural due process minima of notice or opportunity for hearing.

This Court should hold that the singling out of disfavored inmates and the meting out of drumhead punishment of increased sentence length is prohibited as a Bill of Attainder.

Prohibited *Ex Post Facto* Laws

Florida Statute section 944.278 (1993) and retroactive application of the exclusions in 944.277(1) are proscribed *ex post facto* laws contrary to Article I, § 10, United States Constitution and Article I, § 10, Florida Constitution.

An *ex post facto* law has the two critical elements that "it must be retrospective . . . and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981) (cited with approval by Waldrup v. Dugger, 562 So. 2d 687, 691 (Fla. 1990)). An *ex post facto* law need not impair a "vested right" but only increase the penalty for a crime. Weaver, 450 U.S. at 29-30.

The *ex post facto* proscription does not apply to a purely procedural law, but "a change in the law that alters a substantial right can be ex post facto even if the statute takes a seemingly procedural form." Miller v. Florida, 482 U.S. 423, 433, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987) (citation and internal quotation marks omitted). A procedural law narrowly refers to "procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." Collins v. Youngblood, 497 U.S. 37, 45, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). Clearly, "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause." Collins, 497 U.S.

at 46; see also, Weaver v. Graham, 450 U.S. 24, 31, n.15, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981) ("The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by the legislative enactment, under any form, however disguised." quoting Cummings v. Missouri, 4 Wall. 277, 325 (1867)).

This Court is in agreement: "For ex post facto purposes, the question is not what name a particular form of 'credit' or 'gain time' has, but what its actual effect is." Griffin v. Singletary, 638 So. 2d 500, 501, n.1 (Fla. 1994).

This Court previously held administrative and provisional credits were purely procedural laws because the award of these credits was contingent on factors outside the inmate's control and was not a quantifiable expectation at the time of sentencing. E.g., Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994) (loss of accrued administrative and provisional credits from single 1986 incident); Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991) (inmate excluded from earning future provisional credits based on type of offense), cert. denied, 112 S. Ct. 886, 116 L. Ed. 2d 790 (1992); Blankenship v. Dugger, 521 So. 2d 1097 (Fla. 1988) (inmate excluded from earning future administrative credits of offense); see also, Dugger v. Grant, 610 So. 2d 428, 430 (Fla. 1993) (reaffirming provisional credit law is administrative).

The Griffin v. Singletary decision is the only case involving the cancellation of both administrative and provisional credits by

section 944.278, Florida Statutes (1993). This opinion, issued *per curiam* by six Justices without former-Chief Justice Barkett taking part and with former Justice McDonald sitting, rejected the petitioner's *pro se* mandamus petition for restoration of credits. The opinion merits close analysis.

Griffin begins by declaring administrative and provisional credits are the same and that "the legislative history discloses that the legislature merely changed the name of 'administrative gain time' to 'provisional credits' . . . ." Griffin v. Singletary, 638 So. 2d 500, 501 (Fla. 1994). The opinion continues to assert both forms of credit were "to reduce prison overcrowding when the correctional system reached ninety-eight percent of its lawful capacity." Griffin, 638 So. 2d at 501.

More exactly, the 1988 legislative changes lowered the triggering population figure to 97.5 percent. Compare 944.276(1), Fla. Stat. (1987) (98 percent) with 944.277(1), Fla. Stat. (Supp. 1988) (97.5 percent). The 1988 legislative changes also further restricted eligibility for credits. § 944.277(1)(a-g), Fla. Stat. (Supp. 1988). Most significantly, the 1988 legislative changes put into place a new system which created an earlier date of possible release, the provisional release date, § 944.277(3), Fla. Stat. (Supp. 1988), and established an entire program of provisional release supervision. § 944.277(5-7), Fla. Stat. (Supp. 1988). The names of the credits were not merely changed.

Griffin goes on to distinguish the constitutional difference between gain-time and overcrowding credits. Underlying Griffin is

the rule established in Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990) that basic and incentive gain-time are constitutionally protected interests. Griffin v. Singletary, 638 So. 2d 500, 501 (Fla. 1994). The opinion distinguishes credits from gain-time by noting credits "are not a reasonably quantifiable expectation at the time an inmate is sentenced." Griffin, 638 So. 2d at 501. The opinion declares credits are "in no sense tied to any aspect of the original sentence" and cannot factor into plea decisions. Id. The opinion also notes award of credits is "based solely on the happenstance of prison overcrowding." Id.

Not so. The award of credits to inmates was based on prison overcrowding, inmate's eligibility determined by type of underlying offense, § 944.277(1)(a-g), Fla. Stat. (Supp. 1988), and importantly, the inmate's eligibility for incentive gain-time. § 944.277(1), Fla. Stat. (Supp. 1988). Sub-section 944.277(1) (Supp. 1988) expressly limited persons entitled to receive provisional credits to each "inmate who is earning incentive gain-time" less certain excluded categories. § 944.277(1), Fla. Stat. (Supp. 1988); see also, § 944.276, Fla. Stat. (1987) (administrative credits available "to all inmates who are earning incentive gain-time . . . .") An inmate is only eligible for incentive gain-time based upon good behavior and participation in prison programs. § 944.275(4)(b), Fla. Stat. (1987). It therefore follows every inmate receiving administrative or provisional credits must be obeying prison rules and participating in work or programs. This Court identified the inmate's compliance with prison rules and performing

tasks as factors creating a substantive right in incentive gain-time actually awarded. See Waldrup v. Dugger, 562 So. 2d 687, 692 (Fla. 1990) (citing Weaver v. Graham); see also, Raske v. Martinez, 876 F.2d 1496, 1500 (Fla. 1989) ("if the State affords its inmates such work, it is bound to reward prisoners for their services . . . ."), cert. denied, 493 U.S. 993, 110 S. Ct. 543, 107 L. Ed. 2d 540 (1989). An inmate conforming his prison behavior for administrative or provisional credits eligibility has a same protected liberty interest in the credits actually awarded as incentive gain-time.

Both incentive gain-time and credits are tied to the original sentence to the same degree. While neither is awarded in bulk at sentence commencement, both laws set maximum awards available. Compare § 944.277(1), Fla. Stat. (Supp. 1988) (provisional credits limited to 60 days per award) and § 944.276(1), Fla. Stat. (1987) (administrative credits limited to 60 days per award) with § 944.275(4)(b), Fla. Stat. (1987) (incentive gain-time limited to 20 days per month).

Credits and incentive gain-time are also equally susceptible to advance prediction. Indeed, advance quantification of provisional credits has fewer or the same uncertainties than prediction of incentive gain-time, a protected interest. Incentive gain-time is contingent; there is no right to require Respondent to create opportunities for incentive gain-time. See Pettway v. Wainwright, 450 So. 2d 1279 (Fla. 1st DCA 1984). Award of incentive gain-time is tenuous; indeed, Respondent has near-absolute discretion in the amount of incentive gain-time awarded even if the

inmate participates in earning it. See Turner v. Singletary, 623 So. 2d 537 (Fla. 1st DCA 1993); see generally, Fla. Admin. Code R. 33-11.0065 (stating factors, such as attitude, courtesy and respect). Incentive gain-time is awarded at the institutional level. Fla. Admin. Code R. 33-11.0065(3)(a). Interpretation of performance and award of incentive gain-time necessarily varies among correctional institutions making award unpredictable in advance.

While incentive gain-time is not certain or fully predictable at sentencing, this Court has held incentive gain-time a substantive, statutory liberty interest. Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990). There is no principled distinction between an inmate whose good behavior creates eligibility for incentive gain-time upon the "happenstance" of available work or programs at a particular institution and an inmate whose good behavior creates eligibility for credits against a sentence upon the real and reoccurring condition of prison overcrowding in Florida. As the Tenth Circuit correctly concluded in a holding on point, there is no real difference under the United States *Ex Post Facto* Clause between retroactive reductions in "earned" credits and retroactive reduction in overcrowding or "emergency" credits. Arnold v. Cody, 951 F.2d 280, 283 (10th Cir. 1991). Both violate the *ex post facto* prohibition.

Griffin is not controlling here, even if correctly decided. Griffin addresses the loss of awarded credits as a due process issue, not *ex post facto* violation. Griffin v. Singletary, 638 So.

2d 500, 501 (Fla. 1994). The *ex post facto* violation through retroactive cancellation of awarded credits is at issue here. Also, while Griffin notes § 944.278 (1993) was involved in loss of administrative credits, Griffin at 500, the decision is directed toward loss of provisional credits under Florida Attorney General Opinion 92-96 as indicated in its closing analysis: "Revocation for present purposes has been confined to those inmates convicted of especially serious crimes, including murder, certain offenses against children, and certain sexual offenses." Griffin, 638 So. 2d at 501-502. Petitioner's 1975 armed robbery sentence was always entitled to administrative and provisional credits under former statutory law and is not effected by AGO opinion 92-96. Only Petitioner's separate, 1979 sentence is arguably excluded from provisional credits.

Finally, Griffin is not precedent because it did not address the *ex post facto* issue of revocation under § 944.278 (1993) of earned administrative and provisional credits to a completed sentence. Petitioner is different from the previous cases before this Court because the earned administrative and provisional credits were used to expire Petitioner's 1975 sentence.

The present case squarely confronts the *ex post facto* application of Florida Statute § 944.278 (1993) to a person whose prison behavior qualified him to receive the credits sufficient to complete his sentence. Petitioner invites an express ruling on the Weaver v. Graham issues of whether § 944.278 is retroactive and disadvantages inmates.

The precedent case of Weaver v. Graham is on all fours with the present case as to retroactive cancellation of credits. Section 944.278 (1993) is clearly retroactive by cancelling credits previously awarded under statutory law. Section 944.278 (1993) is also facially disadvantageous because it increases the length of incarceration, and is disadvantageous as applied by forcing Petitioner to re-serve a completed sentence.

Petitioner prays this Court rule § 944.278, Florida Statutes (1993) is an unconstitutional *ex post facto* law under the Florida and United States constitutions and issue the writ of mandamus requiring Respondent to show expiration of Petitioner's 1975 sentence on January 18, 1991 and return the full award of basic and incentive gain-time and earned provisional credits to Petitioner's 1979 sentence.

CONCLUSION

The writ of mandamus should issue against Respondent and require Respondent to show expiration of Petitioner's 1975 sentence on January 18, 1991 and the full award of basic and incentive gain-time against Petitioner's 1979 sentence since January 18, 1991.

Respectfully submitted,

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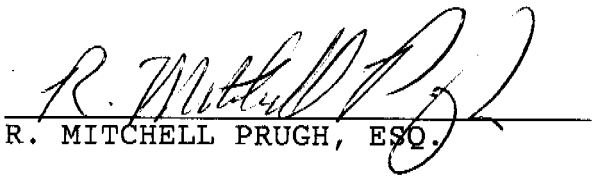
CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of Petitioner's Initial Brief was sent to SUSAN A. MAHER, ESQ., Deputy General Counsel, Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida, 32399-2500 this 6th day of December, 1994.



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