OA 11-9-95

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
SEP 27 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

RUSSELL CALAMIA,

Petitioner,

v. Case No. 84,088

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

Respondent.
_____/

JEFFREY LYNN HOCK,

Petitioner,

v. Case No. 86,182

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

Respondent.
_____/

RESPONDENT SINGLETARY'S CONSOLIDATED RESPONSE TO PETITIONER CALAMIA'S INITIAL AMENDED BRIEF ON PETITION FOR WRIT OF HABEAS CORPUS AND TO PETITIONER HOCK'S PETITION FOR WRIT OF MANDAMUS

Respondent, **HARRY K. SINGLETARY, JR.**, Secretary of the Department of Corrections, through counsel, and pursuant to this Court's order of August 28, 1995, consolidating these cases and directing a response, answers the petitions and requests the petitions be denied for the reasons which follow.[1]

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[1] Because some of the issues raised by the two petitioners overlap, Respondent is filing a consolidated response. The portions of the petitioners' arguments that correspond with Respondent's arguments have been clearly designated for the Court's convenience.

Preliminary Statement

I. Statement of Relevant Facts As To Petitioner Calamia.

Respondent notes that Petitioner Calamia has included in his statement of the case and facts a discussion of his negotiated plea and the representations of defense counsel relative to early release credits and "goodtime" upon which Calamia claims to have allegedly relied in accepting the plea. The Secretary of the Department is not privy to the plea proceedings and, therefore, cannot verify the authenticity of the allegations surrounding the negotiated plea. However, it is the Respondent's position, as a matter of state law, that the plea negotiations are wholly separate and unrelated to the department's administration of the overcrowding statutes and irrelevant to any determination of whether the statutes constitute a violation of the ex post facto clause, the prohibition against bills of attainder, or the due process clause, inasmuch as this Court has made clear that overcrowding credits cannot serve as a basis in deciding to enter a plea. See Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994) (provisional credits are not a reasonably quantifiable expectation at the time an inmate is sentenced . . . [but] are an inherently arbitrary and unpredictable possibility that is awarded based solely on the happenstance of prison overcrowding . . ., 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). Therefore, while these factors may be relevant to seeking relief in the sentencing court in vacating

the plea, they have no bearing on the issues now before this Court.

The relevant facts to be considered by this Court in disposition of these issues are as follows:

Petitioner, Russell Calamia, is an inmate in the custody of the Florida Department of Corrections, presently incarcerated at Polk Correctional Institution in Polk City, Florida. Calamia was received by the department on January 22, 1988, having been sentenced on January 14, 1988 to 20 years for the offense of Second Degree Murder committed on January 2, 1986. (Exhibit A.) The sentence carried a 3-year mandatory firearm provision pursuant to Florida Statutes Section 775.087(2), which terminated on May 8, 1990. (Id.) At the time that Calamia committed his offense, Florida had in effect a statute designed to control prison overcrowding. That statute, Florida Statutes Section 944.276,[2]

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[2] Section 944.276 provided:

> (1) Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary may grant up to a maximum of 60 days of administrative gain-time equally to all inmates who are earning incentive gain-time, unless such inmates:
>
> (a) Are serving a minimum mandatory sentence under s. 775.082(1) or s. 893.135;
>
> (b) Are serving the minimum mandatory portion of a sentence enhanced by s. 775.087(3;
>
> (c) Were convicted of sexual battery or any sexual offense specified in s. 917.012(1) and have not successfully completed a program of treatment pursuant to s. 917.012; or

authorized the Secretary of the department to award up to 60 days of administrative gaintime, once certified to and acknowledged by the Governor, whenever the inmate population reached 98 percent of lawful capacity, equally to all inmates who were earning incentive gaintime and who were not otherwise excluded by the statute. Section 944.276, when enacted was explicitly limited to a specific period of time, expiring effective July 1, 1988. Ch. 87-2, § 2, Laws of Fla. Because Calamia's sentence was enhanced by a minimum mandatory provision pursuant to Florida Statutes Section 775.087(2) and because Calamia did not complete that mandatory prior to the effective expiration of the administrative gaintime statute, Calamia was never eligible for the allocation of administrative gaintime, in accordance with the exclusion under section 944.275(1)(b).[3] Upon the effective expiration and repeal of the administrative gaintime statute[4] on July 1, 1988, a third

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(d) Were sentenced under 775.084.

(2) The authority granted to the secretary shall continue until the inmate population of the correctional system reaches 97 percent of lawful capacity, at which time the authority granted to the secretary shall cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

[3] Calamia asserts that he was eligible for administrative gaintime at the time of his conviction but for the mandatory provision. (Amended Initial Brief at 3.) Respondent disagrees. Calamia was not eligible for the award of administrative gaintime either at the time of his offense or the date of his conviction because of the enhancement provisions of section 775.087(2) and Calamia never became eligible prior to the expiration of the administrative gaintime statute.

[4] The Florida legislature reviewed the administrative gaintime statute prior to its expiration on July 1, 1988, pursuant to section 2 of Chapter 87-2. Pursuant to that review, the

overcrowding statute became effective. That statute, Florida Statutes Section 944.277, lowered the triggering threshold from 98 percent to 97.5 percent of lawful capacity and significantly expanded the exclusions from eligibility from the original four contained in the administrative gaintime statute to a total of seven. Calamia continued to be ineligible for early release due to prison overcrowding until expiration of the minimum mandatory provision on May 8, 1990, pursuant to section 944.277(1)(b). However, once the mandatory provision was complete, the department allocated Calamia a total of 420 days of provisional credits while section 944.277 remained in effect.[5]

In December 1992, the Attorney General was requested to issue an opinion relative to amendments made to section 944.277(1) during the 1992 legislative session. In 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992), the Attorney General concluded that amendments to sections 944.277(1)(h) and (1)(i), effective July 6, 1992, excluded from early release eligibility persons incarcerated for murder or attempted murder offenses and certain crimes against law enforcement officials. The Attorney General further concluded that the Legislature intended these amendments to apply retroactively, requiring that the department cancel any provisional credits previously allocated to these offenders. Therefore, on May

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Legislature decided to supplant the administrative gaintime statute with a more comprehensive overcrowding mechanism and therefore affirmed the repeal of section 944.276 effective July 1, 1988, by Chapter 88-122, § 6, Laws of Florida.

[5] Section 944.277 was repealed effective June 17, 1993, by Chapter 93-406, § 32, Laws of Florida.

7, 1994, the department cancelled the 420 days of provisional credits previously allocated to Calamia. (Exhibit A.)

During the 1993 legislative session, the Legislature enacted Florida Statutes Section 944.278, effective June 17, 1993, which directed the department to cancel all administrative gaintime and provisional credits previously allocated to any offender who was still in custody on active sentences or to any offender who was returned to custody with sentences to which these early release credits had been allocated.[6] Respondent notes that had Calamia's provisional credits not been previously cancelled due to the 1992 legislative amendments and the Attorney General's opinion, these credits would have been cancelled effective June 17, 1993.

II. Statement of Relevant Facts As To Petitioner Hock.

Respondent accepts the statement of facts provided by Petitioner Hock as to all paragraphs contained in the factual statement (pages 2-5) **except** paragraph 22, in which Petitioner asserts that he has not presented the claims asserted herein to this or any other court. Respondent notes that Petitioner Hock previously filed a petition with this Court in Case No. 79,438 in

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[6] Section 944.278 cancels "all awards of administrative gain-time under s. 944.276 and provisional credits under s. 944.277 . . . for all inmates serving a sentence or combined sentences in the custody of the department, or serving a state sentence in the custody of another jurisdiction. * * * Inmates who are out of custody due to an escape or a release on bond, or whose post-release supervision is revoked on or after the effective date of this act, shall have all administrative gin-time and provisional credits canceled when the inmate's release date is reestablished upon return to custody."

1992 in which Petitioner challenged on ex post facto grounds the discontinuation of the award of provisional credits and his ineligibility for control release under Florida Statutes Section 947.146, a fourth overcrowding mechanism which supplanted the provisional credits statute in January 1991. This Court denied the petition on March 23, 1992, and Hock pursued additional relief through federal habeas corpus. In January 1995, the Eleventh Circuit Court of Appeals affirmed with opinion in Hock v. Singletary, 41 F.3d 1470 (11th Cir. 1995) the decision of the District Court for the Northern District of Florida, which denied habeas corpus relief. In the Hock decision, the Eleventh Circuit not only addressed the ex post facto challenge raised by the petitioner, but also addressed the due process issues that, although not raised by petitioner, had been ruled upon by the district court below. Although Petitioner may seek to distinguish his present claims from those addressed by the Eleventh Circuit because the present issues surround a retroactive cancellation of allocated credits and not a deprivation of future overcrowding credits, Respondent asserts that this is a distinction without a difference. The decision in Hock, supra, disposes of all of Hock's present claims.

III. Historical Background of Florida's Overcrowding Statutes

The provisional credits statute (Section 944.277) is one of several mechanisms enacted by the Florida Legislature to address the Since 1983, the State of Florida, like several other states, has enacted a series early release statutes specifically and solely

designed to alleviate an overcrowding crisis which has plagued the state prison system over the last decade. In the face of a federal court consent decree on overcrowding and delivery of health services in the Florida prison system, the Legislature opted to afford the Department of Corrections an emergency relief procedure to preclude the mass release of Florida inmates at the direction of the federal courts. See Costello v. Wainwright, 397 F.Supp. 20 (M.D. Fla. 1975), aff'd, 525 F.2d 1239 (5th Cir. 1976).

The first early release statute (Florida Statutes Section 944.598), enacted in 1983 and repealed in 1993, provided for the mandatory grant of emergency gaintime to all inmates within the prison system if the threshold of 99% of lawful capacity was reached. That statute was never implemented. See Blankenship v. Dugger, 521 So.2d 1097, 1098 (Fla. 1988). Because of the legitimate and compelling concern for public safety, the legislature enacted a second early release mechanism which was designed to be triggered prior to the emergency release statute. The administrative gaintime statute, enacted as Florida Statute Section 944.276 (1987), became operational at 98% of lawful capacity, and the emergency gaintime statute's triggering level was raised to 99% of lawful capacity. The administrative gaintime statute contained a number of exclusions which eliminated from eligibility certain types of violent or repeat offenders. See § 944.276(1)(a)-(d), Fla. Stat. (1987).[7] The administrative gaintime

[7] Specifically, the statute excluded a prisoner serving a minimum mandatory sentence for a capital felony (§ 775.082(1)) or drug trafficking offense (§ 893.135), a prisoner serving a minimum

statute was repealed effective July 1, 1988,[8] and supplanted with a more comprehensive early release statute which excluded more classes of violent or habitual offenders,[9] and which provided for certain offenders a limited period of supervision after release.[10]

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mandatory term enhanced by s. 775.087(2), a prisoner convicted of sexual battery or any sexual offense specified under s. 917.012(1) who had note successfully completed a program of treatment pursuant to Chapter 917, and a prisoner sentenced as a habitual offender under s. 775.084.

[8] See Chapter 88-122, Laws of Florida.

[9] The exclusions of Section 944.277(1), as originally enacted, essentially encompass a variety of minimum mandatory terms, sexual offenses, and habitual offenses. § 944.277(1)(a)-(g), Fla. Stat. (1988 Supp.). In 1989, the statute was amended to exclude murderers as well as a variety of offenses against law enforcement and judicial officers. The new exclusions were effective only for new offenses committed on or after January 1, 1990. In 1992, the legislature, through amendment, mandated that the provisional credits previously allocated to murderers and offenders committing crimes against law enforcement and judicial officers be retroactively cancelled. See 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992); Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994).

[10] Supervision was required for any inmate serving one or more sentences of imprisonment imposed on or after July 1, 1988, and who received 30 days or more of provisional credits, unless the inmate was also serving a sentence for an offense that occurred prior to July 1, 1988. Other forms of supervision, such as community control, probation, or conditional release were substituted for provisional release supervision if such inmate was subject to one

See § 944.277, Fla. Stat. (1988 - 1992). The operational threshold for the provisional credits statute was 98% of lawful capacity. Five years ago, the legislature enacted the latest early release program, called control release, which is administered by the Florida Parole Commission, sitting as the Control Release Authority. See § 947.146, Fla. Stat. (1989 - 1995). The operational threshold for control release has varied between 97.5% and 99% of lawful capacity. With the exception of two effective date variations and one additional exclusion, the eligibility exclusions for control release were identical to those contained in the provisional credits statute; however, the control release program affords the Control Release Authority more discretion in establishing control release dates for early release. Cf. § 944.277, Fla. Stat. (1992 Supp.) with § 947.146, Fla. Stat (1992 Supp.). Control release is the only mechanism presently in effect to control prison overcrowding.

As the overcrowding crisis subsided and in light of the grave concern for public safety, the Florida Legislature began to narrow the categories of prisoners eligible for overcrowding release and exclusions were added to the statutes. Prisoners convicted of murder offenses were not initially among the excluded classes under any of the overcrowding statutes. In 1989, the Florida Legislature removed from eligibility for early release for overcrowding any prisoner convicted of a murder offense. § 944.277(1)(i), Fla. Stat. (Supp. 1990). However, this provision

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or more of these types of supervision.

did not seek to remove earlier allocations of overcrowding credits. In 1992, the Florida Legislature reenacted the statutory exclusion for murder offenses, this time giving the provision retroactive effect. See 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992). The following year, the Florida Legislature repealed the overcrowding statutes administered by the Florida Department of Corrections and mandated that all overcrowding credits previously allocated to prisoners who remained in custody be cancelled. § 944.278, Fla. Stat. (1993).

Argument

I. **FLORIDA'S EARLY RELEASE STATUTES ENACTED SOLELY TO CONTROL PRISON OVERCROWDING ARE REMEDIAL, PROCEDURAL MECHANISMS THAT CREATE NO SUBSTANTIVE RIGHTS RELATED TO A PRISONER'S SENTENCE. THEREFORE, THE RETROACTIVE CANCELLATION OF PETITIONERS' PREVIOUSLY ALLOCATED PROVISIONAL CREDITS PURSUANT TO SECTION 944.277(1)(I), FLORIDA STATUTES (SUPP. 1992) OR PURSUANT TO SECTION 944.278, FLORIDA STATUTES (1993), DOES NOT VIOLATE THE PROHIBITION AGAINST EX POST FACTO LAWS IN ARTICLE I, SECTION 10, OF THE FLORIDA CONSTITUTION AND ARTICLE I, SECTION 10, CLAUSE 1, OF THE UNITED STATES CONSTITUTION.** [Petitioner Calamia's Argument I, pp. 9-19; Petitioner Hock's Argument IV.A., pp. 7-17.]

Both Petitioners claim that sections 944.277(1)(i) as amended in 1992 and section 944.278 enacted in 1993 which provide for the retroactive cancellation of early release credits allocated them due to prison overcrowding violate the prohibition against ex post facto laws under the Florida and United States Constitutions. Contrary to Petitioners' contentions, the retroactive cancellation of early release credits allocated solely for the purpose of alleviating prison overcrowding does not violate the prohibitions of the ex post facto clause. The framers of the Constitution considered the ex post facto prohibition so important that it appears twice -- once in Article I, Section 9, forbidding the Congress from passing any ex post facto law, and again in Article I, Section 10, placing the same limitation upon the states. Early opinions of the Supreme Court have recognized that "ex post facto law" was a term of art with an established meaning at the time of the framing of the Constitution. Calder v. Bull, 3 U.S. (3 Dall) 386, 391 (1798) (opinion of Chase, J.); id. at 396 (opinion of Paterson, J.). In Calder, the seminal case in ex post facto analysis, Justice Chase noted that:

> The prohibition, "that no state shall pass any ex post facto law," necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing.

Id. at 390.

While taken literally, "ex post facto" could encompass any law passed "after the fact", Justice Chase sought to clarify in Calder what laws, in his view, were implicated by the ex post facto clauses:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 390.

As is apparent from this definition, the constitutional prohibition on ex post facto laws applies to penal statutes which disadvantage the offender affected by them. Calder, 3 U.S. (3 Dall.) at 390-392; see also, Weaver, 450 U.S. at 24, 28-29. There is no doubt that one of the objectives underlying the ex post facto prohibition is to provide fair notice and to foster governmental restraint when a legislature increases punishment beyond what was prescribed when the crime was consummated. Calder, 3 U.S. (3 Dallas) at 387-388; Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Dobbert v. Florida, 432 U.S. 282, 298 (1977); Weaver, 450

U.S. at 28-29 (1981); Miller v. Florida, 482 U.S.423, 107 S.Ct. 2446 (1987).

However, the prohibitions of the ex post facto clauses do not extend to every change of law that "may work to the disadvantage of a defendant." Dobbert, 432 U.S. at 293.

> It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

Portley v. Grossman, 444 U.S. 131, 1312 (1980).

> The critical question, as Florida has often acknowledged, is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence.

Weaver, 450 U.S. at 32, n. 17 (citations omitted).

> The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

Paschal v. Wainwright, 738 F.2d 1173, 1176, n.4 (11th Cir. 1984), citing United States v. Lovett, 328 U.S. 303, 324 (1946).

The underlying purpose of the statutes now under ex post facto scrutiny is of critical importance in determining whether a statute is procedural or substantive, or indeed properly the subject of ex post facto analysis. Administrative gaintime and provisional credits were no more than mechanisms for reducing the prison population for the administrative convenience of the Department of Corrections -- these statutes do not address the

substantive matters concerning punishment or reward. See Blankenship, 521 So.2d 1097, 1098; Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991).

Like the term "ex post facto", the term "procedural" requires some explanation. While the earlier decisions of the United States Supreme Court describing "procedural" changes have not explicitly defined what is meant by the term, the Supreme Court has recently expounded upon and limited the scope of the definition in Collins v. Youngblood, 497 U.S. 37, 111 L.Ed.2d 30 (1990).[11]

In Collins, the Supreme Court acknowledged that previous decisions of the court held that:

> [A] procedural change may constitute an ex post facto violation if it 'affect[s] matters of substance,' Beazell, supra, at 171, 70 L.Ed 216, 46 S.Ct. 68, by depriving a defendant of 'substantial protections with which the existing law surrounds the person accused of crime,' Duncan v. Missouri, 152 U.S. 377, 382-283, 38 L.Ed. 485, 14 S.Ct.570 (1894), or arbitrarily infringing upon 'substantial personal rights.' Malloy v. South Carolina, 237 U.S. 180, 183, 59 L.Ed. 905, 35 S.Ct. 507 (1915); Beazell, supra, at 171, 70 L.Ed 216, 46 S.Ct. 68.

Collins, 497 U.S. at 45, 111 L.Ed 2d at 40-41.

However, the Collins court went on to hold that "the references in Duncan and Malloy to 'substantial protections' and 'personal rights' should not be read to adopt without explanation an undefined enlargement of the Ex Post Facto Clause." Collins, 497 U.S. at 46, 111 L.Ed.2d at 41-42.

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[11] In declining to expand the scope of the ex post facto clauses, the Supreme Court has receded from its earlier decisions in Kring v. Missouri, 107 U.S. 221 (1883) and Thompson v. Utah, 170 U.S. 343 (1898).

In announcing its decision in Collins, the Supreme Court specifically receded from its earlier decision in Kring v. Missouri, 107 U.S. 221 (1883):

> The Court's departure [in Kring] from Calder's explanation of the original understanding of the Ex Post Facto Clause was, we think, unjustified.

Collins, 497 U.S. at 49, 111 L.Ed 2d at 43.

In Kring, the Supreme Court had defined an ex post facto law as:

> [O]ne in which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage.

Kring, 107 U.S. at 228-229 (quoting United States v. Hall, 26 F.Case 84 86 (No. 15,285)(D. Pa. 1809)). (Emphasis added.)

The Supreme Court has now made clear that shifting the focus of ex post facto analysis from the original understanding of the Ex Post Facto Clause is impermissible and that the language cited in Kring should was never intended "to mean that the Constitution prohibits retrospective laws, other than those encompassed by the Calder categories, which 'alter the situation of a party to his disadvantage.'" Collins, 497 U.S. at 50, 111 L.Ed.2d at 43-44.

> The holding in Kring can only be justified if the Ex Post Facto Clause is thought to include not merely the Calder categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not

> supported by later cases. We accordingly overrule Kring.

Id. at 44.

Similarly, in receding from its decision in Thompson v. Utah, 170 U.S. 343 (1898), the Supreme Court noted:

> The right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause. To the extent that Thompson v. Utah rested on the Ex Post Facto Clause and not the Sixth Amendment, we overrule it.

Collins, 497 U.S. at 51, 111 L.Ed.2d at 45.

Petitioners contend that the retroactive cancellation of early release credits violates the ex post facto prohibitions because their release dates have been extended and they now will be required to serve a longer portion of his sentence. Under Collins, the question of whether a prisoner is disadvantaged by being required to serve most if not all of his original sentence falls short of providing a full answer when conducting an ex post facto analysis. The fact that Petitioners may feel disadvantaged by being excluded from early release prompted by prison overcrowding, when considered alone, is insufficient to trigger the prohibitions of the Ex Post Facto Clause. Petitioners must also show that the State's procedural mechanism to relieve prison overcrowding through early release credits creates a "substantial personal right" related to the definition of crimes, defenses, or punishments. Obviously, these statutes do not retroactively create new criminal offenses nor do they deprive a defendant of defenses. Thus the

sole question is whether FloridaU'searly release statutes "change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

The Supreme Court has also given guidance in determining whether a statute is punitive or penal in nature. In Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), the Court described the standards traditionally applied to determine whether a statute is punitive or penal in nature:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id.

The underlying purpose of the early release statutes thus becomes of critical importance in determining whether the statutes are procedural or substantive in nature, or whether they operate to increase the "quantum of punishment" merely because they afford early release from a sentence already imposed. There can be no dispute that the sole purpose of the early release statutes is to provide a mechanism to alleviate prison overcrowding. The statutes were not designed nor enacted to promote the traditional aims of punishment -- that is, retribution and deterrence. The statutes

were enacted to address the singular problem of overcrowding -- they were never intended to operate as an incentive to reduced imprisonment or to become a consideration in the sentencing forum.

Petitioners apparently believe that the early release credits are the equivalent to the basic gaintime and incentive gaintime as they rely on the decisions in Weaver v. Graham, 450 U.S. 24 (1981) and Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989). However, the similarities are limited to the nomenclature. Both basic and incentive gaintime relate to the sentence imposed, and a release date reduced by these awards can be reasonably predicted, based upon length of the term meted out. Basic gaintime is applied as a lump sum award to reduce the overall length of sentence the day the prisoner enters the prison gates. While not necessarily a part of the sentence in a technical sense, the award of basic gaintime is a quantifiable determinant of a prisoner's overall term, which, as the Supreme Court recognized in Weaver, may operate as a "factor . . . [in] the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Similarly, the potential to earn incentive gaintime for labor performed and constructive activities, although contingent upon performance and good behavior, is also quantifiable based upon length of sentence imposed. Thus, to the extent that these two types of "gaintime" operate in tandem with the length of sentences imposed, they affect the "quantum of punishment" which attaches at the time the crime is committed. Conversely, the eligibility and receipt by a prisoner of early release awards, whether those awards

are called "gaintime", "credits", "allotments", etc., is in no way tied to overall length of sentence. The need for and application of such awards are contingent upon many outside variables which contribute to prison overcrowding. There is no relationship to the original penalty assigned to the crime at the time it was committed nor to the ultimate punishment meted out.[12] The sole purpose of the early release statutes is to provide a temporary mechanism to alleviate the administrative crisis created by prison overcrowding while continuing to protect the public from violent offenders. The statutes are procedural in nature -- their purpose directed to alleviating the administrative crisis of prison overcrowding not to the traditional purposes of punishment. Consequently, Florida's early release statutes create no "substantial personal rights" relating directly to the definition of crimes, defenses, or punishments, as defined and limited by the Supreme Court's decision in Collins.

It is most important to note that the Eleventh Circuit Court of Appeals as well as the various federal district courts in Florida, have concurred with the decisions of the Florida Supreme Court in Blankenship and Rodrick, supra, in its holdings that these

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[12] This Court has made clear in the sentencing context that early release credits are not a valid consideration in the sentencing process. See Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994) (provisional [credits] in no sense [are] tied to any aspect of the original sentence and cannot possible be a factor at sentencing or in deciding to enter into a plea bargain); Tripp v. State, 622 So. 2d 941 (1993) (the trial court may not direct credit for administrative gaintime or provisional credits on a prior probationary split sentence or a sentence structure affected by the Tripp decision).

statutes are administrative and procedural in nature and not subject to ex post facto proscriptions.[13] More recently, a federal district court has addressed the specific issue at bar here -- that is, the retroactive cancellation of provisional credits and administrative gaintime previously allocated to alleviate prison overcrowding. This decision in Joseph C. Magnotti v. Harry K. Singletary, Case No. 93-8554-Civ-Moreno, rendered on March 24, 1994 (Exhibit B), cites with approval the recent decision of the Florida Supreme Court in Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994). Griffin, like the predecessor decisions in Rodrick, Grant, and Blankenship, supra, makes clear that "Florida Legislature did not intend to confer an expectation upon Florida Inmates such as the petitioner that early release credits would continue to be applied to shorten their sentences. . . [t]he provisional credits in §944.277 were contemplated not as a prisoner entitlement but merely as an escape valve which would be triggered only by the need to alleviate overcrowding in the state prison system." Magnotti at 6.

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[13] See Petrone v. Dugger, Case No. 88-12041-Civ-Atkins, USDC - Southern District, entered August 8, 1988, aff'd, Case No. 88-6061 (11th Cir., August 29, 1989) [It is especially important to note that Circuit Judge Tjoflat, who authored the opinion in Raske in July 1989, was also a member of the panel who entered the decision in Petrone, just one month later in August 1989. Thus, it is clear that the federal appellate court considered the two decisions distinguishable.]; see also Manzanero v. Dugger, Case No. 88-6076-Civ-Scott, USDC - Southern District, judgment entered September 29, 1988; Aman v. Martinez, Case No. 88-50124-RV, USDC - Northern District, judgment entered May 8, 1989; Stafford v. Dugger, Case No. 89-295-Civ-J-16, USDC - Middle District, judgment entered July 10, 1990; Tommy Williams, Sr. v. Dugger, Case No. 90-602-Civ-T-3A98(A), USDC - Middle District, judgment entered June 7, 1991; Edgar Searcy v. Singletary. Case No. 91-1071-Civ-T-23C, report and recommendation entered August 31, 1993.)

Ultimately, the federal district court in the Southern District has concluded that the retroactive cancellation of early release credits allocated specifically for the purpose of alleviating prison overcrowding does not offend the due process, equal protection, or ex post facto clauses of the Constitution. The decision of the Southern District in Magnotti was recently affirmed by the Eleventh Circuit Court of Appeals after oral argument on August 30, 1995. (Exhibit C.)

As noted in the preliminary statement, Petitioner Hock previously raised a challenge on ex post facto grounds to the statutory changes to eligibility for early release on ex post facto grounds. In the Hock decision, the Eleventh Circuit affirmed by opinion this State's characterization of its prison overcrowding statutes as non-substantive, procedural mechanisms. See Hock v. Singletary, 41 F.3d 1470, reh'g denied, ____ F.3d.____ (11th Cir. 1995). In the prior Hock petition, Hock claimed his rights under the ex post facto clause were being violated because he was no longer being awarded provisional credits (due to prison overcrowding) under section 944.277[14] and he was determined ineligible for control release, the state's latest mechanism for controlling prison overcrowding. While the Eleventh Circuit acknowledged that Florida had explicitly recognized its early

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[14] Hock's ineligibility for provisional credits resulted from the enactment of Florida Statutes Section 947.146, an early release mechanism that supplanted the provisional credits statutes. Although Hock received provisional credits while Florida Statutes Section 944.277 was in effect, he was statutorily ineligible to be released early under section 947.146 (control release).

release statutes as "procedural in nature, [and] are not directed toward the traditional purposes of punishment", Hock, 41 F.3d at 1472, citing Dugger v. Rodrick, 584 So. 2d 2, 4 (Fla. 1991), cert. denied sub nom. Rodrick v. Singletary, 502 U.S. 1037, 112 S.Ct. 886, 116 L.Ed.2d 790 (1992), the court went on to conclude that, independent of the Florida authorities, "any disadvantage suffered by the petitioner does not affect punishment and therefore does not violate the Ex Post Facto Clause." Hock, 41 F.3d at 1472. The Eleventh Circuit further distinguished the cases dealing with early release credits from those addressing basic and incentive gaintime:

> The control release statute is quite different. it reduces an inmate's imprisonment automatically for the convenience of the Department of Corrections. The statute is procedural, not substantive like "good-time" gain time, and therefore is not ex post facto. Rodrick, 584 So. 2d at 4.
>
> Additionally, the retroactive application of control release does not actually disadvantage the petitioner by reducing his opportunity to shorten his time in prison. Because control release is based on an arbitrary and unpredictable determinant, the prison population level, an inmate has no reasonable expectation at the time he is sentenced that the prison population will reach the specified triggering level and that his incarceration will therefore be reduced.

Id.

The Supreme Court of the United States has also recently recognized a similar rationale in ex post facto inquiries of laws which allegedly "disadvantage" covered offenders in Cal. Dept. of Corrections v. Morales, 514 U.S. ___, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). The Calamia petition is back before this Court from the United States Supreme Court for review in light of Morales.

The Morales decision reinforces this Court's earlier decisions in Griffin, Langley, and Rodrick, among others and there is no reason for this Court to recede from those decisions as urged by Petitioners.

In Morales, the petitioner argued that a California statute which allowed a decrease in frequency of parole suitability hearings to prisoners who committed particular crimes prior to the statute's enactment violated the ex post facto clause of the Federal Constitution. Id. The court recognized that several of its prior opinions suggested that enhancements to the measure of criminal punishment fell within the ex post facto prohibitions because they operated to the "disadvantage" of covered offenders. Id. at n.3. However, the court acknowledged that this language was inconsistent with the framework developed in Collins, finding that:

> Our opinions in *Lindsey*, *Weaver*, and *Miller* suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the "disadvantage" of covered offenders. See *Lindsey*, 301 US, at 401, 81 L Ed 1182, 57 S Ct 797; *Weaver*, 450 US, at 29, 67 L Ed 2d 17, 101 S Ct 960; *Miller*, 482 US, at 433, 96 L Ed 2d 351, 107 S Ct 2446. But that language was unnecessary to the results in those cases and is inconsistent with the framework developed un *Collins v. Youngblood*, 497 US 37, 41, 111 L Ed 2d 30, 110 S Ct 2715 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent seems to suggest, on whether an amendment affects a prisoner's "opportunity to take advantage of provisions for early release," see post, at ___, 131 L.Ed. 2d, at 602, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Id. This interpretation is well in keeping the Eleventh Circuit in Hock v. Singletary, 41 F.3d 1470 (11th Cir. 1995) and acts to

further bolster the position of the Respondent as to the cancellation of provisional credits.

Nevertheless, Petitioners both argue that Morales dictates that this Court recede from its prior precedents. Both Petitioners still contend that because the allocation of provisional credits had the effect of potentially reducing the length or duration of confinement and because Petitioners both received allocations under the provisional credits statute, that the cancellation of those credits increased the penalty by which their crimes were punishable. This is precisely the effect-based analysis rejected by the United States Supreme Court in both Collins and Morales. It is precisely the argument of the dissent in Morales that has been firmly rejected by the majority. Petitioners cannot prevail with this argument. In both Collins and Morales, the Supreme Court has emphasized that it the "increase in the penalty by which a crime is punishable" that triggers the ex post facto prohibitions not just any potential disadvantage occasioned by a prisoner or change that results in an alteration of the actual length of confinement. The State of Florida did not change its mind as to the overall terms of imprisonment it believed appropriate as punishment for Petitioners' crimes. It simply was faced with addressing an independent and somewhat unpredictable problem of overcrowding -- the fact that the Legislature devised various mechanisms to allow releases to control prison overcrowding did not in any way alter the punishments Petitioners were destined to receive on the dates they committed their crimes. Petitioners

had no way of knowing what the future might hold with regard to prison overcrowding and their potential to receive a very early release as a result. Neither the State of Florida nor the sentencing courts altered the punishment range under the sentencing guidelines based upon prison overcrowding -- it was a phenomena addressed administratively by the Florida legislature and the department. Since the overcrowding statutes have been properly determined to be remedial, administrative, and procedural statutes designed to address prison overcrowding rather than penal statutes designed to address punishments for crimes, these statutes do not offend the prohibition against ex post facto laws under either the Collins or Morales tests,

Based upon the foregoing analysis, the petition must be denied.

II. THE RETROACTIVE APPLICATION OF THE EXCLUSIONS FROM ELIGIBILITY FOR PROVISIONAL RELEASE CREDITS MUD THE SUBSEQUENT CANCELLATION OF CREDITS PURSUANT TO SECTION 944.277(1)(i), FLORIDA STATUTES (Supp. 1992) AND SECTION 944.278, FLORIDA STATUTES (1993), ARE NOT UNCONSTITUTIONAL VIOLATIONS OF THE PROHIBITION AGAINST BILLS OF ATTAINDER CONTAINED IN ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION. [Petitioner Calamia's Argument II, pp. 20-23.1

Calamia asserts that Florida's enactment of retroactive legislation cancelling overcrowding credits and eliminating the possibility of very early release due to prison is an unconstitutional bill of attainder. As Calamia notes, a legislative act may be a bill of attainder if it "legislatively determines guilt and inflicts punishment upon an identifiable

individual without provision of the protections of a judicial trial." Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977). In assessing whether a challenged act constitutes punitive legislation, the United States Supreme Court has generally viewed three areas: (1) whether any feature of the act falls within the historical category of punishment, (2) whether the act functionally furthers no non-punitive legislative purpose, and (3) whether the legislative history of the act shows a motivational intent to punish. Id. at 473-478. The challenged legislation survives these tests.

Calamia asserts that the two legislative provisions fall within the historical category of punishment simply because he was deprived of the opportunity for very early release and that he will now be required to serve the term of imprisonment as imposed. Calamia incorrectly states that his prison term has been increased through cancellation of overcrowding credits. Calamia's 20-year term remains intact, as does his tentative release date calculated due to application of "goodtime" gaintime for positive behavior. The fact that Calamia will not achieve a very, very early release from his term of incarceration due to prison overcrowding, a factor totally unrelated to Petitioner's crime and the punishment meted out, simply cannot be viewed as a historical category of punishment.

Moreover, the retroactive cancellation of overcrowding credits by the Florida Legislature furthers an important and non-punitive legislative purpose and is completely devoid of a

motivational intent to punish, Florida's overcrowding statutes were enacted in response to a federal mandate achieved through a consent agreement capping the prison population in the case of Costello v. Wainwright, 397 F.Supp. 20 (M.D. Fla. 1975), aff'd, 525 F.2d 1239 (5th Cir. 1976). Without these statutes, the federal court system would have been saddled with effecting the release of Florida's prisoners. Florida did not abdicate its responsibility. The legislature sought ways to confront the burgeoning prison population including the increased building of prisons, the development of front-end diversionary programs, and amended sentencing guidelines. As an interim and temporary safety valve, Florida put in place early release mechanisms to offset the front-end flow of prisoners. When the overcrowding crisis began to wane, the Florida Legislature appropriately terminated the overcrowding mechanisms and cancelled all further early releases in deference to public safety.

The legislation is civil, not penal, designed solely to contain prison overcrowding. Calamia had no vested right or legitimate expectation that he would attain early release due to prison overcrowding. Griffin v. Singletary, 638 So, 2d 500 (Fla. 1994); Hock v. Singletary, 41 F.3d 1470 (11th Cir. 1995). No doubt Calamia feels personally disadvantaged because he failed to achieve the windfall of very early release from his prison term due to prison overcrowding, but potential unfairness of retroactive civil legislation to an individual or group of individuals does not in and of itself violate the constitutional proscription against bills

of attainder.

Accordingly, Petitioner Calamia's petitionmust be denied as to this issue

III. SECTION 944.277, FLORIDA STATUTES, DID NOT CONFER A PROTECTED LIBERTY INTEREST OR ENTITLEMENT TO FLORIDA'S PRISONERS IN RECEIVING OR RETAINING OVERCROWDING CREDITS AND, THEREFORE, PETITIONERS WERE NOT DEPRIVED OF FAIR NOTICE AND PROCEDURE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. [Petitioner Calamia's Argument III, pp. 24-28; Petitioner Hock's Argument IV.B., pp. 17-23.]

Petitioners Calamia and Hock both claim a protected liberty interest in the provisional credits cancelled by the Secretary and in the provisional release dates tentatively calculated through allocation of those credits. Petitioners both essentially assert that they are entitled to an individualized adjudication of fault before revocation of credits or denial of early release can occur.

Liberty interests under the due process clause can be created by state action, See, e.g., Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 463 (1981); Wolff v. McDonnell, 418 U.S. 639, 558 (1974). However, whether state action creates a protected liberty interest turns on the degree to which official action is constrained. See Francis v. Fox, 838 F.2d 1147, 1149 (12th Cir. 1988) ; see also Board of Pardons v. Allen, 482 U.S. 369, 375-76 (1987); Olim v. Wakinekona, 461u.S. 238, 249 (1983) (state law can give rise to a liberty interest when it places "substantive limitations upon official discretion"); Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979)

If official action is discretionary, no liberty interest has been created. Francis v. Fox, 838 F.2d at 1149; Conloque v. Shinbaum, 949 F.2d 378, 380 (11th Cir. 1991). In measuring the degree of discretion, the courts typically have examined a law to see whether it is couched in "mandatory" language -- that is, shalls, wills and the like -- or whether the law creates "substantive predicates" -- that is, standards or restrictions to delimit state (and, in most cases focusing on these factors, the executive branch) action, See Hewett v. Helms, 459 U.S. 460, 471 (1983); Chandler v. Baird, 926 F.2d 1057, 1060 (11th Cir. 1991)

> The types of interests that constitute "liberty" and "property" for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than "an abstract need or desire" and must be based on more than "a unilateral hope." Rather, an individual claiming a protected liberty interest must have a legitimate claim of entitlement to it.

Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461 (1989) (citations omitted). "[W]hether any . . . state statute provides a protectible entitlement must be decided on a case-by-case-basis." Greenholtz, 442 U.S. at 12. In conducting this case-specific analysis, the Eleventh Circuit Court of Appeals has found that "three, sometimes overlapping, factors are crucial in determining whether a liberty interest is created:"

> (1) whether the system places substantive limitations on the discretion of the decisionmakers; (2) whether the system mandates the outcome that must follow if the substantive predicates are met; and (3) whether the relevant statutes and regulations contain explicitly mandatory language dictating the procedures that must be followed and the result that must be reached if the relevant criteria are satisfied.

Sultenfuss v. **Snow**, 35 F.3d 1494, 1500. The Eleventh Circuit, sitting en banc, most recently applied these three factors in relation to new parole guidelines promulgated by Georgia's parole board.

> In examining these three factors in relation to the Georgia parole system, we must keep in mind that our analysis is inherently subjective. The Supreme Court has recognized that "[n]either the drafting of regulations nor their interpretation can be reduced to an exact science." Thompson, 490 U.S. at 462, 109 S.Ct. at 1909. We must be careful not to lose sisht of the forest for the trees. The Georgia statutes and regulations must be read in conjunction to derive the overridins purpose and function of the parole guidelines svstem. With this caveat in mind, we proceed to analyze the Georgia parole system in light of the three factors set forth above.

Id. (Emphasis added.)

In reviewing Florida's early release statutes in light of these three factors, the Eleventh Circuit has warned that courts must "not . . . lose sight of the forest for the trees." Contrary to what Petitioners have suggested, "the mandatory language requirement is not an invitation to courts to search regulations for any imperative that might be found. The search is for relevant mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question." Thompson, 490 U.S. at 464 n.4. Most recently, the United States Supreme Court has also issued an opinion that expresses great concern that its earlier decisions which shifted "the focus of the liberty interest inquiry to once based on the language of a particular regulation, and not the nature of the deprivation, [has]

encouraged prisoners to comb regulations **in** search of mandatory language on which to base entitlements to various state-conferred privileges." Sandin v. Conner, 63 L.W. 4601, 4603 (1995). Petitioner Calamia seeks to distinguish the United States Supreme Court's decision in Sandin as one limited to state laws and regulations governing prison discipline and not one related to sentencing issues. However, Sandin is applicable here because Florida's overcrowding statutes are not penal statutes relating to the sentence imposed but rather are remedial and procedural statutes that operate "within the sentence imposed". Sandin requires that when assessing whether a state has created a protected liberty interest by statute or regulation, that the question which must truly be addressed is whether the state "created an interest of 'real substance' comparable to the good time credit scheme of Wolff . . .", not simply whether the statute or regulation contained " ' language of an unmistakably mandatory character'. . . ." Sandin, 63 L.W. at 4603. "The Due Process Clause standing along confers no liberty interest in freedom from state action taken 'within the sentence imposed'". Id. citing Hewitt v. Helms, 459 U.S. 460 (1983) .

In order to determine whether the Florida Legislature intended to create a protected liberty interest in retaining overcrowding credits, a review is required of the early release statutes to assess the existence and purpose of any mandatory language in light of the overriding function and purpose of the early release mechanism itself. The only mandatory language in the

administrative gaintime statute, the forerunner to the provisional credits statute at issue here, appears in the sentence that requires the Department of Corrections to certify that the system has reached 98 percent of lawful capacity as defined by s. 944.598. See § 944.276(1), Fla. Stat. (1987).[15] However, this mandatory certification in no way required the Department to award administrative gaintime -- rather, once the Governor acknowledged the certification in writing, then it was up to the secretary to decide whether to grant the early release credits or not.[16]

Similar language requiring a certification to the Governor appeared in the provisional credits statute; however, like

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[15] Section 944.276(1) provided, in part:

> Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary may grant up to a maximum of 60 days administrative gain-time equally to all inmates who are earning incentive gain-time . . . . (emphasis added)

[16] The specific language of the statute is "the secretary may grant up to a maximum of 60 days . . . ". Clearly there was no mandatory burden upon the secretary to award the gaintime after certification; however, once the decision was made to award the early release credits, it was incumbent upon the secretary to award it equally to all eligible inmates. To do otherwise would have made the system to cumbersome to effectively apply as daily calculations of prisoner population and capacity were necessary to monitor overcrowding.

the administrative gaintime statute, the decision on whether to grant any early release credits was up to the secretary of the department once the certification was acknowledged by the Governor. Additional mandatory language appears in subsections (2) , (3), and (4) of section 944.277; however, the language contained in these sections essentially assures an orderly mechanism for administering early release due to overcrowding, by providing for a provisional release date for tracking purposes and an equal distribution base for efficient overcrowding control. Without an orderly mechanism, it would not have been possible for the department to determine quickly and efficiently when the floor of 97% of lawful capacity was reached. Thus, the mandatory language is in place for the purpose of providing an orderly mechanism -- not for the purpose of assuring or creating an inmate benefit or entitlement. Petitioners make much ado about this mandatory language but are quick to overlook the full discretion afforded the Secretary in whether the statute should be implemented at all.

Petitioner Hock further asserts that because the Florida Legislature limited the department's ability to cancel or revoke early release credits through disciplinary proceedings and to revoke post-release supervision and credits absent a determination of personal fault in individualized proceedings, the legislature conferred upon inmates "the unqualified right to an individualized, judicial determination of fault before revocation."[17] (Hock

[17] At page 21 of the petition, Mr. Hock asserts that the provisional credits allocated him would be revocable only in connection with a judge's sentencing decisions revoking probation

Petition at 21.) Again, these provisions, like the provisions which actually established the procedural mechanism for release, are simply assurances that an orderly and effective mechanism for overcrowding would prevail. They were not intended to confer an entitlement to an inmate to absolutely retain credits either pre-release or post-release. The fact that revocation of provisional credits after release is based upon individualized personal fault merely fulfills the intention and purpose of the overcrowding statutes. Obviously, it would not serve the intended purpose of the overcrowding statutes to have inmates released due to prison overcrowding returned to prison unless they demonstrated an inability to remain in the community. Such concerns do not equally apply to prisoners pending release if the overcrowding crisis were eliminated or other mechanisms were available to address overcrowding issues. The Florida legislature's systematic narrowing of the statutes and ultimate repeal and cancellation of all early release credits clearly evidences its intent that the

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or community control and, therefore, the Constitution mandates minimally acceptable process. **Mr,** Hock references the Florida Supreme Court's decision in Tripp v. State, 622 So, 2d 941 (Fla. 1993). However, the Tripp decision merely reinforces all of the prior decisions of the supreme court relating to the nature and purpose of early release credits. In Tripp, the court specifically held that although gaintime applied to a sentence resulting in the release of an inmate for expiration of sentence was the "functional equivalent of time served", see State v. Green, 547 So. 2d 925 (Fla. 1989), early release credits such as administrative gaintime under section 944.276 and provisional credits under section 944.277 were not and therefore could not be directed as credit upon resentencing for violation of probation. There is no concomitant revocation of provisional credits upon revocation of probation or community control -- the credits simply cease to exist as they were never considered the functional equivalent of time served on a prisoner's sentence.

credits be in place only so long as necessary to address the prison overcrowding issue and then, only to the extent necessary, without jeopardizing public safety.

In analyzing whether a state-created liberty interest has been created, both Petitioners have focused solely upon language which constrains the power of executive branch officials to revoke or refuse to apply early release credits. However, this case involves not executive discretion, but the discretion of the Florida Legislature in enacting legislation mandating cancellation of early release credits it previously authorized awarded to control prison overcrowding. The Florida legislature entrusted to the Secretary of the Department of Corrections the full discretion to decide whether early release credits would be allocated on any given date -- that discretion was not altered by other statutory provisions that set out the procedural mechanism for effecting an orderly release of inmates and assured the ability to predict overcrowding levels on a daily basis. The early release statutes were enacted in response to a federal mandate achieved through a consent agreement capping the prison population in the case of Costello v. Wainwright, 397 F.Supp. 20 (M.D. Fla. 1975), aff'd, 525 F.2d 1239 (5th Cir. 1976). Without these statutes, the federal court system would have been saddled with effecting the release of Florida's prisoners. Florida did not abdicate its responsibility. The legislature sought ways to confront the burgeoning prison population including the increased building of prisons, the development of front-end diversionary programs, and amended

sentencing guidelines. As an interim and temporary safety valve, Florida put in place early release mechanisms to offset the front-end flow of prisoners. As recognized by this state's Supreme Court in Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991) and Dugger v. Grant, 610 So. 2d 428 (Fla. 1992), the Florida legislature intended to confer no expectation upon prisoners that early release credits would continue. Neither Mr. Calamia or Mr. Hock nor any other prisoner can create for himself a protected liberty interest simply because he is good or simply because they personally relied on overcrowding to continue and afford them early release.

Essentially, Petitioners now complain that the legislature, when enacting the provisional credits statute, did not warn him that his credits could be cancelled should the prison overcrowding crisis pass. The very nature and purpose of the early release statutes puts Petitioners on notice that a change in the prison overcrowding crisis could result, and essentially has resulted, in such action. It is illogical for Petitioners to contend that they have an unconditional interest in something which is expressly intended to be a temporary repair to the interim overcrowding problem faced by Florida's prison system. One cannot have a reasonable expectation that overcrowding will continue or that the windfall of early release will continue to be utilized as the mechanism to address overcrowding. The safety valve of early release through administrative gaintime and later, provisional credits, was never intended to be permanent. Indeed, should the crisis pass, it would be logical that the legislature would repeal

all early release mechanisms and cancel all early release awards. Indeed, it now appears that through the building of additional prison beds, the crisis has fully passed. No early releases due to prison overcrowding have been made since December 1994 and all control release dates have been cancelled.

In Dugger v. Grant, 610 So. 2d 428 (Fla. 1993), a case involving early release eligibility, this Court recognized the special nature of the early release statutes and made clear that Florida's early release statutes confer no substantive or procedural liberty due process rights:

> [S]ection 944.277 is permissive, rather than mandatory, and is strictly an administrative mechanism to relieve prison overcrowding. Because provisional credits are solely implemented to relieve prison overcrowding, are in no way tied to an inmate's overall length of sentence, and create no reasonable expectation of release on a given date, no substantive or procedural "liberty" due process rights vest in an inmate under the statute.

Id. at 431.

A year later, considering a credits cancellation case, this Court again stated as a matter of state **law** that an inmate possesses no protected liberty interest in retaining provisional credits in its opinion in Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994). Further, the Court points out that in previous decisions, "any due process interest in the *provisional* credit is far less, due to its peculiarly contingent nature and the fact that the state has great discretion in revoking or limiting provisional credits." Griffin, 638 So. 2d at 501, citing Rodrick. The court

further notes that in another earlier decision of the court, a decision to revoke could be supported by the "some evidence" standard. Id., citing Dugger v. Grant, 610 So. 2d 428, 432 (Fla. 1992) (quoting Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445, 456, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985)). To understand the perspective of the Court here, the particulars of the Grant decision are important. In Grant, the Court considered what the burden of the department would be in assessing eligibilities for early release credits, a function that was mandated by the legislature to the department as a part of the early release mechanism. The screening process, of course, was to eliminate from early release any habitual or potentially violent offenders based upon categories set out by the legislature. The state's district court had concluded that the department could not rely on information contained in an arrest report to exclude Grant from eligibility and suggested that the burden of the department in making assessments was equal to the burden to convict. The Secretary reasoned that where no substantive interest existed, it should certainly not be held to any higher standard than the minimal standard of "some" evidence or a "modicum" of evidence that had been established where a substantive due process interest did exist in the administrative context. Upon review, this Court agreed, providing the following analysis:

> As stated previously, section 944.277 is permissive, rather than mandatory, and is strictly an administrative mechanism to relieve prison overcrowding. Because provisional credits are solely implemented to relieve prison overcrowding, are in no way tied to an inmate's overall length of

> sentence, and create no reasonable expectation of release on a given date, no substantive or procedural "liberty" due process rights vest in an inmate under the statute. We note, however. that. even if section 944.277 did vest due process rights in an inmate, the level of evidence necessary to deny provisional credits would not rise to that necessary to convict; nor would the Secretary's determination necessarily be subject to second-guessing on review. As the United States Supreme Court held in Superintendent, Massachusetts Correctional Institution v, Hill, 472 U.S. 445, 105, S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985). only a "modicum" of evidence is necessary to support an administrative decision regarding inmates even when such a decision does involve due process rights.

Grant, 610 So. 2d at 432. (Emphasis added.)

Thus, this Court has concluded that the State did not create a liberty interest in its early release statutes. It has further noted that even assuming such an interest had indeed been created, the Legislature clearly would have met its burden in justifying the cancellation of credits. See also Langlev v. Sinsletarv, 645 So. 2d 961 (Fla. 1994) (even if a more stringent review were needed here--which we do not decide--we also believe the legislature has met the "some evidence" standard suggested by the United States Supreme Court in Hill).

In summary, Florida's early release statutes were not created as an inmate benefit, nor were they designed to foster rehabilitation, manage behavior, or reward for positive achievement. The statutes had the singular purpose of controlling prison overcrowding. Florida's courts are in the best position to determine the intent and purpose of its statutes and to interpret the provisions of its statutes. Unlike the task set forth for the Court in Sultenfuss, this Court has already declared not less than

seven times in as many years that Florida's early release statutes are solely procedural mechanisms for relieving prison overcrowding and unrelated to the overall length of sentence or the original punishment meted out. These declarations have been made in a variety of contexts (ex post facto analysis on more restrictive amendments, eligibility determinations, retroactive cancellation of credits) and have been consistent in substance that the Florida legislature conferred no entitlement to prisoners related to their punishments or otherwise. See, Blankenship, Rodrick, Felk, Grant, Tripp, Griffin, Langlev, susra. These state decisions with regard to the creation of a protected liberty interest have been upheld by the federal courts in Hock v. Singletarv, 41 F.3d 1470 (11th Cir. 1995)[18] and, most recently, in the cancellation context, in

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[18] In Hock, the Eleventh Circuit stated:

> In order to have a protectible right under the Due Process Clause, " 'a person clearly must have more than an abstract need or desire for [the right]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' " Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103-2104, 60 L.Ed.2d 668 (1979) (quoting Board of Resents v. Roth, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 2705-2706, 33 L.Ed.2d 548 (1972)).
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> Here, Florida Statutes §§ 944,277 and 947.146 are administrative, designed solely to relieve prison overcrowding. The petitioner had no reasonable expectation that the prison population would ever reach a level that would trigger the use of these early release mechanisms; he had no reasonable expectation of release on any given date. Thus, no liberty interest vests under theses statutes.

Id.

Magnotti v. Sinsletary, Case No. 94-4425 (11th Cir. 1995). (See attached district court opinion in Masnotti v. Sinsletary, Case No. 93-8554-Civ-Moreno, USDC-SD (Miami) and per curiam affirmance of Eleventh Circuit attached as Exhibits B and C, respectively.)

Accordingly, the petitions must be denied as to this issue.

IV. THE STATE DID NOT REDEFINE ITS PENOLOGICAL INTERESTS IN PETITIONER HOCK'S SENTENCE UPON THE ENACTMENT OF SECTION 944.277 PROVIDING FOR EARLY RELEASE DUE TO PRISON OVERCROWDING OR UPON ITS DECISION TO RETROACTIVELY CANCEL ALL EARLY RELEASE CREDITS. FLORIDA'S EARLY RELEASE MECHANISMS WERE REMEDIAL STATUTES ENACTED SOLELY TO CONTROL PRISON OVERCROWDING. THEREFORE, THE STATE WAS JUSTIFIED IN CANCELLING ALL FURTHER EARLY RELEASES UNDER THESE STATUTES WHEN SUCH RELEASES NO LONGER SERVED THE REMEDIAL PURPOSE ORIGINALLY INTENDED. [Petitioner Hock's Argument IV.C., pp. 24-39.]

Mr. Hock asserts an inherent federal liberty interest which he describes as "a fundamental right as a convicted citizen to be released from prison upon his satisfaction of the terms of incarceration established, imposed, and executed by law in accordance with the State's previously declared and settled interest." (Hock petition at 28.) Mr. Hock was convicted of second degree murder, an offense he committed on October 1, 1988. Mr. Hock received a 32-year term of incarceration. At sentencing, it was the state's intent that Mr. Hock serve that sentence in full, less any gaintime available to him under section 944.275, Florida Statutes, that he might earn for good behavior. Prison overcrowding was not a factor affecting the actual punishment meted out to Mr. Hock.

As overcrowding reached its crisis stage, the Florida

legislature enacted a series of early release mechanisms, including the provisional credits statute under section 944.277, that eliminated from eligibility the most violent or habitual offenders and allowed an incremental reduction in population, as needed, in the discretion of the Secretary. As other measures including the building of prison beds began to take effect and reduce overcrowding concerns, the Florida legislature systematically began to narrow the pool of inmates eligible for very early release due to prison overcrowding. The Legislature's efforts culminated in the retroactive cancellation of early release credits for some groups of violent offenders, including Mr. Hock, in 1992 and ultimately, the retroactive cancellation of pending early release balances for all prisoners in 1993 with the enactment of Florida's Safe Streets Act. See Ch. 93-406, Laws of Fla. In that Act, the legislature cites its intent:

> Section 1. This revision of the sentencing guidelines may be cited as the "Safe Streets Initiative of 1994," and is designed to emphasize incarceration in the state prison system for violent offenders and nonviolent offenders who have repeatedly committed criminal offenses and have demonstrated an inability to comply with less restrictive penalties imposed.
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> * * *
>
> Section 38. It is the intent of the Legislature that the requirements for space in correctional facilities resulting from the revisions to the sentencing guidelines and the other provisions of this act in the first 5 fiscal years following this act becoming a law stand as the commitment of the state to appropriate the necessary funding to actually construct and operate the requisite, sited correctional facilities from general revenue, the Grants and Donations Trust Fund of the Department of Corrections, or any other revenue or funding

source for said purpose.

Id.

The restrictive nature of the 1994 guidelines, the elimination of basic gaintime and the commitment to prison construction when coupled with the legislature's mandate that all early release credits be cancelled should make clear that it is the state's intent that overcrowding be wholly eliminated and that prisoners serve the sentences originally imposed. Mr. Hock claims that the state had included consideration of early release due to prison overcrowding in determining what the initial punishment should be. This is not true and this Court has repeatedly recognized that the Legislature has never tied overcrowding statutes to actual punishment imposed. See Rodrick, Griffin, supra. The state did not reassess its penological interests in having Mr. Hock serve his entire sentence when it implemented the various early release mechanisms. In fact, the Legislature made each mechanism for early release contingent upon the Secretary's exercise of discretion at various thresholds of lawful capacity so as to release only so many prisoners as would be necessary to control prison overcrowding. The provisional release statute established a "provisional release date" -- not the "mandatory release date" described by Mr. Hock. The term "provisional" connotes a contingency -- that contingency being that overcrowding still necessitated Mr. Hock's release upon reaching the provisional date. The Florida legislature took action prior to Mr. Hock's attaining the provisional release date, determining that certain

violent offenders such as murders and offenders committing crimes against law enforcement officers were poor risks to return to the community prior to full satisfaction of the original sentence imposed.[19]

Mr. Hock cites a series of parole and probation revocation cases to support his position that the only basis upon which the state could revoke the early release credits allocated him due to prison overcrowding are new, fault-based grounds. These cases are simply inapplicable here. Unlike parole and probation, the state and federal courts have repeatedly viewed overcrowding credits and early release due to their allocation as separate from a prisoner's punishment or his rehabilitative needs.[20] Florida's overcrowding credits were not earned for good behavior nor were they designed as a management or rehabilitative tool. See Rodrick,

---

[19] Mr. Hock accuses the State of impermissibly punishing him as the result of public attitudes toward the impending release of a notorious inmate, Donald McDougall, in December 1992. While the McDougall case gave rise to the review by the Florida Attorney General of the 1992 amendments to section 944.277, the opinion of the Attorney General that the legislature amended the early release statute to provide for retroactive cancellation of credits for certain violent offenders as of July 6, 1992, has been ratified by this Court. See Griffin, supra. Thus, regardless of the context under which the department's erroneous interpretation of the 1992 legislative amendments was revealed, the retroactive nature of these amendments is now a matter of settled state law.

[20] Compare Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991); Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994); Langley v. Singletary, 645 So. 2d 961 (Fla. 1994); Waite v. Singletary, 632 so. 2d 192 (Fla. 3d DCA 1994); Hock v. Sinsletary, 41 F.3d 1470 (11th Cir. 1995) with Sellers v. Bridges, 15 So. 2d 293 (Fla. 1943) (parole is that procedure by which a prisoner who must in any event be returned to society at some time in the future is allowed to serve the last portion of his sentence outside prison walls and under strict supervision, as preparation for his eventual return to society).

Griffin, Lanslev, Hock, supra. The state's early release mechanisms never assured Mr. Hock that the provisional credits allocated for overcrowding were indestructible -- no guarantees appear in either the administrative gaintime statute or the provisional credits statute that indicate once the overcrowding crisis passes a prisoner's provisionally calculated release date will nevertheless remain intact. Moreover, the probation and parole cases cited by Petitioner Hock address circumstances in the post-release context -- Mr. Hock never achieved his liberty. It is illogicalto suggest that credits allocated solely for the singular purpose of controlling overcrowding would inure to Mr. Hock any contingent liberty interest such that upon the elimination of the sole purpose for allocating the credits that Mr. Hock nonetheless should serve much less than the original sentence imposed under the law.

Finally, Mr. Hock asserts "[o]nce the State establishes its reasons for a certain term of confinement for certain purposes, it is not permitted repeatedly to assert generic, previously asserted reasons for later extending that confinement . . . [and] . . . [w]hen those initial reasons and purposes are declared and the justifications for the initial deprivation of liberty thereby established, then new and contemporary justifications are required for subsequent deprivations of liberty." Hock petition at 28. While Respondent does not concede in any fashion that Hock's actual term of confinement has been redefined or extended, even if such could be considered to have occurred, the state has ample and

legitimate justification for cancelling the credits. This Court has recognized that:

> Given the inherently contingent nature of provisional credits and administrative gain time and the strong societal interest, we hold that the court may not go behind the state's decision to cancel the provisional credits and administrative gain time of this inmate.
>
> * * *
>
> Revocation for present purposes has been confined to those inmates convicted of especially serious crimes, including murder, certain offenses against children, and certain sexual offense. In [this] case, the crime was second degree murder. We believe the state has more than sufficient reason because of its need to protect society in general from certain categories of felons.

Griffin, 638 So. 2d at 501-502.

> Even if a more stringent review were need here -- which we do not decide -- we also believe the legislature has met the "some evidence" standard suggested by the United States Supreme Court in Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985); see Griffin. As Respondent notes, administrative gain time and provisional credits were temporary devices for achieving federally mandated reduction in prison overcrowding. The legislature now has determined that the problem has lessened and that other devices are available that render administrative gain time and provisional credits redundant or unnecessary. These devices include increased building of prisons, front-end diversionary programs, and certain other early release programs.

Langley, 645 So. 2d at 962.

Mr. Hock complains that he is being unduly punished. He demands that he have the 360 days of provisional credits restored to him against his overall 32-year term simply because he had "a unilateral hope" that the overcrowding crisis would afford him a

very early release from the actual guidelines sentence imposed. His expectation of unconditional, mandatory release was not legitimate or shared by the state. This Court has never wavered on this point. While Mr. Hock may be disappointed he failed to receive the windfall of early release due to prison overcrowding, he has not been harmed by the state's requirement that he serve his sentence as originally imposed. The state's actions in this regard did not give rise to some inherent and fundamental federally protected liberty interest as Mr. Hock is not being restrained of his liberty beyond the sentence imposed upon him under Florida law. Accordingly, the Hock petition must be denied as to this issue.

Respectfully submitted,

SUSAN A. MAHER
DEPUTY GENERAL COUNSEL
Florida Bar No. 0438359

Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500
(904) 488-2326

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT SINGLETARY'S CONSOLIDATED RESPONSE TO PETITIONER CALAMIA'S INITIAL AMENDED BRIEF ON PETITION FOR WRIT OF HABEAS CORPUS AND PETITIONER HOCK'S PETITION FOR WRIT OF MANDAMUS** has been furnished by Federal Express to **R. MITCHELL PRUGH, ESQUIRE**, Middleton, Prugh & Edmonds, 303 State Road 26, Melrose, Florida 32666 and to **JOHN C. SCHAIBLE, ESQUIRE**, Florida Institutional Legal Services, Inc., 1110-C N.W. 8th Avenue, Gainesville, Florida 32601, on this 27th day of September, 1995.

SUSAN A. MAHER

CalaHock.RSC/SAM/sms

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
LAWTON CHILES
Secretary
HARRY K. SINGLETARY, JR.

An Affirmative Action/Equal Opportunity Employer

2601 Blair Stone Road • Tallahassee, FL 32399-2500

A F F I D A V I T

COUNTY OF LEON

Personally appeared before me this day Hugh Ferguson, who being duly sworn deposes and says that:

He is the Acting Bureau Chief of Admission and Release of the Department of Corrections and as such Acting Bureau Chief he is the official custodian of all inmate records pertaining thereto:

Russell Harris Calamia, DC #110297, was received by the Florida Department of Corrections on January 22, 1988, having been sentenced in the Circuit Court of Brevard County on January 14, 1988, for the following:

Case Number:	86-504
Term:	Forty (40) years less 250 days credit for time served prior to sentencing; after serving a period of twenty (20) years imprisonment the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of twenty (20) years. The court further ordered a three (3) year minimum sentence provision pursuant to Florida Statute section 775.087(2).
Offense:	Second Degree Murder
Date of Offense:	On or between January 2, 1986 and January 3, 1986

Based upon Opinion 92-96 of the Florida Attorney General rendered December 29, 1992, and clarified on December 31, 1992, inmates in the Department's custody as of July 6, 1992, are not eligible to retain provisional credits if convicted of crimes listed in section 944.277(1)(i) regardless of what date the crime was committed. Section 944.277(1)(i) excludes inmates who are convicted, or have been previously convicted, of committing or attempting to commit murder in the first, second, or third degree; or has ever been convicted of any degree of murder in another jurisdiction.

EXHIBIT
A

RE: Russell Harris Calamia, DC #110297

According to the Attorney General's opinion, the ineligibility of an individual convicted of an offense listed in s. 944.277(1)(i) applies retrospectively due to 1992 Legislative changes. Therefore, based on inmate Calamia's conviction for "Second Degree Murder", a total of 420 days of provisional credits were cancelled on May 7, 1993 .

IF, provisional credits had not been cancelled on May 7, 1993, pursuant to the Attorney General's opinion, inmate Calamia's release date as of June 16, 1993, would have been August 3, 1998.

Pursuant to Florida Statute 944.278 (effective June 17, 1993), all awards of administrative gain-time under s. 944.276, and provisional credits under s. 944.277, were cancelled for all inmates serving a sentence or combined sentences in the custody of the department, or serving a state sentence in the custody of another jurisdiction.

Currently, inmate Calamia's tentative release date is February 4, 1998.

The facts stated in the foreqoinq affidavit are based on information contained in the official files of the Department of Corrections

Hugh Ferguson, Acting Bureau Chief
Admission and Release Authority
Department of Corrections

Sworn and Subscribed before me
this 27th day of September, A.D.
1995, by Hugh Ferguson who is
personally known to me.

Notary Public

I

CHERYL T. DULA
MY COMMISSION # CC442525 EXPIRES
March 1, 1999
BONDED THRU TROY FAIN I-. INC.

UNITED STATES DISTRICT COURT?
SOUTHERN DISTRICT OF FLORIDA;.

CASE No. 93-8554-Civ-MORENO
MAGISTRATE JUDGE SORRENTINO

JOSEPH C. MAGNOTTI,

Petitioner,

v.

HARRY K. SINGLETARY,

Respondent.

FINAL JUDGMENT
HABEAS CORPUS

For the reasons stated in the report of the Magistrate Judge, and upon independent review of the file, it is

ORDERED AND ADJUDGED as follows:

1. This petition for writ of habeas corpus is denied.

2. All pending motions not otherwise ruled upon are denied, as moot.

DONE AND ORDERED at Miami, Florida, this 24th day of March, 1994.

UNITED STATES DISTRICT JUDGE

cc: Joseph C. Magnotti, Pro Se
Susan A. Maher, Esquire
Jason Vail, Esquire
CHS

EXHIBIT
B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-8554-Civ-MORENO
MAGISTRATE JUDGE SORRENTINO

JOSEPH C. MAGNOTTI,

Petitioner,

v.

HARRY K. SINGLETARY,

Respondent.

REPORT OF
MAGISTRATE JUDGE

Joseph C. Magnotti, a state prisoner confined at Glades Correctional Institution, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2241.

This action, initially filed in the Northern District of Florida as Case No. 93-40352-MP, was transferred to this District on October 5, 1993, and assigned Case No. 93-8554-Civ-Moreno.

Magnotti also filed a pro se complaint for damages in the Northern District, Case No. TCA 93-40067-WS, concerning the cancellation of his provisional credits, which case was stayed pending resolution of the habeas corpus issues.

In this action Magnotti complains that, he was denied provisional credits in January 1993. This, he contends, deprived him of due process of law and equal protection, and violated the

prohibition against ex post facto laws under the United States Constitution.

For its consideration of this petition the Court has the state's response to an order to show cause with multiple exhibits, and the petitioner's reply.

On February 11, 1987, Magnotti was convicted of Murder in the Second Degree in Case No. 86-9270-CF-10 in the Circuit Court for the Seventeenth Judicial Circuit of Florida, at Broward County. On March 12, 1987, Magnotti was convicted in the same Court of Possession of PCP in Case No. 85-13248-CF-10. He was sentenced in both cases on March 12, 1987. He received a term of twenty years imprisonment, less credit for time served, to be followed by two years community control on the murder charge; and a concurrent term of five years imprisonment, less credit for time served, in the drug case.

Magnotti was received by the Department of Corrections on March 17, 1987, to begin serving the twenty year sentence. His release date was advanced to January 1, 1993, in part through the application of provisional release credits under Section 944.277 of the Florida Statutes. However, pursuant to Opinion 92-96 of the Florida Attorney General rendered on December 29, 1992, the DOC cancelled 1350 days of provisional credits previously allotted to Magnotti and extended his release date.

Issues raised in a federal habeas corpus proceeding must be fairly presented **in** the state courts and thereby exhausted. Anderson v. Harless, 459 U.S. 4 (1982); Atkins v. Att'y Gen. of Alabama, 932 F.2d 1430 (11 Cir. 1991); Hutchins v. Wainwriqht, 715 F.2d 512 (11 Cir. 1983). Although the doctrine requiring exhaustion for state -judicial or administrative remedies is codified only in 28 U.S.C. §2254 and not 28 U.S.C. §2241, the Courts have fashioned such a requirement for §2241. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Kvle v. Hanberry, 677 F.2d 1386 (11 Cir. 1982); Davis v. Paqe, 640 F.2d 599 (5 Cir. 1991)(en banc); Ahn v. Levi, 586 F.2d 625 (1978); Brown v. Estelle, 530 F.2d 1280 (5 Cir. 1976).

In its response the respondent contends that Magnotti has not properly exhausted his state remedies as **to** the **claim** that he is entitled to restoration of provisional credits. The respondent argues that although the **claim** was first raised in the Florida Supreme Court and denied, Magnotti subsequently raised the **claim in** the Fifteenth Judicial Circuit of Florida, at Palm Beach, and failed to appeal from that Court's order of denial which was entered on October 15, 1993.

The record reveals that the claim regarding provisional credits was raised by Magnotti **in** the **Supreme Court** of Florida **in** an Emergency Petition for Writ of Habeas Corpus, Case No. 81,062. In that proceeding, however, the claim was couched only **in** terms of

denial of due process and equal protection. Magnotti did not allege an ex post facto violation. On March 2, 1993, the Supreme Court of Florida entered an order stating that the petition, "having been duly considered," was denied. (DE# 5, Exs. D & F).

When Magnotti again complained about the denial of provisional credits, this time in the Palm Beach Circuit Court, he raised an ex post facto argument for the first time. (DE# 5, Ex. J). Magnotti, however, only alleged that the purported ex post facto violation offended Florida's Constitution. The Circuit Court denied the petition, reasoning in pertinent part that because the claim for restoration of provisional credits was previously litigated in Case No. 81,062 in the Florida Supreme Court, the claim was barred by the principles of res judicata. (DE# 5, Ex. L). Magnotti did not appeal.

Magnotti has not fully exhausted his state remedies as to the ex post facto claim which was raised in the state Circuit Court. See: Leonard v. Wainwright, 601 F.2d 807, 808 (5 Cir. 1979).

The ex post facto claim raised by Magnotti in the Fifteenth Judicial Circuit is not the same issue raised in this proceeding. It was not until the filing of the petition in this federal habeas corpus proceeding that Magnotti first argued that the cancellation of provisional credits was a violation of the prohibition against ex post facto laws under the United States Constitution.

It would, however, be a waste of judicial resources to require Magnotti to return to the Florida Courts in an attempt to **further** exhaust this ex post facto claim since clearly it is without merit, for reasons which are discussed below.

The statute at issue, Fla.Stat. §944.277 (Supp. 1988), is a prison population control statute. As described by the Florida Supreme Court, the statute provides in pertinent part:

> . . . that when the inmate population of the correctional system reaches a certain percentage of lawful capacity the department may grant provisional credits to all prisoners except those convicted of certain crimes or serving certain types of sentences.

Dugger v. Rodrick, 584 So.2d 2, 2-3 (Fla. 1991).

The petitioner's first claim is that he was deprived of a liberty interest without due process.

Liberty interests protected by the Fourteenth Amendment may arise from either the Constitution itself or the laws of a state. Hewitt v. Helms, 459 U.S. 460, 466 (1983); Francis v. Fox, 838 F.2d 1147 (11 Cir. 1988).

In the present case the petitioner argues that the interest in question arises from the enactment of a state statute. In general, for an liberty interest to be created in this manner it is required that there be statutory "language of an unmistakably mandatory

character ." See: Chandler v. Baird, 926 F.2d 1057, 1060 (11 Cir. 1991); Ingram v. Papalia, 804 F.2d 595, 597 (10 Cir. 1986), citing, Hewitt v. Helms, 459 U.S. 460, 471 (1983).

Accordingly, the validity of Magnotti's due process claim hinges on whether a liberty interest in provisional credits has been created by statute or regulation.

Where official action is discretionary, no liberty interest is created. Francis v. Fox, supra at 1149.

It is clear, as discussed in the Florida Supreme Court's opinions in Dugger v. Rodrick, supra; Dugger v. Grant, 610 So.2d 428 (Fla. 1992), and more recently in Griffin v. Sinsletarv, _____ So.2d _____, (Fla. No. 82,452, Feb. 24, 1994), that the Florida Legislature did not intend to confer an expectation upon Florida Inmates such as the petitioner that early release credits would continue to be applied to shorten their sentences. The provisional credits in §944.277 were contemplated not as a prisoner entitlement but merely as an escape valve which would be triggered only by the need to alleviate overcrowding in the state prison system.

The statute in pertinent part requires that the Secretary of the DOC shall certify to the Governor that the inmate population has reached a specified percentage of lawful capacity. The statute, however, states that when the Governor acknowledges this

condition in writing the Secretary may grant a certain number of provisional credits equally to each inmate who is earning incentive gain time.

Thus, although 5944.277 contains mandatory language regarding the manner in which provisional credits are to be administered, there is no mandatory language conferring upon the prisoners an entitlement or right to benefit from provisional credits.

Magnotti also fails to establish that he was deprived of equal protection under the law.

The Equal Protection Clause does not require that all persons be treated identically, but if distinctions between similarly situated individuals are to withstand an equal protection analysis, the distinctions must be reasonable, not arbitrary, and must rest on grounds having a fair and substantial relation to the object of the legislation. Hendking v. Smith;'.781 F.2d 850, 851 (11 Cir. 1986).

After the enactment of §944.277 and the rendering of Attorney General's Opinion 92-96, the Florida Legislature began to restrict the population of inmates which would be eligible for early release due to prison overcrowding. Section 944.277, as amended in 1992, now provides that an expanded group of inmates who have committed certain offenses cannot be granted provisional credits even if the

Secretary exercises his discretion to. grant provisional credits. Section 944.277 (l)(i), Florida Statutes (1992 Supp.) prohibits the award of provisional credits to an inmate who has been convicted of murder, regardless of when or where the conviction occurred; and 5944.278 in pertinent part directs that all previous unused balances of provisional credits be cancelled for all inmates in custody as of June 17, 1993.

The Florida Legislature initially enacted 5944.277 in 1988 for the purpose of providing a mechanism to alleviate prison overcrowding. The Legislature has now seen fit to amend that mechanism, and in doing so has retroactively eliminated the possibility that inmates such as Magnotti, who are convicted of serious offenses such as murder, might be released early through the granting of provisional credits. Here the distinction between inmates who in January of 1993 remained eligible to receive grants of-provisional credits and those who did not is clearly reasonable and not arbitrary; and this distinction clearly is rationally related to the object of the legislation: relieving prison overcrowding without placing the general public at risk through the early release of violent offenders. See: Griffin v. Sinsletarv, Hendking v. Smith, and Conloque v. Shinbaum, supra.

The provisions affecting whether Magnotti could benefit from a grant of provisional credits therefore did not cause a denial of equal protection.

Last, Magnotti contends that **the retroactive forfeiture of** provisional credits after the Attorney General's Opinion No. 92-96 violates the ex post facto prohibition.

To fall within the ex post facto prohibition, a law must be 1) retrospective in application, and 2) disadvantageous to the offender affected by it. Id., at 430. However, not every law that may "work to the disadvantage of a defendant," falls within the prohibition. Dobbertv. Florida, 432 U.S. 282, 293 (1977). The central purpose of the Ex Post Facto Clause is to prevent a lack of fair notice and governmental restraint when the legislature imposes a punishment for an act which was not punishable at the time it was committed, or increases the possible punishment after a crime is committed. Miller v. Florida, 482 U.S. 423, 429 (1987); Weaver v. Graham, 450 U.S. 28 (1980); Dobbert, supra; Paschal v. Wainwright, 738 F.2d 1173, 1176, n.4 (11 Cir. 1984). This is not what happened in this case.

An award of provisional credits under s944.277 is merely a procedural device to reduce prison population, and not a substantive matter of punishment or reward. Duaqer v. Rodrick, supra.

Moreover, the1992 statutoryamendmentprecluding an expanded group of persons convicted of certain offenses from being eligible to benefit from grants of provisional credits. In the petitioner's case §944.277(1)(i), which exempts persons convicted of murder, was

also procedural in nature and not.. a substantive matter of punishment or reward. See: Dugger v. Rodrick.

In Griffin v. Singletary, supra, the Supreme Court of Florida noted that it had previously held in Dugger v. Rodrick that the state's unilateral decision to restrict provisional gain time does not trigger the constitutional issues that would be present if some other form of gain time such as basic or incentive gain time were at stake. The Court explained, as follows:

> The reason is that provisional gain time is not a reasonably qualifiable expectation at the time an inmate is sentenced. Rather, provisional gain time is an inherently arbitrary and unpredictable possibility that is awarded based solely on the happenstance of prison overcrowding. Thus, provisional gain time is in no sense 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 gain time is not subject to the prohibition agianst ex post facto laws.

Griffin v. Singletary, supra (citing Dugger v. Rodrick, at 4).

In short, the retroactive denial of provisional credits to the petitioner Magnotti did not offend the Ex Post Facto Clause of the United States Constitution.

In his reply to the response to order to show cause the petitioner complains that if his provisional credits had not been forfeited in January of 1993 he would have been released, and he therefore would have been unaffected by the subsequent legislative

action, as embodied in 5944.278, cancelling all balances of unused provisional credits effective June 1993. This argument is to no avail, since, as discussed supra, the petitioner was not entitled to the provisional credits as a matter of right, and the forfeiture of the credits in January of 1993 did not amount to a deprivation of due process or equal protection, or an ex post facto violation.

In its recent opinion in Griffin v. Sinsletarv, supra, the Supreme Court of Florida addressed petitioner Griffin's claim that the provisional gain time could not be cancelled once it was awarded, noting that the claim is essentially a question of due process. The Court further noted that while basic and incentive gain time may become "vested" once they are awarded, it had previously held that

> any due process interest in provisional gain time is far less, due to its peculiarly contingent nature and the fact that the state has great discretion in revoking or limiting provisional credits.

Griffin v. Singletary, supra (citing Duqqer v. Grant).

The Supreme Court of Florida has also noted that the United States Supreme Court has only required that "some evidence" support the decision to revoke in this context. Griffin v. Singletary, supra; Duqqer v. Grant, supra at 432 (quoting Superintendent v. Hill, 472 U.S. 455, 456 (1985)).

The **Griffin.** court **reasoned that the** State **"has** identified a legally sufficient reason to revoke provisional and administrative gain time for inmates such as Griffin." Noting that the revocation for present purposes **"has** been confined to those inmates convicted of especially serious offenses, including murder, certain offenses against children, and certain sexual offenses," the Court stated its belief **"that** the state has **a** more than sufficient reason because of its need to protect society in general from certain categories of **felons."** Griffin v. Singletary, supra.

In denying inmate Griffin's petition, the Florida Supreme Court stressed that it is not the duty of the courts to question the action of the Florida Legislature. The Court concluded its opinion in Griffin v. Singletary, stating as follows:

> Given the inherently contingent nature of provisional gain time and the strong societal interest, we hold that the courts may not go behind the state's decision to cancel the provisional and administrative gain time of this inmate. This conclusion is only reinforced by the fact that the instant cancellation was pursuant to newly enacted legislation that will be applicable to all similarly situated inmates. Absent this legislative authorization, DOC might have been required to initiate proceedings to cancel the gain time.

(Id.).

The petitioner in this case and the defendant/petitioner in Griffin v. Singletary were both convicted of murder in the second degree. It is clear that both men are similarly situated.

For the above stated reasons it is recommended that this petition for writ of habeas corpus be denied.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: March 2, 1994

CHIEF MAGISTRATE JUDGE

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEAL

FOR THE ELEVENTH CIRCUIT

No. 94-4425

D. C. Docket No. 93-8554-CIV-FA

JOSEPH C. MAGNOTTI,

Petitioner-Appellant,

versus

HARRY K. SINGLETARY, ROBERT A. BUTTERWORTH, Attorney General,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Florida

(September 11, 1995)

Before BLACK, Circuit Judge, HILL, Senior Circuit Judge, and ALAIMO*, Senior District Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

* Honorable Anthony A. Alaimo, Senior U.S. District Judge for the Southern District of Georgia, sitting by designation.

[1] 11th Cir. R. 36-1 provides:
When the court determines that any of the following circumstances exist:
(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law;
and an opinion would have no precedential value, the judgment or order may be affirmed or enforced
•)(♦=□♦♦ opinion*