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.

_____/

REPLY BRIEF OF PETITIONER

ORIGINAL PROCEEDING FOR WRIT OF MANDAMUS

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PREFACE

Petitioner adopts Respondent's nomenclature for consistency of argument.

"Work" gain-time refers to Florida Statutes sections 944.29 (1973) and 944.275 (1978).

"Incentive" gain-time refers to Florida Statutes section 944.275 (1983).

Petitioner's Initial Brief will be referred to as "IB" followed by the page number where the reference may be found.

Respondent's Supplemental Brief will be referred to as "SB" followed by the page number where the reference may 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.

ARGUMENT

The most important of Respondent's many concessions is that "[] Petitioner possesses a protected liberty interest in retaining gaintime awarded him . . . ." (SB at 23). Respondent's summary revocation of Petitioner's 533 days of earned work gain-time and substitution of 486 days work gain-time clearly violates that protected liberty interest in the substantive due process right of the time earned and the procedural manner of revocation. Art. I, § 9, Fla. Const.; U.S. Const. amend. XIV, § 2. Nor has Petitioner simply lost a net 47 days already earned.

Respondent admits that when Petitioner attempts to re-earn his incentive gain-time "other factors may preclude . . . earning the maximum potential gaintime available, such as transfers, lack of job assignment, incapacity, etc. . . . ." (SB at 26). Simply put, Petitioner loses his vested right in 533 days work gain-time already earned; Petitioner gets a speculative chance, not a guarantee, to re-earn the same amount of time once more. Petitioner also loses the ability to earn work gain-time at the higher "Waldrup" rate under current conditions. The practical difficulty of earning incentive gain-time a second time because of prison vagaries, such as mandatory transfers between institutions, (SB at 26), is magnified by new legal restrictions on incentive gain-time. Compare Vol. 20, No. 8, Fla. Admin. Weekly 1099-1105 (February 25, 1994) (rule changes) with Fla. Admin. Code Rule 33-11.065 (1993) (former rule). Respondent urges a return to status quo ante to 1983 while changing the rules which make that impossible.

Respondent admits the Legislature did not prescribe how to implement the cancellation of administrative and provisional credits. (SB at 14). Respondent found only two choices. (SB at 12). A third alternative is plain: credit inmates with actual gain-time earned through implementation of section 944.278. Petitioner should then complete the sentence in service. The re-service of the 1975 sentence is an unreal issue because Petitioner served that sentence through to completion.[1]

Bill of Attainder

Respondent concedes that the retroactive cancellation of administrative and provisional credits in Florida Statute section 944.278 targets identifiable individuals and was imposed without judicial trial. (SB at 30).

Respondent disputes whether lengthened prison incarceration is punishment. (SB at 31-32). The United States Supreme Court interprets the concept of punishment under the Bill of Attainder clause broadly. See United States v. Brown, 381 U.S. 437, 447, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965); Laurence H. Tribe, American Constitutional Law s.10-4, at 642, n.9 (2nd ed. 1988). Imprisonment is a historical category of punishment as a "bill of pains and penalty." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 474, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977). The proscription against bills of pain and penalty has been long incorporated into the

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[1] Petitioner will address Respondent's authority to combine the 1975 and 1979 sentences together in Petitioner's Supplemental Brief ordered by this Court on January 19, 1995.

prohibition against Bills of Attainder. E.g., Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866).

The legislative history of Florida Statutes section 944.278 also shows a motivational intent to punish by lengthening the actual term of incarceration. The preamble to The Safe Streets Initiative of 1994 states the law "is designed to emphasize incarceration in the state prison system" of certain persons. Ch. 93-406, § 1, Fla. Laws. The analysis of Senate Bill 26 targets inmates to serve between 75% to 70% of their sentence with changes to gain-time. Final Bill Analysis & Economic Impact Statement for SB 26-B at 17 (June 18, 1993) (located in Florida State Archives, Series 19, Carton 2389).

Respondent, of course, recasts the 1993 Legislature's motive as providing for public safety. (SB at 31). This proffered tactic around the Bill of Attainder was expressly rejected by the United States Supreme Court:

> It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent--and preventive. *One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.*

United States v. Brown, 381 U.S. 437, 458, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965) (italized emphasis added).

The public demands for longer terms of actual incarceration may not be satisfied retroactively. The Bill of Attainder clause anticipates and pre-empts such pressure: "[A] major concern that prompted the bill of attainder prohibition: the fear that the

legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge--or, worse still, lynch mob." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 480, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); see also, Peters v. Brown, 55 So. 2d 334, 335 (Fla. 1951) (en banc) (discussing history of Bill of Attainder).

The Florida separation of powers also mandates this result: "Were the power the judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." The Federalist No. 47, at 326 (Jacob E. Cooke ed., 1961) (James Madison quoting Montesquieu). See also, United States v. Brown, 381 U.S. 437, 442-446, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965) (proscription against Bill of Attainder protects separation of power).

Ex Post Facto Law.

Respondent disingenuously claims prison overcrowding credits have been superseded by building prisons. (SB at 31). Prison overcrowding credits remain very much a part of Florida's prison system through section 947.146, Florida Statutes (1993). Prison overcrowding credits only disappeared from Respondent's viewpoint when it lost this power to the Parole Commission through the Safe Streets Initiative of 1994. Compare § 944.278, Fla. Stat. (1993) (removing DOC authority to grant provisional credits) with § 947.146, Fla. Stat. (1993) (creating new law that overcrowding credits are awarded by Parole Commission through control release); see also, Final Bill Analysis & Economic Impact Statement for SB 26-

B at 18-21 (June 18, 1993) (discussing changes to early release mechanisms). Petitioner should not be penalized by the retroactive forfeiture of early release credits because the Florida Legislature changed the agency awarding early release credits for prison overcrowding.

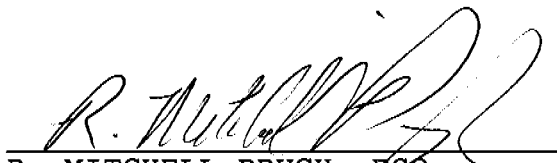
Respondent asserts the administrative and provisional credits were procedural laws and their retroactive cancellation therefore does not violate State and federal prohibitions against *ex post facto* laws. (SB at 6). Respondent's standpat position is similar to that urged by the State and accepted by this Court in Miller v. Florida regarding Florida's retroactive application of sentencing guidelines. The United States Supreme Court reversed that judgment in an unanimous opinion and held the change in law was substantive because the new law "simply inserts a larger number into the same equation." Miller v. Florida, 482 U.S. 423, 433, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987). Cancellation of Petitioner's earned administrative and provisional credits inserts the larger number of 2,118 days, roughly six (6) years, into the equation of how long Petitioner is incarcerated behind walls and razor wire. (Joint Appendix at 4). Like Florida's unconstitutional changes to basic gain-time in Weaver v. Graham, incentive gain-time in Raske v. Martinez and the sentencing guidelines in Miller v. Florida, section 944.278, Florida Statutes, has substantive impact on Petitioner's length of incarceration, and therefore, is a proscribed *ex post facto* law.

Respondent's reliance on the discretionary nature of granting credits is not legally significant under an *ex post facto* analysis. (SB at 27). The federal Ninth Circuit rejected a similar argument: "[I]t is sufficient for ex post facto purposes if a statute significantly reduces an inmate's early release opportunities, regardless if such opportunities are contingent on the exercise of official discretion." Flemming v. Oregon Bd. of Parole, 998 F.2d 721, 724 (9th Cir. 1993) (citing Weaver v. Graham).

Respondent entirely fails to address the conflict between the federal Tenth Circuit Court of Appeals decision in Arnold v. Cody and its position. The Arnold case is decisive precedent in this case. In 1984 the State of Oklahoma passed the Oklahoma Prison Overcrowding Emergency Powers Act providing emergency credits to inmates when prison population exceeded 95% of capacity. Okla. Stat. Ann. tit. 57, §§ 572-574 (West 1991). In 1989 the Oklahoma Legislature amended the law to excluding inmates who were denied parole from receiving credits. 1989 Okla. Sess. Law 306 § 4 (attached as Appendix A to this Brief). The Tenth Circuit held the law violated the *Ex Post Facto* prohibition: "The purpose of the emergency credits statute is to permit earlier release to alleviate prison overcrowding. An emergency situation due to overcrowding as described in the statute cannot justify postponing a prisoner's release, which is the result caused by the amended statute in this case." Arnold v. Cody, 951 F.2d 280, 283 (10th Cir. 1991).

This Court should follow the federal precedent in Arnold v. Cody, or alternatively, expressly recognize conflict with that decision.

Respectfully submitted,



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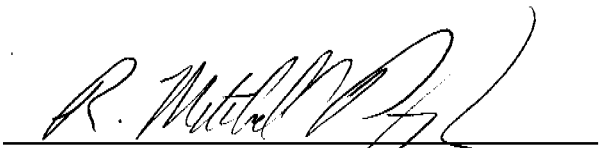
CERTIFICATE OF SERVICE

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 23rd day of January, 1995.



R. MITCHELL PRUGH, ESQ.

APPENDIX A

1. publishing said notice once each week for three (3) consecutive weeks in a newspaper in said county, ~~and notice shall likewise be given by~~; and

2. publishing said notice once each week for three (3) consecutive weeks in a newspaper at the last location where the absentee was last heard from; and

3. mailing copies of such notice to the last-known address of the absentee and to all known relatives of said absent person, and all other persons interested in the estate, known to the petitioner, ~~residents of this state,~~ at their last-known place of residence, and deposited in the post office with the postage thereon prepaid by the petitioner, at least twenty (20) days prior to the date of said hearing.

B. The notice must be issued by the court. Proof of publication and of mailing the notices must be made at the hearing.

SECTION 3. AMENDATORY 58 O.S. 1981, Section 946, is amended to read as follows:

Section 946. ~~Hearing~~ A. At the hearing, the court shall determine whether the absentee is a person who is presumed to be dead. The court may receive evidence and consider the affidavits and depositions of persons likely to have seen or heard from or know the location of the absentee.

B. If the court is not satisfied that a diligent search or inquiry has been made for the absentee, the court may order the petitioner to conduct a diligent search or inquiry and to report the results. The court may order the search or inquiry to be made in any manner that the court determines to be advisable.

C. The costs of a search ordered by the court pursuant to subsection B of this section shall be paid by the estate of the absentee.

D. If, upon said hearing, it appears to the court, upon the evidence offered and of witnesses sworn and examined, that said person for the estate of whom letters testamentary or of administration is asked, has been continuously absent and unaccounted for for a period of more than seven (7) years prior to the date of the filing of said petition, and if it shall further appear upon said hearing that the person for whom letters testamentary or of administration is being asked is qualified, as now provided by law, to act as such, said court shall make and enter a decree declaring such person to be legally dead, and have the full power and authority to issue letters testamentary or of administration to said person, or any other fit and proper person, and that thereafter all further proceedings upon the estate of said absent person shall be had as provided by law, and, with the same force and effect as if the death of said absent person had been definitely proven.

SECTION 4.[1] This act shall become effective November 1, 1989.

Approved May 25, 1989.

PRISONS AND REFORMATORIES—OVERCROWDING—EMERGENCY TIME CREDIT—ASSESSMENT PROCEDURES

CHAPTER 306

H.B.No. 1541

AN ACT RELATING TO PRISONS AND REFORMATORIES; AMENDING SECTION 8, CHAPTER 310, O.S.L. 1988 (57 O.S. SUPP. 1988, SECTION 365), WHICH RELATES TO THE PREPAROLE CONDITIONAL SUPERVISION

1. 58 O.S.Supp.1989, § 943 Note.

PROGRAM; AMENDING SECTIONS 5 AND 6, CHAPTER 97, O.S.L. 1984 (57 O.S. SUPP. 1988, SECTIONS 574 AND 575), WHICH RELATE TO THE OKLAHOMA PRISON OVERCROWDING EMERGENCY POWERS ACT; MODIFYING CERTAIN ELIGIBILITY REQUIREMENTS; CLARIFYING PROCEDURE FOR GRANTING EMERGENCY TIME CREDITS; LIMITING MAXIMUM DAYS OF CREDIT; PROHIBITING DECLARATION OF EMERGENCY PRIOR TO RESCISSION OF EXISTING EMERGENCY; PROVIDING PROCEDURE FOR CERTAIN ASSESSMENTS; DENYING CERTAIN INMATES EMERGENCY TIME CREDITS; REQUIRING CONCURRENCE OF A MAJORITY OF THE PARDON AND PAROLE BOARD BEFORE CERTAIN PERSONS SHALL BE ELIGIBLE FOR PAROLE CONSIDERATION; REQUIRING CERTAIN INFORMATION IN BOARD MEETING MINUTES; AUTHORIZING PAROLE CONSIDERATION OF CERTAIN INMATES; PROVIDING FOR CODIFICATION; PROVIDING AN OPERATIVE DATE; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY Section 8, Chapter 310, O.S.L. 1988 (57 O.S. Supp. 1988, Section 365), is amended to read as follows:

Section 365. A. Whenever the population of the prison system is certified by the State Board of Corrections as exceeding ninety-five percent (95%) of its capacity, as defined in Section 571 of Title 57 of the Oklahoma Statutes, the Department of Corrections and the Pardon and Parole Board shall implement a Preparole Conditional Supervision Program until such time as the population is reduced to ninety-two and one-half percent (92½%) of capacity, for persons in the custody of the Department of Corrections who meet the following guidelines:

1. Only inmates who are otherwise eligible for parole, pursuant to Sections 332.7 and 332.8 of Title 57 of the Oklahoma Statutes, shall be eligible to participate in this program; and

2. An inmate shall serve at least fifteen percent (15%) of his sentence of incarceration and be within one (1) year of his regularly scheduled parole consideration date or be within one (1) year of his projected release date, prior to being eligible for this program.

B. Upon an inmate becoming eligible for this program it shall be the duty of the Pardon and Parole Board, with or without application being made, to cause an examination to be made of the criminal record of the inmate and to make inquiry into the conduct and the record of said inmate during his confinement in the custody of the Department of Corrections.

C. Upon favorable recommendation by the Pardon and Parole Board, notification shall be made to the Department of Corrections that said inmate has been recommended to be placed in this program.

D. Prior to the placement of an inmate on Preparole Conditional Supervision, the Department shall provide written notification to the sheriff and district attorney of the county in which any person on Preparole Conditional Supervision is to be placed and to the chief law enforcement officer of any incorporated city or town in which said person is to be placed of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town.

E. Should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections.

F. Any inmate who escapes from this program shall be subject to the provisions of Section 443 of Title 21 of the Oklahoma Statutes.

SECTION 2. AMENDATORY Section 5, Chapter 97, O.S.L. 1984 (57 O.S. Supp. 1988, Section 574), is amended to read as follows:

Section 574. If the actions by the Governor to declare a state of emergency and the subsequent actions by the Director of the Department of Corrections to grant emergency time credit to the persons specified in Section 4 573 of this ~~act~~ title do not reduce the population of the prison system to ninety-five percent (95%) or less of the capacity within sixty (60) days of the date of the declaration of the emergency, at the end of the sixty-day period the Director shall grant an additional sixty (60) days of emergency time credit to all persons specified in Section 4 573 of this ~~act~~ title on that date, with such credit to be applied as designated in Section 4 573 of this ~~act~~ title. If at the end of the second sixty-day period, the population of the prison system still exceeds ninety-five percent (95%) of the capacity, the Director shall grant an additional sixty (60) days of emergency time credit to all persons specified in Section 573 of this title. Thereafter, while the state of emergency exists, at the end of each sixty (60) days that the population exceeds ninety-five percent (95%) of capacity, the Director shall grant an additional sixty (60) days of emergency time credits to all persons specified in Section 573 of this title; provided, no person eligible for emergency time credit shall receive more than three hundred sixty (360) days of emergency time credit during a year.

SECTION 3. AMENDATORY Section 6, Chapter 97, O.S.L. 1984 (57 O.S. Supp. 1988, Section 575), is amended to read as follows:

Section 575. If at any time during the state of emergency the population of the prison system is reduced to ninety-five percent (95%) or less of the capacity, the Department of Corrections shall certify that fact to the Governor and request the Governor to rescind the state of emergency.

If the Governor finds that within fifteen (15) calendar days of the Department's request that the emergency no longer exists, he shall declare the prison overcrowding state of emergency ended within that fifteen-day period.

If a state of emergency has been declared by the Governor, pursuant to Section 572 of this title, the Governor shall not declare another state of emergency until the existing state of emergency has been rescinded pursuant to this section. Thereafter, if the prison population exceeds ninety-five percent (95%) of capacity, a subsequent state of emergency shall be declared if the conditions required by Section 572 of this title exist.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 574.1 of Title 57, unless there is created a duplication in numbering, reads as follows:

The Pardon and Parole Board, with or without application being made, shall begin assessing the conduct and record of an inmate during confinement, who qualifies for emergency time credits, as follows:

1. If the inmate has been sentenced to a maximum term of confinement of five (5) years or more, within fifteen (15) months of his projected release date;

2. If the inmate has been sentenced to a maximum term of confinement of three (3) years or more, but less than five (5) years, within twelve (12) months of his projected release date; and

3. If the inmate has been sentenced to a maximum term of confinement of one (1) year or more, but less than three (3) years, within nine (9) months of his projected release date.

The Board shall determine whether or not the inmate shall qualify for either parole or the Preparole Conditional Supervision Program. The assessment and determination by the Board shall be completed within three (3) months. Any inmate who, upon consideration by the Board, is not recommended for either parole or the Preparole Conditional Supervision Program, or who refuses consideration for either parole or the Preparole Conditional Supervi-

sion Program, shall not be eligible for further emergency time credits provided for in the Oklahoma Prison Overcrowding Emergency Powers Act.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 332.17 of Title 57, unless there is created a duplication in numbering, reads as follows:

No person who is appearing out of the normal processing procedure shall be eligible for consideration for parole without the concurrence of at least three (3) members of the Pardon and Parole Board. The vote on whether or not to consider such person for parole and the names of the concurring Board members shall be set forth in the written minutes of the Board meeting at which the issue is considered.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 332.18 of Title 57, unless there is created a duplication in numbering, reads as follows:

The Director of the Department of Corrections shall have the authority to request of the Chief Administrative Officer of the Pardon and Parole Board that an inmate be placed on the Pardon and Parole Board docket for a medical reason, out of the normal processing procedures, if documentation of the medical condition is certified by the medical director of the Department of Corrections. The Pardon and Parole Board shall have the authority to bring any such inmate before the Board at any time.

SECTION 7.[1] Sections 2 and 3 of this act shall become operative July 1, 1989.

SECTION 8. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Approved May 25, 1989.

STATE GOVERNMENT—HOUSING FOR THE HOMELESS AND MENTALLY ILL PERSONS

CHAPTER 307

H.B.No. 1566

AN ACT RELATING TO STATE GOVERNMENT; DEFINING TERMS; AUTHORIZING CERTAIN STATE AGENCIES TO COOPERATE WITH THE FEDERAL GOVERNMENT IN PROVIDING HOUSING AND HOUSING ASSISTANCE TO CERTAIN PERSONS; AUTHORIZING CERTAIN RESOURCES TO BE MADE AVAILABLE; PROVIDING FOR THE ADMINISTRATION AND PURPOSE OF CERTAIN FUNDS; AUTHORIZING THE LEASING OF CERTAIN PROPERTY; AUTHORIZING THE SOLICITATION OF CERTAIN FUNDS AND GRANTS; REQUIRING CERTAIN REPORTS; PROVIDING FOR CODIFICATION; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

1. 57 O.S.Supp.1989, § 365 Note.