IN THE SUPREME COURT OF FLORIDA

ROBIN M. OROSZ,

Petitioner,

v. Case No. 83,487

HARRY K. SINGLETARY, JR., Secretary, Department of Corrections,

Respondent.
_____/

SUPPLEMENTAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

For the purpose of the supplemental briefing ordered by the Court, the department prepared another affidavit to assist the Court and counsel with the various issues of the case. The affidavit, which appears as a joint stipulated appendix, provides a breakdown of the individual sentence components for Case Nos. 75-182-CF and 78-223-CF and the respective endpoints as of June 16, 1993, the day before the cancellation of early release credits pursuant to Florida Statutes Section 944.278. The affidavit also provides a calculation of each sentence component after cancellation of early release credits. Finally, the affidavit contains a breakdown of the work gaintime and incentive gaintime dually recorded from January 1991 through May 1993. This affidavit will be referred to in the body of the supplemental brief by reference to "JA" (Joint Appendix) followed by the page number.

STATEMENT OF THE CASE AND FACTS

Respondent makes the following corrections to the Statement of the Case and Facts presented by Petitioner in the Initial Brief.

At paragraph 4 of the Statement (page 2 of the Initial Brief), Petitioner erroneously states that he earned 4,669 net days of basic and incentive gaintime pursuant to sections 944.27 and 944.29, Florida Statutes (1973). While the net figure is correct, the characterization that petitioner earned "incentive" gaintime under Florida Statutes Section 944.29 (1973) is incorrect. In actuality, petitioner has been eligible to earn and have applied three different types of monthly gaintime while in service of his 1975 sentence. Initially Orosz was eligible for "work" gaintime under Florida Statues Section 944.29 (1973) from receipt into custody in March 1975 until July 1, 1978, when a new gaintime statute came into effect. (JA at 2.) Under section 944.29, Orosz was eligible for up to a maximum of 6 days per month for labor performed. On July 1, 1978, Florida Statutes Section 944.275 became effective, and Orosz became eligible for day-for-day "work" gaintime to be applied to the 1975 sentence. (Id.) Thus, under the 1978 version of section 944.275, Orosz was eligible to earn up to a maximum potential of 31 days per month, depending upon the number of actual days in the month worked. In June 1983, Florida Statutes Section 944.275 was amended to provide for up to 20 days per month of "incentive" gaintime and Orosz is therefore limited to that level of gaintime for duration of the 1975 sentence. (Id.;

see also, Waldrup v. Dugger, 562 So.2d 687, 694-695 (Fla. 1990).)

At paragraph 5 of the Statement (page 2 of the Initial Brief), petitioner erroneously states that he earned 1200 days of basic gaintime between January 1991 and May 1993. Regardless of the statute which controls the level at which the gaintime is to be calculated, basic gaintime is applied as a lump-sum. It appears that petitioner may be confused by the fact that the basic gaintime is reflected in the calculation of the endpoints of the two consecutive sentences in two separate locations and that the 1200 days of basic gaintime appears in the calculation after the January 18, 1991 endpoint date for Case No. 75-182-CF. (JA at 4.) This is solely for the purpose of reflecting endpoint calculations. Petitioner's basic gaintime in the amount of 1200 days for Case No. 78-223-CF was banked to him in June 1979 when he initially received this consecutive sentence. Counsel also notes that petitioner erroneously states that he earned 533 days of " 'Waldrup' incentive gain-time" (IB at 2). "Waldrup" gaintime is "work" gaintime, not "incentive" gaintime.

At paragraph 6 of the Statement (page 2 of the Initial Brief), petitioner erroneously states that his provisional release date was calculated as June 16, 1993. The provisional release date for Case No. 75-182-CF, prior to cancellation of credits on June 17, 1993, was January 18, 1991. (JA at 4.) Petitioner correctly states this provisional release date in the argument at page 8 of the Initial Brief so it appears that this reference was oversight.

At paragraph 7 of the Statement (page 3 of the Initial Brief), petitioner erroneously states that "Respondent completely voided 1,200 days of basic gain-time".[1] Respondent did not void any basic gaintime. Basic gaintime on petitioner's sentences was unaffected by the cancellation of early release credits as it is calculated on the overall length of sentence. The overall terms of petitioner's sentences in Case Nos. 75-182-CF and 78-223-CF remain unchanged. The only action taken by Respondent upon enactment of Florida Statutes Section 944.278 was to cancel in place the early release credits previously allocated due to prison overcrowding and to substitute the proper level of monthly gaintime earned based upon sentence eligibility.

Finally, one important fact was omitted by petitioner that is relevant to the arguments insofar as 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992) is concerned. The department initially cancelled petitioner's provisional credits under the authority of the Attorney General's opinion on May 20, 1993, as petitioner's aggravated battery conviction involved a law enforcement officer.[2] However, since petitioner would have been in custody on June 17, 1993, when Florida Statutes Section 944.278

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[1] Undersigned counsel has discussed this misconception with petitioner's counsel, Mr. Prugh. It is clear from her discussion with Mr. Prugh that this misconception was based upon a lack of clear understanding of how the department applies basic gaintime and the manner in which the basic gaintime was reflected in the calculations provided in the affidavit appearing in the joint appendix. Counsel believes the issue of basic gaintime will be resolved in the reply brief submitted by Mr. Prugh.

[2] Like section 944.277(1)(i) that was the subject of the Attorney General's opinion, section 944.277(1)(h) was given retroactive effect under the same reasoning articulated in the Attorney General's opinion. See Answer to Question Three in 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992).

became effective, the provisional credits would have been cancelled pursuant to that section.[3] Thus, any argument with regard to the validity or application of the Attorney General's opinion is rendered moot.

[3] As noted in the affidavit attached as Exhibit A (at page 4) to the original Response to Order to Show Cause, if provisional credits had not been cancelled under the authority of the Attorney General's opinion, petitioner's release date as of June 16, 1993, would have been June 14, 1996.

SUMMARY OF ARGUMENT

Petitioner Orosz is an inmate in the department's custody serving an overall term of 45 years. Petitioner's overall term is comprised of a 1975 sentence of 35 years followed by a consecutive 1979 sentence of 10 years. During the course of his incarceration, petitioner was allocated early release credits due to prison overcrowding. In applying the early release credits to forecast an ultimate provisional release date, the department necessarily advanced the endpoint of petitioner's 35-year sentence. Upon reaching the endpoint of the 35-year sentence, the department allowed the 1979 sentence to theoretically commence in order to continue to forecase a provisional release date if necessary to release petitioner due to prison overcrowding.

Because petitioner is eligible for different rates of monthly gaintime depending upon whether he is in service of the 1975 sentence or the 1979 sentence, the department evaluates and records gaintime under both systems, in the event that a sentence reduction or modification occurs and petitioner's eligibility for gaintime is altered. Although dual records of gaintime are maintained, only one rate of gaintime can be applied.

When petitioner's endpoint advanced on the 1975 sentence to the beginning point of the 1979 sentence, due to allocation of early release credits, the department allowed the enhanced gaintime rates related to the 1979 to apply in lieu of the lower gaintime rates related to the 1975 sentence. However, when the department cancelled all early release credits due to legislative mandate,

petitioner's 1975 and 1979 sentences were reinstated to the status quo ante, as if no early release credits had heen allocated, and the 1975 rates of gaintime were substituted for the 1979 rates of gaintime for that portion of the 1975 sentence remaining to be served due to cancellation of credits. The restructuring of petitioner's sentences into their original posture and the substitution of gaintime awards related to each sentence protects the integrity of each sentence even though cumulated into an overall term.

Only that gaintime which petitioner is eligible to earn based upon date of offense and length of sentence may be applied and vest to a sentence to cause its expiration. Gaintime cannot be considered fully vested and the functional equivalent of time served until a prisoner is released from custody in satisfaction of the sentence. Allocation of early release credits, which are not directly tied to a prisoner's sentence and which afford him no protected benefits, cannot operate to satisfy a sentence until and unless the prisoner is released from custody. Therefore, reinstatement of petitioner's sentences to the status quo ante and substitution of the appropriate monthly gaintime awards does not violate the due process, double jeopardy, or ex post facto clauses of the Florida or United States Constitutions.

Finally, this Court has on many occasions addressed the nature of Florida's early release statutes and has concluded that these statutes are procedural mechanisms unrelated to a prisoner's sentence and punishment. As such, these statutes are not subject

to ex post facto prohibitions. More recently, this Court has addressed the issue of retroactive cancellation of the early release credits in Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994) and again concluded that such cancellation does not violate the ex post facto or due process clauses of the United States and Florida constitutions.

For these reasons, the petition must be denied.

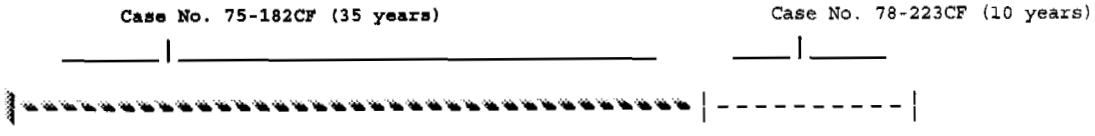
ARGUMENT

I. ONLY THAT GAINTIME WHICH PETITIONER IS ELIGIBLE TO EARN BASED UPON DATE OF OFFENSE AND LENGTH OF SENTENCE MAY BE APPLIED AND VEST TO A SENTENCE TO CAUSE ITS EXPIRATION. BECAUSE PETITIONER WAS NOT RELEASED FROM CUSTODY UPON ALLOCATION OF EARLY RELEASE CREDITS DUE TO PRISON OVERCROWDING, THEIR CANCELLATION REQUIRES PETITIONER TO SERVE HIS SENTENCES AS IMPOSED. THEREFORE, SUBSTITUTION OF THE GAINTIME EARNED BY PETITIONER RELATED TO THE 1975 SENTENCE WAS APPROPRIATE UPON CANCELLATION OF EARLY RELEASE CREDITS PREVIOUSLY ALLOCATED TO SUCH SENTENCE AND SUCH REINSTATEMENT DOES NOT VIOLATE THE DUE PROCESS, DOUBLE JEOPARDY, OR EX POST FACTO CLAUSES OF THE UNITED STATES CONSTITUTION. (PETITIONER'S ISSUES I, II AND III.)

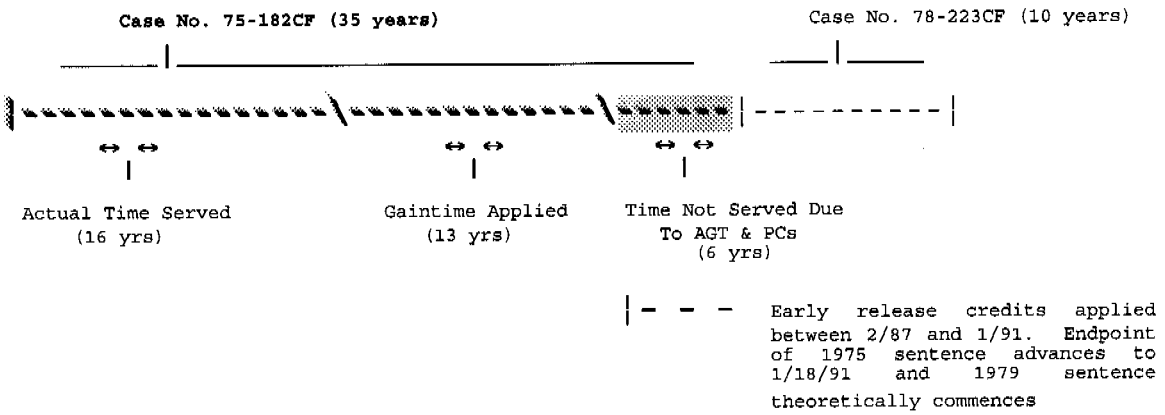
Petitioner offers a host of arguments to defeat the department's reinstatement of his sentence and substitution of incentive gaintime for work gaintime during the time attributable to the cancelled early release credits: 1) the department lacks statutory authority under section 944.278 to void work gaintime already earned (Argument I), 2) petitioner must receive credit for work gaintime earned under the principles of State v. Green, 547 So. 2d 925 (Fla. 1989)(Argument I), 3) voiding petitioner's work gaintime alters petitioner's length of sentence in violation of the double jeopardy clause (Argument I), 4) reinstatement of petitioner's 1975 sentence and substitution of incentive gaintime interrupts the consecutive 1979 sentence and requires petitioner to serve his sentence in bits and pieces (Argument II), 5) the provisional credits applied to the 1975 sentence cannot be cancelled based upon an ineligibility determined by the 1979 sentence (Argument II), 6) the department lacks authority to

combine the 1975 and 1979 sentences into one overall term (Argument II), 7) the department's reinstatement of the 1975 sentence violates due process (Argument III), 8) petitioner has a protected liberty interest in retaining previously allocated early release credits (Argument III). The department will address each of these arguments in due course; however, to assist the Court in considering each of these arguments, the department sets forth below its reasoning and the effect of the positions of the parties on petitioner's sentence structure.

As noted in the initial response to the petition, it is the department's position that the instant case presents no issues of forfeiture of previously awarded gaintime but rather an issue of eligibility for previously applied gaintime based upon changes that affect the length of an individual sentence component in an overall term comprised of consecutive sentences. Petitioner's overall 45-year term may be visualized as follows:



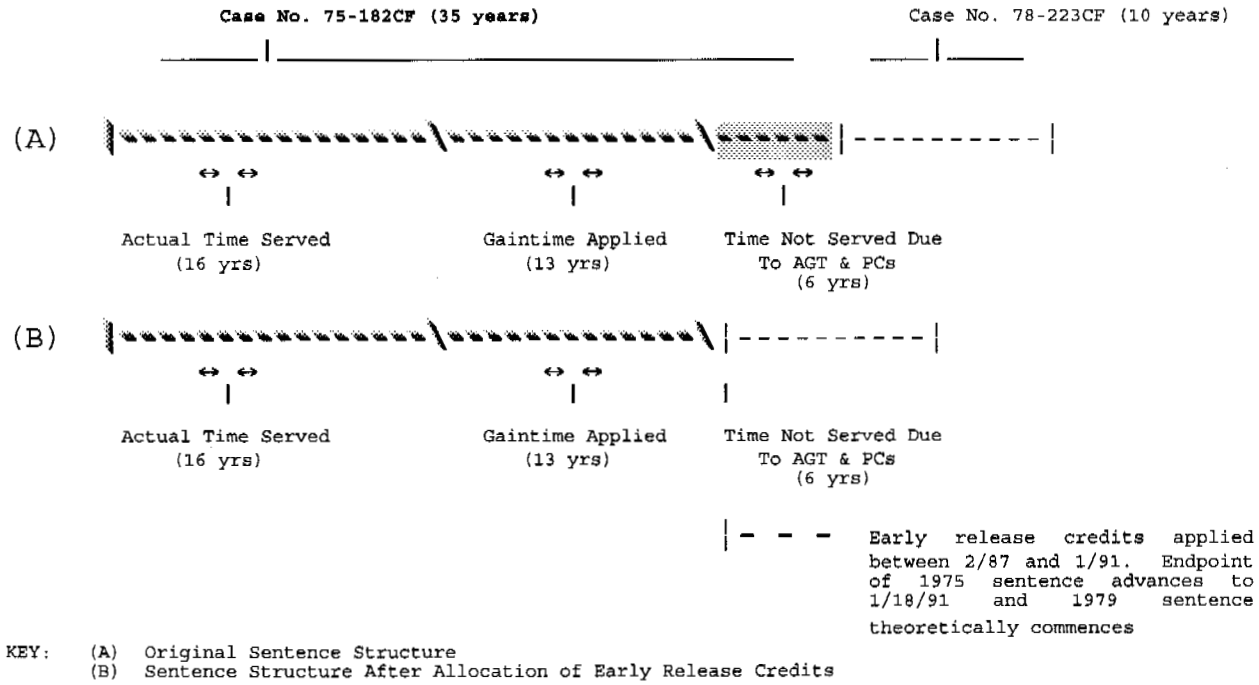
During the time that sections 944.276 (administrative gaintime) and 944.277 (provisional credits) were in effect and allocated to petitioner's sentence for the purpose of calculating a potential early release date, petitioner's overall term appeared as follows:



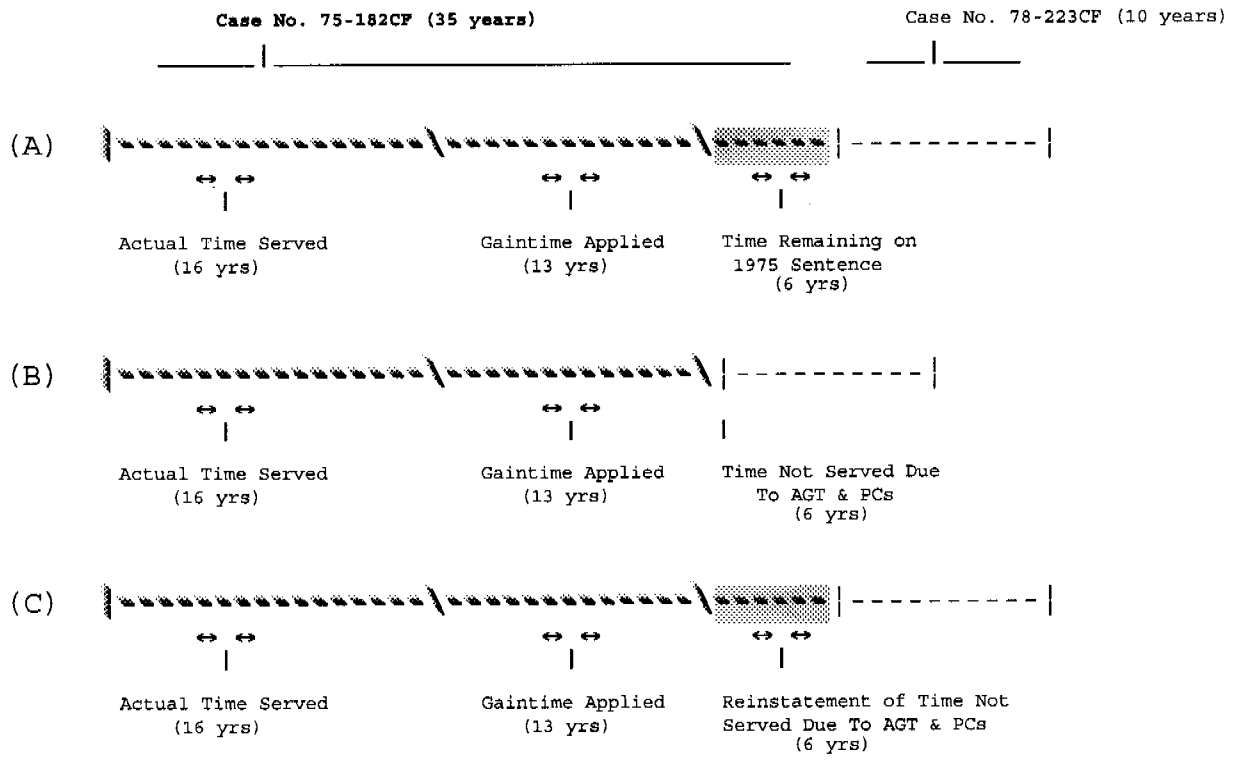
As a result of varying eligibilities for gaintime and since an inmate must be in service of the sentence to be eligible for the particular type of gaintime authorized by the various statutes applicable to an inmate's sentences, the department's automated data base is programmed to calculate endpoints for each segment of a consecutive sentence. Additionally, because the endpoints of consecutive sentences are subject to change due to forfeitures of gaintime, sentence reductions and/or modifications, the department has maintained dual records of work, extra and incentive gaintime awards for inmates whose sentences are subject to various gaintime eligibilities so that adjustments may be made if the endpoints of the various consecutive sentences change due to sentence modifications requiring restructuring of sentence.

The department has been maintaining dual records for petitioner since 1990 when the decisions in Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989) and Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990) made it clear that two systems of monthly gaintime would be in place. Although an inmate may be evaluated and rated under both systems of gaintime, only one gaintime rate may be applied, depending upon which sentence is considered in service at the time.

In petitioner's case, the work gaintime rather than incentive gaintime began applying when petitioner theoretically advanced into the 1979 sentence upon allocation of early release credits to reach a newly projected tentative release date. (See Gain-Time Chart at page 5 of the Joint Appendix.) In essence, the allocation of early release credits while in service of the 1975 sentence caused approximately 6 years to "drop out" of petitioner's 35-year term:

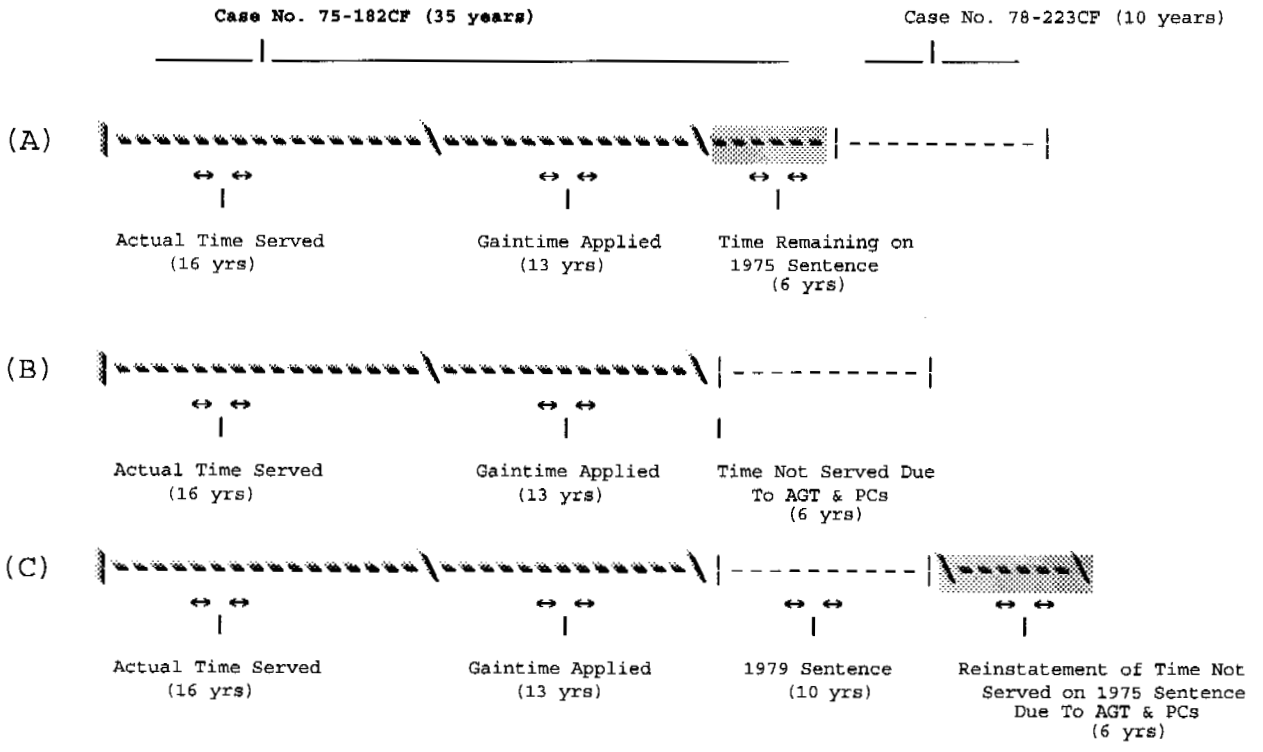


When the department was required to cancel the early release credits, whether under 1992 or 1993 legislative changes, the only choices available were (1) to reinstate the unserved portion of the 1975 sentence and once again extend the endpoint of the sentence -- in other words, a return to the status quo ante -- or (2) to place the unserved 6 years of the 1975 sentence at the end of the overall term. Logic dictated that the department reinstate the 1975 sentence -- that is, return to the status quo ante -- and to then apply the gaintime awards that petitioner had earned at the appropriate rates related to the unserved portion of the 1975 sentence. To do otherwise, as petitioner suggests, would, contrary to petitioner's assertions, actually cause petitioner to serve his sentence in bits and pieces. The department's treatment of petitioner's sentences after cancellation appears as follows:



KEY: (A) Original Sentence Structure
(B) Sentence Structure After Allocation of Early Release Credits
(C) Sentence Structure After Cancellation of Early Release Credits

Petitioner's position is that the 1975 sentence has been satisfied, notwithstanding the cancellation of the early release credits, and that he is entitled to remain in service of the 1979 sentence, to retain the gaintime awards that were earned as to that sentence between January 1991 and the date of cancellation of credits, and to then continue in service of the 1979 sentence. Petitioner does not address what is to happen to the 6-year period attributable to the cancellation of the early release credits that constitutes 6 years not served on the 1975 sentence. Petitioner must serve that time at some point. Under Petitioner's theory, that time would necessarily be appended to the end of sentence and would be structured as follows:



KEY: (A) Original Sentence Structure
(B) Sentence Structure After Allocation of Early Release Credits
(C) Sentence Structure After Cancellation of Early Release Credits

Under petitioner's theory, petitioner would receive the windfall benefit of receiving the higher level of gaintime rates dictated by the 1979 sentence eligibility for an additional 6 years[4] or, if petitioner concedes he is not entitled to earn on the last 6 years at a level greater than the 1975 sentence eligibility, then petitioner would indeed be serving the 1975 sentence in bits and pieces. Neither makes sense. However, of the two possible scenarios, the department submits that the latter circumstance would be the only one that could occur, since petitioner is not entitled to earn more gaintime during service of his overall term than the statutes in effect at the time of his offense, unless the legislature has explicitly provided for higher rates. Waldrup, 562 So. 2d at 694-695. In cancelling the early release credits, the legislature did not speak to this issue. Its silence clearly indicates the intent that petitioner not be eligible for that 6-year period to more gaintime than the sentence to which it is tied.

As noted in the department's initial response, the

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[4] Obviously petitioner would not be before this Court if his situation was reversed -- that is, if he were serving a "Waldrup" eligible sentence (potential 31 days monthly) followed by a 1983 Reform Act sentence (potential 20 days monthly). In such a case, petitioner's higher rates of work gaintime would have been substituted upon cancellation of early release credits for the lower rates of incentive gaintime that could be earned on the "reform act" sentence. Indeed, if such were petitioner's situation, he would be heartily objecting to the present position he espouses in that would cause him to earn the lower rates of gaintime related to the "reform act" sentence for a total of 16 years rather than 10 years. In cancelling the early release credits, the department reinstated each prisoner's sentence to the status quo ante without regard to the result. Thus, in some cases, such as petitioner's, incentive gaintime awards were substituted for work gaintime awards and, in other cases, work gaintime awards were substituted for incentive gaintime awards.

instant case presents no issues of forfeiture of previously awarded gaintime but rather an issue of eligibility for previously applied gaintime based upon changes that affect the length of an individual sentence component in an overall term comprised of consecutive sentences. Consecutive sentences are chained together in an overall term and the endpoints of these consecutive sentences are naturally subject to change. Vesting of gaintime can only occur if the prisoner was eligible for the gaintime in the first place. A variety of situations can make vesting uncertain in terms of amount but not in terms of eligibility. For example, had petitioner's 35-year term been reduced by court order to a 30-year term after commencement of the sentence in Case No. 78-223CF, the department would have adjusted petitioner's gaintime awards by reducing basic gaintime to that amount accruable to a 30-year term rather than a 35-year term and would have substituted work and extra gaintime under the Waldrup decision at an earlier point in time even though those awards were not actually applied while petitioner was in service of that portion of his sentence. Indeed petitioner would have it no other way if this were the case. Likewise, if petitioner had been resentenced to a term of 40 years in Case No. 75-182CF after Orosz had passed the endpoint calculated on the 35-year term, the department would recalculate the endpoint for Case No. 75-182CF and again apply the gaintime awards to the extended sentence based upon the endpoint calculated on the 40-year term.

Another example of an alteration of gaintime balances based upon eligibilities would be in an instance where an inmate is

received with an overall term of 10 years for robbery with a firearm; however, due to clerical error, the sentencing papers do not reflect imposition of the firearm mandatory provision under Florida Statutes Section 775.087(2). If the department later receives amended judgment and sentence papers that correct this deficiency, the inmate would not be eligible to have applied any basic and/or incentive gaintime due to the prohibitions of the firearm mandatory provision. Therefore, any gaintime that would have been applied to that sentence would be voided until satisfaction of the mandatory term. Because the inmate was not eligible for the gaintime in the first place due to the imposition of the firearm mandatory, the gaintime that had been applied is not considered to have vested and the retroactive voiding of the gaintime does not offend the proscriptions of the ex post facto clause.

This case is no different from the examples given above. The allocation of early release credits necessarily makes eligibility for gaintime uncertain. Ultimately, the gaintime awards cannot fully vest until the prisoner is released from incarceration and gaintime becomes the "functional equivalent of time served". See State v. Green, 547 So. 2d 925 (Fla. 1989). Thus, when the department cancelled all early release credits, it was appropriate to reinstate the sentences to their status quo ante and apply gaintime in relation to the statutory eligibilities.

With this background in mind, Respondent addresses each of petitioner's various arguments in turn.

1) THE DEPARTMENT LACKS STATUTORY AUTHORITY UNDER SECTION 944.278 TO VOID WORK GAINTIME ALREADY EARNED (ARGUMENT I)

As noted above, the department did not void or forfeit gaintime already earned. The department substituted that gaintime which correlated with the time not served on the 1975 case due to allocation of early release credits. Gaintime eligibilities are determined by the statutes in effect at the time an offender commits his offense. See Weaver v. Graham, 450 U.S. 24 (1981); Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989); Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990). Moreover, the department did not void petitioner's 1979 sentence. The department merely returned petitioner to the status quo ante as if early release credits had never been in existence. The actions of the department in this regard are no different than if petitioner had received either a reduction in the 1975 sentence or an increase in the 1975 sentence after meeting the endpoint of that sentence. A new structuring occurs and gaintime is applied accordingly. The department needs no further statutory authority than in existence in order to make these adjustments in sentence structure.

2) PETITIONER MUST RECEIVE CREDIT FOR WORK GAINTIME EARNED UNDER THE PRINCIPLES OF STATE V. GREEN, 547 SO. 2D 925 (FLA. 1989) (ARGUMENT I)

Petitioner contends that he is entitled to retain the higher awards of work gaintime after cancellation of early release credits because gaintime is the "functional equivalent of time spent in prison". Petitioner cites State v. Green, 547 So. 2d 925 (Fla. 1989) for this proposition. The department disagrees.

Gaintime becomes the functional equivalent of time served in prison only upon achieving release which results in satisfaction of that sentence. See Heuring v. State, 559 So. 2d 207 (Fla. 1990) (once a prisoner is released from the remaining period of incarceration due to gain-time, that remaining period of the sentence is extinguished). Since petitioner was not released from his overall sentences or for that matter, from either of his sentences, the gaintime did not convert to the functional equivalent of time served and could be adjusted based upon changes in petitioner's sentences.

3) VOIDING PETITIONER'S WORK GAINTIME ALTERS PETITIONER'S LENGTH OF SENTENCE IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE (ARGUMENT I)

The thrust of petitioner's double jeopardy argument is not totally clear to respondent. Petitioner asserts that 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 ssentence imposed . . . [and that] [d]ouble jeopardy protects a defendant's legitimate expectation that a sentence will not be increased after service on the sentence begins". (IB at 13.) Presumably it is petitioner's position that his 1975 sentence was final and only his 1979 sentence remains. Therefore he can only receive awards of work gaintime related to the 1979 sentence after cancellation of credits or there is no finality to the 1975 sentence. Indeed, the department submits that there was no finality to the 1975 sentence. The early release credits allocated during service of the 1975

sentence did not extinguish the 1975 sentence. They merely allowed the theoretical endpoint of that sentence to advance and for the 1979 sentence to commence with the possibility that petitioner may one day achieve early release due to prison overcrowding. The allocation of early release credits created a "fiction" so that the department could in some fashion calculate a potential early release date due for the purpose of controlling prison overcrowding. It did not allow petitioner to satisfy the 1975 sentence and cancellation of the early release credits merely returned petitioner to his original status.

4) REINSTATEMENT OF PETITIONER'S 1975 SENTENCE AND SUBSTITUTION OF INCENTIVE GAINTIME INTERRUPTS THE CONSECUTIVE 1979 SENTENCE AND REQUIRES PETITIONER TO SERVE HIS SENTENCE IN BITS AND PIECES (ARGUMENT II)

As demonstrated by the diagrams presented above, it is clear that the petitioner's position results in service of the 1975 sentence in bits and pieces. The department did not sandwich the petitioner's 1975 sentence in the middle of his 1979 sentence. It returned petitioner's sentence structure to the status quo ante, without consideration of the early release credits previously allocated. Petitioner relies on a series of cases that hold that a prisoner is entitled to serve his sentences *seriatim* not in bits and pieces. However, these cases are inapposite. For example, in Segal v. Wainwright, 304 So. 2d 446 (Fla 1974), the petitioner was serving a 1968 sentence for robbery from which he was paroled. The petitioner committed a new offense in 1971 and his parole was revoked. Petitioner served a 1-year term for the 1971 offense in

county custody and then was returned to the department. After return to custody, the petitioner was again paroled and again committed a new offense. However, prior to revocation of the parole on the 1968 sentence, petitioner was convicted and sentenced on the new offense committed in 1972. He was returned to custody and the department structured the overall term so that the 9-year 1972 sentence began to run. Subsequently his parole was revoked, and the department structured the overall term to allow the remainder of the 1968 sentence to be served after completion of the 1972 sentence. Literally, the 1971 and 1972 sentences were sandwiched into the center of the 1968 sentence. This Court concluded that such a sentence structure was impermissible. This is not the case here. The department reinstated the 1975 sentence in its entirety and restructured the 1979 sentence to follow.

In Massey v. State, 389 So. 2d 712 (Fla. 2d DCA 1980), the defendant challenged a 90-day sentence that the trial court imposed to be served only on the weekends. The court found this 9-day sentence, interrupted by periods of non-incarceration to be impermissible. Again, this factual situation does not apply to petitioner.

Finally, in Rozmestor v. State, 381 So.2 d 324 (Fla. 5th DCA 1980), the trial court imposed a 4-year sentence for attempted burglary and then directed that 2 of the 4 years be served concurrently with a previously existing 1978 sentence and that the last 2 of the 4 years be detached and served consecutively with the 1978 sentence. The appellate court concluded this was an illegal

sentence as there was no statutory authority to structure the sentence in this fashion. Again, the fact pattern does not describe what the department has done in reinstating the 1975 sentence in its entirety. Indeed, it more closely describes what petitioner contends is appropriate -- that is, for the 1979 sentence to continue to run from January 1991 and, presumably, the unserved 6-year portion of the 1975 sentence be appended to the end of his overall term. The 6-year portion of petitioner's 1975 sentence was not forgiven -- it must be served at some point. The department's structuring of the sentence best protects the integrity of both the 1975 sentence and the 1979 sentence.

5) THE PROVISIONAL CREDITS APPLIED TO THE 1975 SENTENCE CANNOT BE CANCELLED BASED UPON AN INELIGIBILITY DETERMINED BY THE 1979 SENTENCE (ARGUMENT II)

Petitioner claims that the provisional credits allocated to the 1975 sentence cannot be cancelled under the authority of the Attorney General's opinion because of the alleged ineligibility of the later 1979 sentence. Petitioner cites to Dugger v. Anderson, 593 So. 2d 1134 (Fla. 1st DCA 1992) and Dominguez v. State, 606 So. 2d 757 (Fla. 1st DCA 1992). However, each of these cases construes different statutory provisions and changes than the 1992 amendments mandating the retroactive cancellation of credits that is described in the Attorney General's opinion. See 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992), n. 17. Moreover, as noted in the statement of facts, petitioner would have been in custody on the date section 944.278 became effective if his credits had not been previously cancelled under the authority of the Attorney General's

opinion. Thus, any argument with regard to the validity or applicability of the Attorney General's opinion has been rendered moot. Section 944.278 specifically mandates all awards of administrative gaintime and provisional credits are to be cancelled regardless of eligibility requirement changes or date of allocation.

6) THE DEPARTMENT LACKS AUTHORITY TO COMBINE THE 1975 AND 1979 SENTENCES INTO ONE OVERALL TERM (ARGUMENT II)

Petitioner asserts that the department lacks statutory authority to combine the 1975 and 1979 sentences into one overall term because the provisions of sections 944.275(2)(a), (b) that establish maximum and tentative release dates for consecutive sentences was not in effect when petitioner committed his 1975 crime. The existence of the statutory provisions of section 944.275 in 1975 is irrelevant as the department had the authority to merge consecutive sentences under the statutory scheme in effect at that time. While petitioner seeks to distinguish the case, the decision in Joiner v. Sinclair, 110 So. 2d 12 (Fla. 1959), nevertheless provides the basis for such cumulation of consecutive sentences. In Joiner, this Court noted that a prisoner under two or more cumulative sentences was to be allowed commutation as if they were all one sentence. The reason was that gaintime was prescribed in a progressive formula that increased to a total of 15 days of gaintime per month for the fifth and all succeeding years. Thus, in order to get the benefit of the 15 days per month on the longer terms of incarceration, the sentences were treated an one

overall term for the purpose of award of gaintime. The Joiner court further reasoned that if the legislature gave prisoners the benefit of earning credits by treating consecutive sentences as one overall term, then the consequences of forfeiture of gaintime should also apply to consecutive sentences as one overall term. Like the 1957 statutes, petitioner is subject to earning progressive rates of gaintime. Thus, the same principle applies. Sections 944.275(2)(a), (b) are merely codifications of what has been a long-standing and consistent treatment in the structuring of sentences.

7) THE DEPARTMENT'S REINSTATEMENT OF THE 1975 SENTENCE VIOLATES DUE PROCESS (ARGUMENT III)

Petitioner's consecutive sentences are structured in one overall term. No one term is considered satisfied until all sentences are satisfied and petitioner is released from custody. Petitioner is subject to forfeiture of gaintime related to the 1975 sentence even though he may be in service of the 1979 sentence. Likewise, petitioner's sentence structure may change and the endpoints of the individual sentence components may be altered by sentence reductions or modifications, or as in this case, a cancellation of credits. Thus, reinstatement of the 1975 sentence does not violate due process. Moreover, while petitioner possesses a protected liberty interest in retaining gaintime awarded him and therefore is entitled to some due process hearing when gaintime is forfeited, petitioner's gaintime was not forfeited here. He has merely been rendered ineligible for the heightened awards of

gaintime because cancellation of the early release credits required him to serve out the remaining 6 years of his 1975 sentence. No due process hearing is therefore required.

8) PETITIONER HAS A PROTECTED LIBERTY INTEREST IN RETAINING PREVIOUSLY ALLOCATED EARLY RELEASE CREDITS (ARGUMENT III)

In Griffin, this Court previously addressed the issue of whether Florida's early release statutes create a protected liberty interest in retaining early release credits. The Court concluded that no such interest was created. No further argument on this issue is warranted.

II. FLORIDA'S EARLY RELEASE STATUTES, ARE PROCEDURAL MECHANISMS ENACTED SOLELY TO CONTROL PRISON OVERCROWDING AND THEREFORE CREATE NO SUBSTANTIVE RIGHTS CONNECTED WITH A PRISONER'S SENTENCE NOR DO THE STATUTES INFLICT ADDITIONAL PUNISHMENT. THUS RETROACTIVE CANCELLATION OF CREDITS PREVIOUSLY ALLOCATED DOES NOT OFFEND THE EX POST FACTO CLAUSE NOR DOES THE STATUTORY CANCELLATION CONSTITUTE A BILL OF ATTAINDER. (PETITIONER'S ISSUE IV.)

In the original petition, Orosz did not raise the question of whether the cancellation of the early release credits (administrative gaintime and provisional credits) also constituted an ex post facto violation or a bill of attainder. For this reason, no argument was contained in the initial response. However, no extensive argument is really necessary. This Court has spoken on several occasions as to the nature of Florida's overcrowding statutes and has repeatedly and consistently held that these statutes do not fall within the prohibitions of the ex post facto clause nor do they provide any entitlement related to a prisoner's punishment or otherwise. See Langley v. Singletary, 19 Fla. L. Weekly S647 (Fla., December 8, 1994); Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994); Tripp v. State, 622 So. 2d 941 (Fla. 1993); Dugger v. Grant, 610 So. 2d 428 (Fla. 1992); Felk v. Singletary, 589 So. 2d 905 (Fla. 1991), cert. denied, ___U.S.___, 112 S.Ct. 1961, 118 L.Ed.2d 563 (1992); Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991), cert. denied, ___U.S.___, 112 S.Ct. 886, 116 L.Ed.2d 790 (1992); Blankenship v. Dugger, 521 So. 2d 1097 (Fla. 1988).

Essentially, petitioner urges this Court to recede from

this long line of decisions. The argument petitioner advances is that early release credits are as predictable as incentive gaintime and, further, that early release credits are based upon a prisoner's good performance as credits were not awarded unless the prisoner was earning incentive gaintime in the first place. Petitioner further argues that even if the very recent decision of this Court in Griffin is correctly decided, it is inapplicable to petitioner because Griffin did not address the "*ex post facto* issue of revocation under § 944.278 (1993) of earned administrative and provisional credits to a completed sentence". (Emphasis added.)

These two points can be disposed of readily. First, it is ludicrous to argue that early release credits allocated due to prison overcrowding are equally predictable with the potential incentive/work gaintime that could be earned by a prisoner toward completion of his sentence. The gaintime statutes establish a maximum potential gaintime award available to earn on a monthly basis. And, while it is true that other factors may preclude an inmate from earning the maximum amount of gaintime available, such as transfers, lack of job assignment, incapacity, etc., the prisoner nevertheless can predict with some certainty the minimum time he could serve assuming he received (and did not forfeit) the maximum amount of gaintime available to be earned. On the other hand, early release credits are neither based upon a prisoner's good performance or behavior nor meted out in a specific quantity per month. Clearly, a prisoner could not command the allocation of early release credits as a result of his or her good behavior while

in prison.[5] Rather, the allocation of early release credits, the number of such allotments and the level of the allotments[6], were driven solely by the fact of overcrowding, a status that was effected by many outside variables peculiar to the criminal justice system, to economics, and to legislative trends.

Petitioner further claims that in Griffin, this Court did not make a ruling on the cancellation of early release credits in factual circumstances that are particularized to petitioner's case. This is not so. Like Griffin, petitioner's provisional credits initially were cancelled under the authority of 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992), although the operative statutory

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[5] The criteria for allocation of early release credits for prison overcrowding were predicated on one thing and one thing only -- safety to the public. In allocating provisional credits, the Florida Legislature mandated that the department look at two things to assess risk to public safety: first, the nature of present or prior crimes, and, second, whether the otherwise eligible prisoner had demonstrated recent behavior that would indicate a poor risk for early release into the community. Apparently petitioner believes that he was actually "earning" overcrowding credits simply because one of the criteria for an immediate grant of credits was that a prisoner be earning incentive gaintime. This belief is ill-founded. The requirement that a prisoner be earning incentive gaintime was merely an indicia of present behavior calculated to assess the risk to the safety of the general public if the grant of credits would result in the immediate release of the prisoner into the community. It was no more.

[6] Both the administrative gaintime statute and the provisional credits statute provided that once the overcrowding thresholds were reached and the decision was made to act, the awards of early release credits could not exceed 60 days. However, there was no predictability as to how many times a month or how many days per award would be allocated since these decisions were driven solely by the overcrowding threshold and the number of prisoners to be released to effectively address that level of overcrowding.

provision was the retroactive effect of section 944.277(1)(h)[7] rather than section 944.277(1)(i).[8] And like Griffin, petitioner's administrative gaintime was cancelled under the authority of section 944.278. The only difference between the positions of Griffin and petitioner is the fact that, unlike Griffin who would have been released but for the issuance of AGO 92-96, petitioner would have still been in custody as of June 17, 1993, had petitioner's credits not already been cancelled as a result of the Attorney General's opinion and his credits would therefore have been cancelled under section 944.278. However, this is a difference without a distinction. A retroactive cancellation, whether under the Attorney General's opinion construing the 1992 amendments to section 944.277 or under section 944.278, is nevertheless a retroactive cancellation. This Court clearly considered the ex post facto question in Griffin and held that "the ex post facto clauses of both the federal and state Constitutions do not prohibit the legislature from passing, nor DOC from enforcing, legislation that limits or eliminates the availability of this particular species of credit or gain time, whatever name it is given." Griffin, 638 So. 2d at 501. In reaching this conclusion, the Court emphasized its prior characterization of the early release statutes from its decision in Rodrick:

> [P]rovisional credits are not a reasonably

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[7] Section 944.277(1)(h) addressed crimes against various law enforcement and judicial officers while section 944.277(1)(i) addressed the crimes of murder and attempted murder.

[8] See footnote 4.

> quantifiable expectation at the time an inmate is sentenced. Rather, provisional credits are an inherently arbitrary and unpredictable possibility that is awarded based solely on the happenstance of prison overcrowding. Thus, provisional credits in no sense are tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea bargain. As a result, we held that provisional credits are not subject to the prohibition against ex post facto laws.

Id., citing to Dugger v. Rodrick, 584 So. 2d 2, 4 (Fla. 1991).

Finally, petitioner asserts his position is different from the previous cases because the administrative gaintime and provisional credits were used to expire his 1975 sentence. On the contrary, petitioner did not expire his 1975 sentence. The allocation of early release credits only theoretically advanced the endpoint of the 1975 sentence and allowed petitioner to commence the 1979 sentence for the purpose of calculating a potential early release date. As noted in the argument in Issue I, consecutive sentences are not considered expired until all consecutive sentences have expired or until the prisoner has served that sentence day-for-day exclusive of gaintime awards. See § 944.275(2)(a), (b), Fla. Stat. (1993); Kimmons v. Wainwright, 338 So.2d 239 (Fla. 1st DCA 1976); Nelson v. Wainwright, 374 So.2d 1172 (Fla. 1st DCA 1979); see also Joiner v. Sinclair, 110 So.2d 12 (Fla. 1959). If a prisoner is not considered to have expired an earlier-in-time consecutive sentence because such sentence remains subject to the forfeiture of gaintime earned during the time the prisoner was in service of that sentence, then it is even more illogical to argue that an earlier-in-time consecutive sentence is

considered expired as a result of allocation of overcrowding credits that did not result in release.

The numerous decisions of this Court have addressed petitioner's ex post facto argument. Griffin controls the facts of this case. The petition must be denied on this issue.

Petitioner also claims that the retroactive legislation of 1992 and 1993 amount to bills of attainder prohibited by the United States and Florida Constitutions. Petitioner sets forth the test for determining whether a legislative act is a bill of attainder and then misapplies it.

As noted by petitioner, a legislative act is a bill of attainder if it (1) inflicts punishment, (2) against identifiable individuals, (3) without judicial trial. See Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 846 (1984). Petitioner summarily concludes that this three-prong test is met simply because a class of Florida prisoners were deprived of the hope of early release due to overcrowding. Concededly, a class of prisoners can be identified who were affected by the retroactive legislation. However, they were not targeted by the legislature for an evil purpose as petitioner would have the Court believe. And indeed, there were no judicial trials nor due process hearings prior to cancellation of the early release credits. But, as this Court has noted on several occasions, the early release statutes create no substantive rights for Florida's prisoners so such trials and hearings are unnecessary. Finally, this Court has recently stated in dictum in the Langley decision

that even if there were a flicker of substantive due process inherent in the early release statutes, the Legislature met its burden in justifying its purpose under the statute.

Finally, petitioner fails to meet the third prong of the test -- that is, the legislative act inflicts punishment. As also noted by petitioner, an act is punishment under a 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 shows a motivational intent to punish. See Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 473-484 (1977). The retroactive legislation cancelling early release credits meets none of these parameters. Petitioner seeks to divorce the original legislation enacting the early release statutes from the later legislation disbanding them. This simply cannot be done. The early release statutes were enacted for one purpose and one purpose only -- the remedial purpose of controlling prison overcrowding. The legislation also had primary concerns with regard to public safety in accomplishing its stated and intended goals. However, the legislation was never enacted with the purpose of punishing Florida's prisoners or with the purpose of benefitting them. Likewise the legislation disbanding these early release mechanisms and cancelling early release credits has neither of these purposes in mind. Quite simply, the need for these mechanisms to control overcrowding was supplanted with other equally effective mechanisms including the increased building of prisons, the development of front-end diversionary programs,

amended sentencing guidelines, and so forth. It should come as no surprise that once overcrowding concerns were brought under control through these alternative mechanisms that the early release statutes would be disbanded and early release credits cancelled.

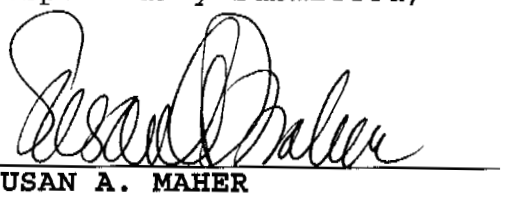
Clearly neither the statutes enacting nor repealing these statutes fall within the historical category of punishment or demonstrate a motivational intent to punish. Moreover, contrary to petitioner's contentions, the legislature wholly furthers non-punitive purposes. No doubt petitioner is disappointed that he will not receive a very early release from his original sentence, but the punishment here is solely in the eye of the beholder.

Petitioner's claim that the retroactive legislation of 1992 and 1993 amount to bills of attainder is wholly without merit. The petition must be denied.

CONCLUSION

For the foregoing reasons, this Court must deny the petition for writ of mandamus.

Respectfully submitted,



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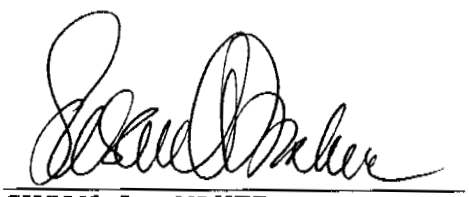
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S SUPPLEMENTAL BRIEF** has been furnished by U.S. Mail to **R. MITCHELL PRUGH, ESQ.**, Middleton, Prugh & Edmonds, P.A., Route 3, Box 3050, Melrose, Florida 32666, on this 10th day of January, 1995.



SUSAN A. MAHER

Orosz.SB/sam