IN THE SUPREME COURT OF FLORIDA

RUSSELL CALAMIA,

Petitioner,

vs.

DOCKET NO.: 84,088

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

Respondent.

INITIAL AMENDED BRIEF OF PETITIONER

ON REMAND FROM THE UNITED STATES SUPREME COURT

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PREFACE

Both administrative credits awarded under repealed section 944.276, Florida Statutes (1987) and provisional credits awarded under repealed section 944.277, Florida Statutes (Supp. 1988) will be referred to as "early-release credits" to avoid confusion with other forms of gain-time or credit provided by statute or agency rule.

STATEMENT OF THE CASE

On July 27, 1994 the Petitioner filed a petition for writ of habeas corpus before this Court. This Court denied the petition for a writ of habeas corpus on September 15, 1994. *Calamia v. Singletary*, 645 So. 2d 450 (Fla. 1994) (table).

Petitioner then filed a petition for certiorari review of this Court's order with the United States Supreme Court. That Court summarily vacated this Court's order and judgment without briefing and remanded for reconsideration in light of its 1995 *California Department of Corrections v. Morales* decision. *Calamia v. Singletary*, 115 S. Ct. 1995, 131 L. Ed. 2d 998 (1995) (memorandum decision).

STATEMENT OF FACTS

The verified petition for habeas corpus alleges the following facts.[1]

On or about January 28, 1986, Petitioner was charged by indictment with one count of first degree murder, a capital felony punishable by life imprisonment or death, allegedly committed on January 3, 1986. In December of 1987 a jury was selected for Petitioner's trial and the trial began shortly thereafter.

The state attorney and Petitioner's trial attorney held extended plea negotiations before and during trial. During trial, the state attorney offered to reduce the charge to one count of second degree murder in exchange for Petitioner's plea of *nolo contendere*. In explaining this offer, Petitioner's trial attorney explicitly assured Petitioner that he would be eligible to earn administrative gain-time and "good time" which would be applied to reduce his sentence after Petitioner completed any minimum mandatory portion of Petitioner's sentence.

Based on his trial counsel's assurances, Petitioner agreed to enter a plea of *nolo contendere* to second degree murder. Petitioner materially relied on his future eligibility for administrative gain-

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1 The undenied allegations in a verified petition for habeas corpus are assumed true. *State v. Coleman*, 149 Fla. 28, 5 So. 2d 60, 61 (1941); *Ex parte Hyde*, 140 Fla. 494, 192 So. 159, 160 (1939); *Skipper v. Schumacher*, 124 Fla. 384, 169 So. 58, 65, *cert. denied*, 296 U.S. 578, 56 S. Ct. 88, 80 L. Ed. 408 (1936).

time and a possibility of a decreased sentence under section 944.276, Florida Statutes (1987) in deciding to agree to enter a plea of *nolo contendere.*

On December 10, 1987, the Circuit Court of the Eighteenth Judicial Circuit, Brevard County, Florida, accepted the negotiated plea under which the petitioner pleaded *nolo contendere* to second degree murder.

On January 14, 1988 the trial court sentenced Petitioner to a term of incarceration of twenty years, including a three year minimum mandatory sentence for use of a firearm. Petitioner was accredited with 250 days towards his sentence for time previously served.

Petitioner is currently confined at Polk Correctional Institution pursuant to that judgment and sentence.

There are no other sentences, concurrent or consecutive, pending against Petitioner. Petitioner was eligible at the time of his conviction for administrative gain-time under section 944.276, Florida Statutes (1987), excluding the three year minimum mandatory portion of the sentence.

Section 944.276(1) Florida Statutes provided that when the inmate population reached 98 percent of lawful capacity the Secretary of the Department of Corrections ("DOC") had authority to award up to 60 days administrative gain-time to all inmates who were earning incentive gain-time. The DOC Secretary awarded

administrative gain-time to all eligible DOC inmates from February 16, 1987 until June 30, 1988.

On June 18, 1988 the Florida Legislature repealed section 944.276 and substituted the Provisional Credits Act, Chapter 88-122, Laws of Florida (codified, as amended, at § 944.277, *Fla. Stat.* (Supp. 1988)). The 1988 Act lowered the triggering percentage from 98 percent to 97.5 percent and required the DOC to give credits to all eligible inmates earning incentive gain time. The DOC immediately began awarding provisional credits and continued doing so.

On May 8, 1990 Petitioner completed his three year minimum mandatory sentence and the DOC began to award Petitioner both incentive gain time for meritorious behavior and provisional credits under the 1988 Provisional Credits Act.

The DOC awarded Petitioner a total of 420 days (1 year, 1 month and 25 days) provisional credits between May 8, 1990 and January 1991 in addition to Petitioner's accrued incentive gain time. Petitioner's provisional release date was August 23, 1998 based on provisional credit days actually awarded to Petitioner through January 1991.

Effective July 6, 1992, the Florida Legislature amended Section 944.277(1) and excluded persons incarcerated for second-degree murder from provisional release credit eligibility. The statute did not state it was to be applied retroactively.

On December 29, 1992 the Attorney General of Florida issued Attorney General Opinion 92-96. The Attorney General interpreted the 1992 amendments to the provisional release law to require the DOC to apply the exclusions in sub-sections 944.277(1) (h) and (i) retrospectively to all inmates in the custody of the DOC on July 6, 1992. In addition the Attorney General instructed the DOC to void all provisional credits previously awarded to offenders covered by sub-section 944.277(1) (h) and (i).

On May 7, 1993, pursuant to the Attorney General's opinion, the DOC applied the amended exclusions retroactively and revoked Petitioner's 420 accumulated days of provisional release credits and canceled Petitioner's provisional release date of August 23, 1998.

The DOC canceled Petitioner's accumulated provisional release credits without notice to Petitioner or opportunity for hearing by the Petitioner.

On June 17, 1993 the Florida Legislature's Safe Streets Initiative of 1994, Chapter 93-406, Laws of Florida, became effective. Section 35 of the Safe Streets Initiative of 1994, codified at section 944.278 Florida Statutes (1993), canceled all administrative and provisional credits awarded under prior statute sections 944.276 and 944.277.

Had the Petitioner's credits not been canceled by the DOC, pursuant to the Attorney General's opinion, they would have been lost due to provisions of section 944.278 Florida Statutes (1993).

Petitioner's sentence is 420 days longer than it would have been under the statute that was in force when he was sentenced as a result of the retroactive application of section 944.277(1)(i) Florida Statutes (Supp. 1992) and the passage of section 944.278 Florida Statutes (1993).

Additionally, Petitioner lost the opportunity to continue to earn provisional credits as he was eligible to do under section 944.277, Florida Statutes (Supp. 1988-1991) at the time he was sentenced. Petitioner would be entitled to immediate release if Petitioner had continued to accrue provisional credits through the original date of petition to this Court.

STATEMENT OF JURISDICTION

This Court has jurisdiction in this case under Article V, § 3(b)(9), Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(3).

SUMMARY OF ARGUMENT

1. Summary revocation of Petitioner's awarded provisional credits, and, revocation of future eligibility for provisional credits under the authority of section 944.278, Florida Statutes (1993) and section 944.27(1)(h), Florida Statutes (Supp. 1992) violates the *Ex Post Facto* Clause of the Florida and United States Constitutions because the laws are retroactive and disadvantage the Petitioner.

The decision of the United States Supreme Court in *California Department of Corrections v. Morales*, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995) holds that a law is *ex post facto* punishment if it lengthens the actual duration of confinement. The retroactive revocation of early-release credits lengthens the actual duration of punishment and is therefore a proscribed *ex post facto* punishment. This Court's prior decisions in *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994) and its predecessors must be modified in light of the *Morales* ruling. Further, the Florida Statutes awarding early-release credits are not purely procedural laws, contrary to prior holdings of this Court, because they are of the same nature that this Court held makes incentive gain-time a protected, non-procedural interest. The statutes violate the *Ex Post Facto* Clause because they revoke all

awarded early-release credits which Petitioner earned by good prison conduct.

2. Retroactive application of section 944.278, Florida Statutes (1993) and section 944.27(1)(h), Florida Statutes (Supp. 1992) are unconstitutional Bills of Attainder because they inflict punishment against identifiable individuals without judicial trial. The punishment is increased length of confinement. Increased length of confinement is a historical form of punishment. Also, the legislative history and intent of section 944.278, Florida Statutes (1993) and section 944.27(1)(h), Florida Statutes (Supp. 1992) show an intention to increase the duration of confinement in prison. The identifiable individuals are persons incarcerated by the Department of Corrections.

3. Respondent's summary revocation of Petitioner's awarded provisional credits without advance notice, opportunity for hearing, or written explanation violates the Due Process Clause of the Florida and United States constitutions. Petitioner has a vested liberty interest in the provisional credits already awarded him under Florida statutes. Petitioner also has a vested liberty interest in the statutes and rules controlling how provisional credits may be revoked.

ARGUMENT

Petitioner challenges two distinct actions: (1) the retroactive revocation of Petitioner's 420 days of early-release credits already awarded, and (2) the revocation of Petitioner's future eligibility for early-release credits.

ARGUMENT I: FLORIDA SECTIONS 944.278 (1993) AND 944.277(1) (Supp. 1992) ARE UNCONSTITUTIONAL *EX POST FACTO* LAWS

The United States Supreme Court vacated and remanded this case for reconsideration in light of *California Department of Corrections v. Morales*, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995). The *Morales* decision mandates relief be given for both revocation of awarded credits, and, revocation of future eligibility to receive early-release credits.

The United States Supreme Court held in *Morales* that California's reduction in the frequency of parole violation hearings for an indeterminate life sentence did not violate the federal *Ex Post Facto* Clause. *California Dep't of Corrections v. Morales*, 115 S. Ct. at 1599, 131 L. Ed. 2d at 592. In so holding, the Court distinguished a change impacting sentence length from the frequency of California parole hearings because there was no "reason to conclude that [California's] amendment will have any effect on any prisoner's actual term of confinement . . . ." *Morales*, 115 S. Ct. at 1604, 113 L. Ed. 2d at 599. The Court specifically found that

California's amendment "left unchanged the substantive formula for securing any reductions to [the] sentencing range." *Morales*, 115 S. Ct. at 1602, 131 L. Ed. 2d at 595. And while the Court did not state "what legislative adjustments will be held to be of sufficient moment to transgress the constitutional prohibition" against *ex post facto* laws, the Court did confirm it will determine *ex post facto* laws by whether a change in law "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 115 S. Ct. at 1603, 131 L. Ed. 2d at 597 (citation and internal quotation marks omitted).

The central holding in *Morales* is increased punishment violating the *Ex Post Facto* Clause is identified by whether a change has "any effect on any prisoner's actual term of confinement." *Morales*, 115 S. Ct. at 1604, 131 L. Ed. 2d at 599. The Court clearly included all factors effecting length of confinement: "Other adjustments to mechanisms surrounding the sentencing process should be evaluated under the same standard." *Morales*, 115 S. Ct. at 1603, n.4, 131 L. Ed. 2d at 596.

To illustrate, the Court contrasted California's amendment to "the laws at issue in *Lindsey*, *Weaver*, and *Miller* (which had the purpose and effect of enhancing the range of available prison terms . . . .)" *Morales*, 115 S. Ct. at 1602, 131 L. Ed. 2d at 596. The Court reaffirmed that: "*Weaver* and *Miller* held the *Ex Post Facto* Clause forbids the States from enhancing the measure of punishment by altering the substantive 'formula' used to calculate the applicable

sentencing range." *Morales*, 115 S. Ct. at 1601, 131 L. Ed. 2d at 594. Specifically, "[t]he statute that the petitioner challenged and that we invalidated [in *Weaver*] retroactively reduced the amount of 'gain time' credits available to prisoners under this formula." *Id.* The *Weaver* decision is the binding precedent in this action.

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

There is no question that Florida's revocation of the early-release credits already distributed to inmates increases the actual length of confinement. Petitioner's confinement increased by 420 days. There is no question that Florida lawmakers intended for revocation of early-release credits to keep inmates in prison longer. *Op. Att'y Gen. Fla.* 92-96 (1992); Ch. 93-406, § 1, *Laws of Fla.* There remains no question, therefore, that lengthening actual confinement by revoking already awarded credits violates the *ex post facto* proscription as set forth in *Morales* and *Weaver*.

This Court previously held early-release credits were purely procedural laws outside the *ex post facto* proscription because award of the credits was not a quantifiable expectation at the time

of sentencing. *E.g., Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994) (loss of accrued administrative and provisional credits from single 1986 incident); *Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991) (inmate excluded from earning future provisional credits based on type of offense), *cert. denied sub nom. Rodrick v. Singletary*, 112 S. Ct. 886, 116 L. Ed. 2d 790 (1992); *Blankenship v. Dugger*, 521 So. 2d 428 (Fla. 1988) (inmate excluded from earning future administrative credits based on offense); *see also, Dugger v. Grant*, 610 So. 2d 428, 430 (Fla. 1993) (reaffirming provisional credit law is procedural).

It is correct the *ex post facto* proscription does not apply to a purely procedural law, but "a change in the law that alters a substantial right can be ex post facto even if the statute takes a seemingly procedural form." *Miller v. Florida*, 482 U.S. 423, 433, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987) (citation and internal quotation marks omitted). A procedural law narrowly refers to "procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Collins v. Youngblood*, 497 U.S. 37, 45, 110 S. Ct. 2715, 111 L Ed. 2d 30 (1990). Clearly, "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause." *Collins*, 497 U.S. at 46; *accord, Weaver v. Graham*, 450 U.S. 24, 31, n.15, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). This Court is in agreement: "For *ex post facto* purposes, the question is not what name a particular form of 'credit' or 'gain time' has, but what its actual effect is." *Griffin v. Singletary*, 638 So. 2d 500, 501, n.1 (Fla. 1994).

This Court's decision in *Griffin*, and the predecessor opinions, now must be modified after the *Morales* decision.[2] A law is *ex post facto* under *Morales* if it increases actual duration of confinement. Revocation of 420 days early-release credits increased Petitioner's duration of confinement. That increase, whether retroactive application of section 944.277(1) (Supp. 1992) or application of section 944.278 (1993), is *ex post facto* and unconstitutional.

The *Griffin* decision should also be modified after *Morales* to restore eligibility for provisional credits. *Griffin* merits close analysis on this basis.

Griffin distinguishes a constitutional difference between gain-time and early-release credits. *Griffin* acknowledges that basic and incentive gain-time are constitutionally protected interests. *Griffin v. Singletary*, 638 So. 2d 500, 501 (Fla. 1994). *Griffin* distinguishes early-release credits from gain-time by noting credits "are not a reasonably quantifiable expectation at the time an inmate is sentenced." *Griffin*, 638 So. 2d at 501. The opinion declares credits are "in no sense tied to any aspect of the original sentence" and cannot factor into plea decisions. *Id.* The opinion

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2 Arguably, *Griffin* is inapposite to this case. *Griffin* addresses the loss of awarded credits as a due process issue, not *ex post facto* violation. *Griffin v. Singletary*, 638 So. 2d 500, 501 (Fla. 1994). The result in *Griffin*, however, should be modified to give relief under the *Ex Post Facto* Clause.

also notes award of credits is "based solely on the happenstance of prison overcrowding." *Id.*

Not so. The award of credits to inmates was based on prison overcrowding, and, an inmate's eligibility for incentive gain-time. § 944.277(1), *Fla. Stat.* (Supp. 1988). The provisional credit statute expressly restricted eligibility to each "inmate who is earning incentive gain-time" less certain excluded categories. § 944.277(1), *Fla. Stat.* (Supp. 1988); *see also*, § 944.276, *Fla. Stat.* (1987) (administrative credits available "to all inmates who are earning incentive gain-time . . . .") Only inmates who obey prison rules and work are eligible for incentive gain-time. § 944.275(4)(b), *Fla. Stat.* (1987). Therefore, every inmate who received early-release credits was obeying prison rules and participating in work or programs.

This Court identified the inmate's compliance with prison rules and performing tasks as factors identifying a substantive right in incentive gain-time. *See Waldrup v. Dugger*, 562 So. 2d 687, 692 (Fla. 1990) (citing *Weaver v. Graham*); *see also, Raske v. Martinez*, 876 F.2d 1496, 1500 (11th Cir.) ("if the State affords its inmates such work, it is bound to reward prisoners for their services . . . ."), *cert. denied*, 493 U.S. 993, 110 S. Ct. 543, 107 L. Ed. 2d 540 (1989). An inmate conforming his prison behavior for early-release credits has a same protected interest in those credits as incentive gain-time.

Both early-release credits and incentive gain-time are tied to the original sentence to the same degree. Both laws define when an inmate is released. *Compare* §§ 921.001(10)(d), (11)(d), *Fla. Stat.* (Supp. 1988) (release on provisional release date) *with* § 921.001(11)(b), *Fla. Stat.* (Supp. 1988) (release on sentence expiration caused by accumulated gain-time). Both laws set maximum awards available to inmates. *Compare* § 944.277(1), *Fla. Stat.* (Supp. 1988) (provisional credits limited to 60 days per award) *and* § 944.276(1), *Fla. Stat.* (1987) (administrative credits limited to 60 days per award) *with* § 944.275(4)(b), *Fla. Stat.* (1987) (incentive gain-time limited to 20 days per month).

Credits and incentive gain-time are equally susceptible to advance prediction. Indeed, advance quantification of early-release credits has fewer uncertainties than prediction of incentive gain-time, a protected interest. First, incentive gain-time is contingent; there is no right to require the Department of Corrections to create opportunities to earn incentive gain-time. *See Pettway v. Wainwright,* 450 So. 2d 1279 (Fla. 1st DCA 1984). Second, the actual award of incentive gain-time is unknown; indeed, Respondent has near-absolute discretion in the amount of incentive gain-time awarded even if the inmate participates in earning it. *See Turner v. Singletary*, 623 So. 2d 537 (Fla. 1st DCA 1993); *Fla. Admin. Code R.* 33-11.0065 (1993) (stating factors, such as attitude, courtesy and respect). Third, incentive gain-time is awarded at the institutional level and its availability is contingent upon the availability of work

or programs offered at the correctional facility where an inmate is assigned. *Fla. Admin. Code R.* 33-11.0065(3)(a) (1993). Fourth, interpretation of performance and award of incentive gain-time also necessarily varies among correctional institutions making award. This makes the amount of gain-time vary by institution and fully unpredictable in advance. Fifth, both the Florida Legislature and the DOC continually amend incentive gain-time laws and regulations making the advance prediction of incentive gain-time at sentencing completely unpredictable. Sixth, incentive gain-time is subject to forfeiture while in prison; early-release credits can only be forfeited after release on provisional release. *Compare* § 944.277(7), *Fla. Stat.* (Supp. 1988) (forfeiture of provisional credits after release) *with* § 944.28, *Fla. Stat.* (1987-1993) (forfeiture of incentive gain-time).

While incentive gain-time is not certain or predictable at sentencing, this Court nevertheless has held incentive gain-time a substantive, statutory liberty interest. *Waldrup v. Dugger*, 562 So. 2d 687 (Fla. 1990). There is no principled distinction between an inmate whose good behavior creates eligibility for incentive gain-time upon the happenstance of available work or programs at a particular correctional institution and an inmate whose good behavior creates eligibility for credits against a sentence upon the real and re-occurring condition of prison overcrowding in Florida.

As the federal Tenth Circuit correctly concluded, there is no real difference under the United States *Ex Post Facto* Clause

between retroactive reductions in "earned" credits and retroactive reduction in overcrowding or "emergency" credits. *Arnold v. Cody*, 951 F.2d 280, 283 (10th Cir. 1991). Both violate the *ex post facto* prohibition.

The federal courts are divided on whether retroactive cancellation of eligibility for early-release credits violates the *Ex Post Facto* Clause. The Eleventh Circuit, relying in part on this Court's opinions, recently concluded canceling eligibility for provisional credits and control release under section 947.146, Florida Statutes, did not violate the *ex post facto* proscription. *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995). Importantly, "[t]he cancellation of provisional credits [was] not an issue on appeal" in the *Hock* decision. *Hock*, 41 F.3d at 1471, n.1.

Hock suffers from the same criticisms as *Griffin*, as well as, a systemic confusion between the Department of Correction's award of provisional credits under section 944.277 and the Florida Parole Commission's control release system set-up under section 947.146, Florida Statutes. The *Hock* opinion concludes the loss of eligibility for provisional credits and control release do not effect the quantum of punishment because the retroactive changes to these two separate programs are "procedural." *Hock*, 41 F.3d at 1472.

Hock is not persuasive even if the systemic confusion between provisional credits and control release is ignored. First, *Hock* states "[t]he control release statute" occurs "automatically" without inmates "exhibiting good behavior." *Id.* This is an incorrect

statement about provisional credits; only inmates receiving incentive gain-time, and therefore, only inmates exhibiting good behavior receive provisional credits. § 944.277(1), *Fla. Stat.* (Supp. 1988).

Second, Hock states "there is no relationship between eligibility for and receipt of control release and the length of the original sentence" because "control release is based on an arbitrary and unpredictable determinant, the prison population . . . ." *Id.* at 1472-1473. Again, award of provisional credits is more or equally certain than award of incentive gain-time, a protected interest.

In conflict with Hock, the federal Tenth Circuit of Appeals held a change to eligibility for overcrowding credits violated the *Ex* Post Facto Clause. *Arnold v.* Cody, 951 F.2d 280 (10th Cir. 1991). There, the State of Oklahoma passed the Oklahoma Prison Overcrowding Emergency Power Act providing emergency credits to inmate when prison population exceeded 95% of capacity. *Okla.* Stat. *Ann.* tit. 57 §§ 572-574 (West 1991). In 1989 the Oklahoma Legislature amended the law to exclude inmates who had been denied parole from receiving the early-release credits. 1989 *Okla* Sess. Law 306 § 4. The Tenth Circuit held the law violated the ex ***post*** *facto* prohibition: "The purpose of the emergency credits statute is to permit earlier release to alleviate prison overcrowding. An emergency situation due to overcrowding as described in the statute cannot justify postponing a prisoner's release, which is the result

caused by the amended statute in this case." *Arnold v. Cody,* 951 F.2d 280, 283 (10th Cir. 1991).

The parallel with Florida's retroactive exclusion of certain inmates from "overcrowding" credits through section 944.277(1), Florida Statutes (Supp. 1992) is unmistakable. Petitioner would have continued receiving provisional credits actually awarded to other inmates but for the retroactive application of new exclusions this statute. Likewise, Petitioner would have continued receiving provisional credits based on the actual overcrowding conditions experienced in Florida's correctional system but for the retroactive repeal of provisional credits by the Safe Streets Initiative of 1994. The overcrowding in Florida's correctional system between 1993 and 1995 is quantifiable and not speculative. The revocation of Petitioner's eligibility to receive early-release credits increased the duration of Petitioner's confinement and violated the *Ex* Post *Facto* Clause. *California Dep't of Corrections v. Morales,* 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995).

Petitioner prays this Court rule section 944.278, Florida Statutes (1993) and retroactive application of the exclusions contained in section 944.277(1), Florida Statutes (Supp. 1992) are unconstitutional ex *post facto* laws under Article I, section 10, Florida Constitution and Article I, section 10, United States Constitution, and return the full award of earned provisional credits to Petitioner, restore the credits Petitioner should have received after revocation of eligibility, and issue the writ of habeas corpus.

ARGUMENT II: FLORIDA SECTIONS 944.278 (1993) AND 944.277(1) (Supp. 1992) ARE BILLS OF ATTAINDER

Florida Statute section 944.278 (1993) and retroactive application of the exclusions in former section 944.277(1) (Supp. 1992) are proscribed Bills of Attainder contrary to Article I, § IO, United States Constitution and Article I, § IO, Florida Constitution.

Article I, § 10, United States Constitution, provides that "[n]o state shall . . . pass any Bill of Attainder . . . ." The Florida Constitution similarly provides: "PROHIBITED LAWS. No bill of attainder. . . shall be passed." Art. I, § 10, cl. 1, *Fla. Const.*

A legislative act is a bill of attainder if it (1) inflicts punishment, (2) against identifiable individuals, (3) without judicial trial. *Selective Service System v. Minnesota Public Interest Research Group, 468* U.S. 841, 846, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984).

The summary revocation of earned and awarded early-release credits, and, revocation of future eligibility by the retroactive application of section 944.277(1) and 944.278, Florida Statutes, is just such punishment against prisoners without judicial trial.

Revocation of earned and awarded early-release credits is clearly punishment. An act is punishment under the bill of attainder if it either: (1) falls within the historical category of punishment, (2) functionally furthers no non-punitive legislative purposes, or (3) the legislative history shows a motivational intent to punish. *Nixon v. Administrator of Gen. Servs., 433* U.S. 425, 473-484, 97 S. Ct.

2777, 53 L. Ed. 2d 867 (1977). Lengthening the actual term of incarceration is a historical category of punishment. *See Weaver v. Graham, 450* U.S. 24, 31-32, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). An announced preventative purpose for the law does not disguise its identity as a Bill of Attainder. See United States *v.* Brown, 381 U.S. *437, 456-458, 85* S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

The retroactive cancellation of early-release credits is also directed against only the identifiable individuals consisting of Department of Corrections inmates. Both retroactive application of exclusions contained in section 944.277(1), Florida Statutes (Supp. 1992), and the Safe Streets Initiative of 1994 were political responses directed against the unpopularity of prisoner early release. Specifically, Attorney General Opinion 92-96 was a response to the then-pending release of one Donald McDougall, who was convicted of the torture and murder of a five-year old girl. *Op. Att'y Gen. Fla.* 92-96, at 283 (1992,). See *also,* Roger Handberg and N. Gary Holten, *Reforming Florida's Sentencing Guidelines 82 (1993)* (discussing political response to McDougall controversy); Barbara Walsh, *Inmates' Identities a Secret, State Rounding up of Wrongly Released,* Sun Sentinel, January 15, 1993, at 1 B (quoting Attorney General Butterworth: "The McDougall case woke everybody up. Society has no use for violent offenders.") Former inmates released from prison were rounded-up from public streets and all other incarcerated inmates in the new, exclusion categories summarily

forfeited their accrued early-release credits, all to public acclaim. (Appendix A to Initial Brief).

The Safe Streets Initiative of 1994 was the hurried response to public outcry and pressure against early release of prisoners. Roger Handberg and N. Gary Holten, Reforming *Florida's Sentencing Guidelines* 90-92 (1993). The Governor called the Legislature into a second special session to authorize construction additional prison capacity for the purpose of stopping early release of prisoners. Proclamation (May 13, 1993). The Governor's proclamation did not dissemble its purpose: "[T]he safety of our citizens demands forthright action designed to insure that inmates serve at least 75% of their sentences . . . ." *Id.*

A number of competing bills were entered into the Florida Senate and House for consideration during the special session. Senate Bill 268, later passed as the Safe Street Initiative of 1994, did not originally call for retroactive cancellation of early-release credits: "Inmates who are currently in the state correctional system who have release dates based upon previously awarded provisional release credits shall retain those credits after repeal." Fla. S. Comm. on Correct., Probat. & Parole, SB-26B (1993) Staff Analysis 4 (May 25, 1993) (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 1980, Tallahassee, Fla.) On May 28, 1993 a joint conference amended the bill to include retroactive forfeiture of early-release credits. This bill passed and was approved by the Governor. The legislative intent of the State Streets Initiative of

1994 was to "emphasize incarceration in the state prison system," through, in part, retroactive revocation of all earned early-release credits. Ch. 93-406, §§ 1, 35, ***Laws of Fla.***

The clear intent of the Safe Streets Initiative of 1994 was to lengthen the time actually spent in prison.

Finally, the third prong of the Bill of Attainder analysis is met. It is patent that the retroactive application of sections 944.277(1) and 944.278, Florida Statutes, occurred without judicial trial. Indeed, the revocation of early-release credits occurred without the procedural due process minima of notice or opportunity for hearing.

This Court should hold that the singling out of the disfavored group consisting of DOC inmates and drumhead punishment meted through lengthened terms of actual confinement is prohibited as Bills of Attainder. This Court should then issue the writ of habeas corpus.

ARGUMENT III: SUMMARY REVOCATION OF EARLY RELEASE CREDITS VIOLATES PROCEDURAL DUE PROCESS

In December 1992 Respondent summarily revoked all early-release credits for all inmates without notice, opportunity for hearing, or written explanation. Respondent's summary revocation effected former inmates already released and all of the tens of thousands of inmates then incarcerated by the Florida Department of Corrections. Petitioner was one such inmate.

It is clear that "[p]risoners . . . may not be deprived of life, liberty, or property without due process of law." *Wolff v.* McDonnell, 418 U.S. 538, 556, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). The Due Process Clause of the United States and Florida constitutions mandate that Petitioner receive the procedural minima of notice, opportunity to be heard, and written explanation for the action taken before being deprived of a liberty interest. Amend. XIV, U.S. *Const.*; Art. I, § 9, *Fla. Const.; Wolff v. McDonnell,* 418 U.S. 538, 563-567, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

The State of Florida created a protected liberty interest in the early-release credits awarded to Petitioner. "Stated simply, a State creates a protected liberty interest by placing substantive limitations on official discretion." *Kentucky Dept. of Corrections v. Thompson, 490* U.S. 454, 462, 109 S. Ct. 1094, 104 L. Ed. 2d 506 (1989) (citation and internal quotation marks omitted).

A State creates a liberty interest by establishing "substantive predicates," that is, standards or rules in statutes or regulations to

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

Petitioner has two distinct liberty interests in his early-release credits. Petitioner has a liberty interest in the early-release credits actually earned and awarded. Second, the Petitioner has a liberty interest in the written procedures for revoking those interests.

The United States Supreme Court has plainly established on this point: "Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily." *Superintendent, Mass. Correctional Inst., Walpole v. Hill, 472* U.S. 445, 454, 105 S. Ct. *2768, 86* L. Ed. 2d *356 (1985). See a/so, Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442* U.S. 1, 13, 99 S. Ct. **2100, 60 L. Ed. 2d 668 (1979)** (Due process "is to minimize the risk of erroneous decisions.")

Chapter 944, Florida Statutes, specified the standards governing award and forfeiture of early-release credits.

Upon the occurrence of overcrowding and good behavior by an inmate, the Florida Statutes authorized Respondent to grant administrative credits. § *944.276, Fla. Stat.* (1987). Former section 944.276(1) mandated that Respondent award the administrative credits "equally to all inmates who are earning incentive gain-time." § 944.276(1), *Fla. Stat.* (1987).

Award of provisional credits was similar. Upon the occurrence of overcrowding and inmate good behavior, the Florida Statutes authorized Respondent to grant provisional credits. § 944.277(1), *Fla. Stat.* (Supp. 1988). Section 944.277(4) (Supp. 1988) mandated that "any eligible inmates who is incarcerated on the effective date of an award of provisional credits shall receive such credits." (emphasis added); *see also, Fla. Admin. Code R.* 33-28.001(1) (1993) (eligible inmates shall be awarded provisional credits).

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

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

also, § 921.001(10)(d), (11)(d), *Fla.* Stat. (Supp. 1988) (inmate shall be released upon attaining provisional release date).

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

These statutes and agency rules created a liberty interest in early-release credits. Then, clearly:

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

Wolff v. McDonnell, 418 U.S. 539,. 557, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). The revocation of that liberty interest requires procedural due process notice, opportunity for hearing, and written justification of the official action taken. *Superintendent, Mass. Correctional Inst., Walpole v. Hill, 472* U.S. 445, 454, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985).

The recent case of *Sandin v. Conner* is not to the contrary. Here the United States Supreme Court held that state laws or regulations governing prison discipline do not create liberty interests protected by the Due Process Clause. *Sandin v. Conner, 9* Fla. L. Weekly Fed. S207, S207 (June 19, 1995). *Sandin* does not apply to sentencing issues; the Court clearly distinguished instances

of prison discipline from cases "where the State's action will inevitably affect the duration of [the inmate's] sentence." *Sandin*, Fla. L. Weekly Fed. at S208. This case is one in which Florida's laws effect the duration of Petitioner's sentence.

This Court should hold Respondent's summary revocation of early-release credits violates the procedural due process requirements of the Florida and United States constitutions and issue the writ of habeas corpus.

CONCLUSION

Petitioner, RUSSELL CALAMIA, prays this Court finds the retroactive revocation of early release credits violates the *Ex Post* Facto Clause, the Bill of Attainder Clause, and the Due Process Clause contained in the United States and Florida constitutions, and, issue the writ of habeas corpus releasing the Petitioner from confinement.

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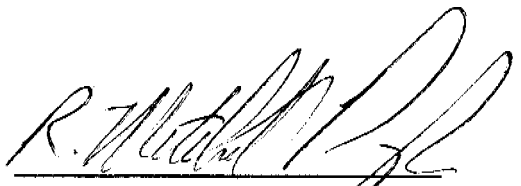
Attorney for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Initial Amended Brief of Petitioner On Remand was sent to SUSAN MAHER, ESQ., Deputy General Counsel, Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida, 32399-2500, this 2nd day of August, 1995.



R. MITCHELL PRUGH, ESQ.

APPENDIX A - TABLE OF CONTENTS

The Gainesville Sun
Friday, December 25, 1992

REGION

HOMELESS SHARE CHRISTMAS SPIRIT.
SEE STATE NEWS 12A

Business/Classified Section B

State works to keep torturer in prison

The Associated Press

TALLAHASSEE — The state's top legal officials planned to work over the Christmas holiday to figure out how to stop the early release of a man convicted of the torture-murder of a 5-year-old girl.

The ashes of Ursula Sunshine Assald lay unclaimed in a funeral home for nearly five years before a children's advocate became involved and got them buried.

That's about half as long as Douglas McDougall, 36, has been n prison for killing Ursula in 1982.

But even though he's served just 10 years of his 34-year sentence, McDougall is scheduled to be released Thursday. His sentence has been cut short because of good behavior and to make room for new inmates.

The man, who murdered a 5-year-old, is scheduled to be released Thursday.

Hundreds of Central Florida residents have protested his pending release.

An attorney for Gov. Lawton Chiles met Thursday with prosecutors and lawyers for the Department of Corrections and Attorney General Bob Butterworth to discuss the case.

"Governor Chiles does not want him released," said Mark Schlakman. He added, however. that the state is Sound by the law and must And a legal basis to keep McDougall behind bars

"'he legal staff at Corrections, the secretary himself, the attorney general's office. the governor's office., are working on this problem," Schlakman said.

Their thinking is that evidence of sexual abuse may be used to ban McDougall from getting nearly five years cut off his sentence to ease overcrowding

Schlakman said the McDougall case underlined the need for reform of the state's release programs.

Up to 140 freed killers may be jailed again

State trying to sort out legalities of early release plan

By PAT LOMA
Herald Staff Writer

Up to 140 murderers who may have been released improperly might have to be brought back to prison, state corrections officials say.

In an urgent letter to Attorney General Bob Butterworth on Wednesday, the Department of Corrections sought clarification of an opinion that appears to let prison officials deny early release to more than 1,500 convicted murderers.

"Somewhere, there has been a major foul-up, and 'astounding' is the nicest word I could think to use," said State Sen. Toni Jennings, R-Orlando, chairman of the Senate Rules Committee.

"I'm amazed that the Department of Corrections hasn't picked up on this sooner," he said. "They have a secretary, a general counsel and a bunk of lawyers who should catch things like this."

The agency had relied on a recent appeals court decision it interpreted as allowing many inmates with first-, second- and third-degree murder convictions to be eligible for provisional release credits. Such credits are designed to ease prison crowding, said Kerry Fleck, assistant to Corrections Secretary Harry Singletary.

But Butterworth's legal opinion appears to say inmates are not entitled to those credits, Fleck said.

If that's so, between 90 and 140 killers released since a June 30 change in the law may have to be put back in prison, she said.

"I think that they are absolutely going to have to go out there and get them and bring them back," said state Sen. Gary Siegel, R-Altamonte Springs. He chairs the Senate Parole and Probation Committee. Siegel called the release "a mistake."

"They have to be recaptured," he said, "because it wouldn't be fair to the other inmates who will have to serve longer sentences to have these 140 benefit by improper early release."

The 1,532 murderers now in prison could see anything from a few months to five years added back to their sentences if Butterworth is right.

Those prisoners had from 20 to 1,860 days chopped from their sentences because of provisional credits. The average was 858 days, Fleck said.

The controversy stems from a decision to deny early release to a Central Florida child killer, Donald McDougall.

The decision was a victory for a grass-roots campaign by people outraged that McDougall was about to be released after serving 10 years of a 34-year sentence. Five years were cut because of provisional release credits.

But the state blocked McDougall's and four other inmates' releases on Friday.

"The whole system has got to change," Siegel said. "It is a system based on the philosophy of early release, not the philosophy of keeping people in."

Caught off guard by Butterworth's opinion, corrections officials feared that news of the problem would cause soon-to-be-freed inmates to plan escapes, Fleck said.

So guards scrambled Tuesday and Wednesday, pulling 230 inmates from work-release programs and ushering them to "more secure facilities," Fleck said.

After screening the 230, they found only about 120 with murder convictions, so the rest were put back in work-release.

Eighty-eight of the 230 were in South Florida; 40 in the Gainesville/North Florida district; 20 in the Panhandle and Orlando area, and 62 on Florida's west coast.

"We were not certain of their status, so we moved them as a precautionary measure," Fleck said.

"They work in the communities. They have jobs in the communities. They report at night to the work-release center," Fleck said. "It could panic them if they believed that the provisional credits that they had previously thought awarded are now voided. They may not be eligible for work release. We did not want to take a chance on them escaping or not returning to the work-release center if they had seen it on the news at 6 o'clock."

IN FLORIDA

A ROUNDUP OF NEWS IN THE SUNSHINE STATE

NORTH FLORIDA

SENT TO PRISON: David Thier, 42, of Maitland, who rammed his power boat head-on into a pontoon boat, killing two boys and blinding a woman, was sentenced to five years in prison.

NEXT GAME: University of Florida doctors have developed a game based on Monopoly to help medical professionals and students understand the problems of aging; it's called Gerontopoly.

BACK ON JOB: Three Duval County officers suspended in a drug-planting scandal that caused prosecutors to

Fallen eagle egg may hatch

TAMPA — (AP) — While authorities searched Wednesday for vandals who cut down a pine tree holding a bald eagle nest, scientists said an egg with a live embryo survived the 40-foot plunge and has a chance to hatch.

"This is a pretty lucky egg. The fact that it fell so far and didn't scramble on the way down is pretty amazing," said Reese Collins, director of the Birds of Prey Center, run by the Florida Audubon Society in Maitland.

A veterinarian used a powerful light to see if there was life inside the quarter-pound egg and a stethoscope to hear any sounds coming from within the shell.

An air bubble inside indicated the embryo was probably between 21 and 25 days into a 33- to 35-day incubation period, Collins said. And the vet could detect a faint heartbeat and scratching noises.

"Hopefully it's a hardy little guy," Collins said. "The chick isn't out of the woods yet. There's no guarantee it will survive, but we're hoping for the best and trying to

The nest was in a mature tree on private property in a protected area near Lake Seminole in Pinellas County. It was cut by chain saw and toppled sometime Monday night, wildlife officers believe.

It was the only tree disturbed in an area of dense woods and thick underbrush, leading to speculation it was a deliberate act to get rid of the eagle nest. Few people knew the birds were there, wildlife officials said.

Investigators and residents think someone planning construction in the area may have targeted the tree. State laws can stop or delay projects near bald eagle nests.

American bald eagles are a threatened species, with federal and state penalties of up to $2,500 in fines and two years in jail for harming the birds.

Remnants of the nest and the single egg were found Tuesday by a bird-watcher who regularly keeps track of the eagles. The adult birds apparently were unharmed.

"The egg was in plain view on the ground in some nesting material," said Paul Schulz of the Florida Game and

peck its way out of the shell, or be subject to pneumonia from exposure.

If all goes well, waiting in the wings are the center's surrogate parents — Prairie, a 13-year-old female missing a wing from an arrow wound, and T.J., a 12-year-old male missing a wing after flying into a power line.

Both have attempted to nest for the past four years. "This would be their first fertile egg, and I don't have any doubt they would incubate it," Collins said.

"Pinellas County eagles are urban wildlife success stories, and a lot of citizens are involved in their management," said Tony Steffer, a wildlife expert with Biological Research Associates, hired by the county to monitor the nest.

The nesting pair has been in the spotlight for years. Environmentalists challenged county plans for a bridge over Lake Seminole because of concerns that construction would disturb their nest.

In response, plans were changed.

Residents said the eagle pair has been in the area at least 15 years. Territorial

THE BALD EAGLE

DEC

Prison crowding: Florida's time bomb

❑ Because of state laws, some violent criminals may serve less time-to make room for nonviolent repeat offenders.

By Debbie Salamone

OF THE SENTINEL STAFF

Escalating crime, a shortage of prison beds and tough sentencing laws for career criminals are pushing Florida's crowded prison system to gridlock.

It is so bad, corrections officials say, that some felons considered too dangerous today for some of the state's early release programs may go free anyway.

The prisons are running out of less-harmful criminals to let go.

So by October, lawbreakers convicted of robbery, manslaughter and aggravated battery may start getting out faster than ever.

Only state lawmakers may be able to stop it, They are searching for solutions but are so divided that criminal justice experts fear the problem will only worsen.

"If the Legislature does not react, w should be tarred and feathered out of Tallahassee," said state Sen. Rick Dantzler, D-Winter Haven, who is studying the issue.

In 1991, the National Council on Crime and Delinquency found Florida's nearly $2 million-a-day prison system had the highest rate of ad-n&ions and the shortest length of stay of any prison system in the country.

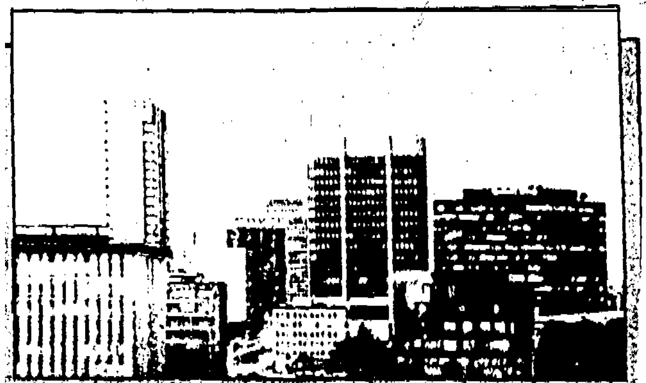
Because the number of prisoners has grown faster than the prison space to house them. inmates on average serve only a third of their sentences. Most qualify for automatic time off, called gain time, because of crowding.

That is how Donald McDougall, who tortured and killed 5-year-old Ursula Assaid of Altamonte Springs. almost got out of prison Dec. 31 after serving only 10 years of a 34-year sentence,

Even though state officials found a technicality last week to keep McDougall and some other inmates behind bars longer, the problem of early release is far Prom solved.

Prison officials have tried to keep the most dangerous offenders behind bars the longest. To do so, they give less dangerous criminals, such as thieves, even more time off their sentences through a program called controlled release.

Please see PRISONS, A-14



In Business . . .

Blacks who apply for home loans in Orlando are almost twice as likely to be turned down as whites. Loan records for Orlando financial institutions in 1991 show the area's record is only slightly better than the national average.

Representatives of financial [illegible] [illegible] rejection [illegible] *Full story, F-1*

. . . plus, new features

- Two pages of Personal Finance news
- Personal Computing column
- Column on Succeeding in Small Business

Weekly stock listings are [illegible] permanently to Saturday's editions. The 1992 Year-End Stock Guide ran Saturday.

Camel crossing

Oblivious to the fate awaiting it, a herd of Somali camels clops its way through Mogadishu's main street Saturday on the way to a slaughthouse. Camel meat is commonly eaten in the country. Meanwhile, a British relief worker was killed in the port city of Kismayu, and 1 of Somalia's principal warlords appeared to be waffling on his commitment to attend a peace conference. Story, A-4.

Good Morning . . .

Grand jury

Investigators expec

By Lauren Ritchie

Career criminals get longer sentences

PRISONS from A-1

But the number of lesser criminals still behind bars is dwindling, corrections officials say. By October, prison officials think they will have to open the controlled release program to more dangerous criminals imprisoned for robbery, manslaughter and aggravated battery.

And, if little is done in the next few years, the problem is expected to explode in 1996. That is when a third program -- called emergency release -- kicks in and all inmates will get time off. The program has never been used.

Prosecutors and victim advocates are screaming for more prisons. But some criminal justice experts, including a number of lawmakers and judges, think the solution is more complicated.

They want to overhaul the way criminals are sentenced, claiming the wrong kinds of prisoners are taking up prison space. Violent offenders, they contend, walk free while some drug dealers and career burglars remain in prison.

Whom to keep in?

In 1986, Donn Durham strangled his former high school tutor, stole her jewelry and left her body to rot in a car trunk outside an Altamonte Springs movie theater.

A year later, Karen Barkley's family watched as a judge sentenced Durham to 17 years in prison for second-degree murder. But Durham served less than four years. He walked out of prison in October 1991 — 13 years early.

This fall, Jaunathan T. Nables received 20 years in prison for stealing more than $700 worth of clothes from an Altamonte Springs department store and failing to show up for court. Nables got the stiff penalty because he was sentenced as a career criminal. He has more than 20 convictions for grand theft, forgery, fraud and other crimes.

Under Florida's career criminal law, Nables must serve most of his sentence. He is not scheduled for release until after 2010.

To the disbelief and horror of Barkley's family, a nonviolent career crook will serve more time than their relative's killer.

"It is like pouring alcohol in the wound to know this person is walking around living his life as free as can be," said Barkley's sister, Cheryl Park. "Her life was worth more than 3½ years. I just wish everyone understood how dangerous this is. We are all in danger."

State law lets prosecutors and judges put repeat offenders in prison for long periods. A serial rapist could qualify as a career criminal, as could a habitual car stereo thief.

Violent or not, career criminals can serve more time than one-time criminals, even a one-time killer like Durham. Career criminals average a 14-year sentence and serve 75 percent of their time, state figures show.

The problem, prison officials say, is that career criminals are clogging up the prison system because they are ineligible for the controlled-release program.

What's more, a study this summer by the Legislature's Economic and Demographic Research Division revealed most career criminals are nonviolent drug offenders or burglars.

Prosecutors, who have great discretion in determining who should be labeled a career criminal, contend the study proves little.

They say the career criminal law was designed to punish people for their criminal histories, no matter what kind of crime brings them to court for the last time.

Prosecutors think many repeat offenders belong in prison because crime is their way of life. Housing a prisoner costs $40 a day. Crime costs much more, said Tom Hastings, Seminole County's career criminal prosecutor.

"If we have got to pick and choose which type of offenders you want in prison I would think the choice is clear," Hastings said.

Some judges and others have called for replacing the career criminal law with another sentencing system. But the issue has raised heated debate.

At the heart of the issue is whether punishment, rehabilitation or a combination of both is the best answer for handling the increasing number of Florida lawbreakers.

Seeking a solution

"We are going to have to build more steel bars in this state," said Dania Gorda lawyer and victim advocate Kathleen Finnegan. "Are we going to have them on the prisons or on our homes?"

Advocates such as Finnegan and prosecutors think the immediate solution is to build more prisons.

Right now, Florida has more than 100 prisons with 49,000 beds. It costs $1.98 million a day to run them, not including construction or renovation costs.

In the past decade, Florida has budgeted for thousands of new prison beds. Although no money was appropriated by lawmakers last year, two years earlier, the state paid for about 6,500 new beds.

Bill Thurber, deputy secretary for the Department of Corrections, said the state needs to add at least 4,200 more beds a year for five years. The cost would be about $550 million. Operating costs are expected to be at least $14,500 per inmate.

Gov. Lawton Chiles' proposed 1992-1993 budget calls for 3,600 new prison beds at a cost of $30.4 million. He also has included more money for drug treatment and other alternative programs to keep less violent offenders out of state prison.

"There comes a point when people cannot afford any more law enforcement," said Seminole Circuit Judge O.H. Eaton Jr. of Sanford. "You have to have crime prevention as the second part of public safety. We cannot build ourselves out of the prison overcrowding problem."

Eaton is a member of the state's Sentencing Guidelines Commission, which oversees the state's sentencing system and has proposed its overhaul in recognition of limited prison space.

Under the new system, fewer people would go to prison. Those who do would be mostly violent offenders and serve about 75 percent of their sentences. The revised system ranks the severity of crimes more efficiently and gives judges greater discretion in sentencing, Eaton said.

Most nonviolent offenders would go to prisons specializing in drug treatment, or be supervised under house arrest or in prison centers where they could work by day and gain job skills.

People now in state prison get little drug treatment, job training or counseling. Prison drug treatment is especially needed, Eaton says, because most offenders, such as robbers and burglars, are drug addicts supporting their habits.

Right now, the state has only 550 prison beds for offenders with drug problems. Corrections officials want to double that number if lawmakers appropriate the money.

Although many prosecutors also think treatment, education and alternative punishments are necessary, they view the revised sentencing system as too lenient.

The reforms would eliminate the career criminal law and minimum prison stays for many drug offenders. Proponents insist the system still will handle these offenders effectively. Prosecutors disagree.

"I don't think it is in the interest of the citizens to have a prison system for rapists and robbers," said Brevard-Seminole State Attorney Norm Wolfinger. "The state has to take responsibility for the two or three-time burglar.

"The gridlock I see is in leadership in the state to provide adequate facilities," Wolfinger said. "A lot of legislators, quite frankly, don't understand it. They don't understand what the alternative is. It is going to ante up."

Wolfinger said he thinks the revised system will give criminals the opportunity they need to rule the streets.

"Norm Wolfinger has been crying that tune and if that doesn't work he'll find some other bugaboo," said state Rep. Elvin Martinez. "He's an alarmist."

Last year, Martinez sub revised system to lawm got nowhere. He plans to He blames last year's state senators, who he b being influenced by stat tors.

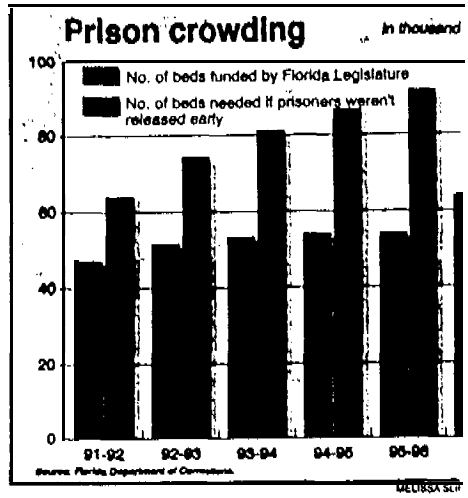
"You've got to be Neanc to see the wisdom of t guidelines," Martinez s have their heads so far i the sun doesn't shine."

Sen. Dantzler says that case. He is investigatin the state can use existin federal buildings to hous immediately to avoid gri for the long term, newl state Sen. Gary Siegel, R-I is examining whether pri be more cheaply run b companies.

Court officials complain makers should have act problem years ago.

"If our elected repre will . . . quit being part o lem and become part of t there will be far fewer cr mitted by dangerous crin result of early release," Ea

DON DURHAM (above right) was sentenced to 17 years for the death of Karen Barkley (above left) in 1987. He was after 4 years. Barkley's sister, Cheryl Park, is appalled the violent criminal was released while nonviolent criminals ar oned for far longer periods. 'I just wish everyone underst dangerous this is," she said. 'We are all in danger.'



Freed convict makes fresh start, then state says his release was an error

Knight-Ridder Wire

MIAMI — After serving eight years of a 15-year sentence for attempted murder, Alvino Burrola stepped out of Hendry Work Camp on July 21, 1992, a free man.

No parole. No probation. Unconditional freedom, he was told.

With the clothes on his back and $100 in his pocket courtesy of the Department of Corrections, Burrola headed home to Dade County certain of only one thing.

"I was never coming back to prison," Burrola said. "I was going to turn my life around."

He landed a well-paying construction job and moved with his wife and twins into a Hollywood, Fla., duplex.

But 11 months after his release, Burrola, 23, was back in jail anyway. Applying a new interpretation of a new law, the state decided he had not been eligible for early release.

Burrola got the bad news while shopping for Texas Steer work boots at Kmart in Hollywood. A police officer was escorting a handcuffed shoplifter out of the store, and the shoplifter bumped Burrola. Words were exchanged. The police officer asked Burrola to accompany him outside.

The officer ran a check on Burrola's driver's license, then told him he was going back to prison.

OPERATION RETAKE

It was Operation Retake.

Operation Retake rounded up prisoners who were released between July and December based on provisional release credits, one of three programs that cut time from a prisoner's sentence. Unlike time off awarded for good behavior or for working in the prison system, prisoners cannot earn provisional release credits. They are granted solely to relieve prison overcrowding.

Five months after Burrola was released, a convicted child killer named Donald McDougall was about to get out of prison — his sentence reduced by provisional release credits. State Sen. Gary Siegel, R-Altamonte Springs, asked Attorney General Bob Butterworth if anything could be done to keep McDougall behind bars.

Butterworth issued an opinion that kept McDougall in prison. A new law, Butterworth said, made prisoners convicted of murder or attempted murder ineligible for provisional release credits. In April, the Florida Supreme Court approved Butterworth's opinion, saying it was legal to cancel a prisoner's scheduled release from prison due to provisional credits.

The Florida Supreme Court wasn't asked and didn't endorse picking up people already released.

But between April and July, 89 former prisoners — including Burrola — were picked up and returned to prison.

Burrola went to jail and his wife and two children went on welfare.

"I was in love, I was bringing home $550 a week, and I had a family," Burrola said. "I was living the American dream."

WANTS TO CHALLENGE LAW

Burrola wants to challenge the law, but can't afford a lawyer. "It isn't constitutional," Burrola says about his return to prison.

Many lawyers agree. Peter Sleasman, an attorney specializing in prison law, says it's a violation of due process to pick up people already released. He plans to challenge the action in court on behalf of several of those picked up.

The attorney general's office defends its actions. "These guys were released by mistake," said Assistant Attorney General Jay Vail. 'The Department of Corrections misunderstood the law. It's the same as If we released Joe Smith when we meant to release John Smith."

In a 1982 case, a federal court did not allow the government to re-imprison a California man the government contended had been released in error.

The court said: "An order requiring service of defendant's sentence now would needlessly jeopardize his long-trm adjustment to society, disrupt both his family and his family life, and destroy his economic base, all for no purpose other than to secure blind obedience" to his original sentence.

Vail said Burrola's situation is the price you pay for committing a crime. 'It's a warning to others not to commit crimes," Vail said.

Burrola answers that he paid his debt to society. "I served my sentence, I was released and after I was released, I did exactly what society wanted me to do," Burrola said.

Burrola was 15 years old when he pleaded guilty to attempted murder during an armed robbery. We was arrested with two adult men In prison, he learned plumbing. carpentry and masonry. He even helped build prisons, he said.

HARSHER TREATMENT

Through no fault of his own, Burrola says, he has received harsher treatment since his return to prison. He is now held in a medium security prison Before his release, he was in a minimum security prison. He's also been denied work release, a program h e participated in before his release. It was during work release that Burrola met his wife and fathered their twins.

"They should at least let me work," Burrola said, "so that I can help my family. I'll do anything, house arrest, parole, so I can support my family."

Burrola's new release date is August 13, 1995. He's skeptical, however.

"What if In five years they come up with another new law," he asks. "Are they coming after me again?"

Atlanta Constitution
Sunday, 1/24/93, Page A3

When. should the violent go free?

Early release is dangerous, critics charge

By Susannah Vesey
STAFF WRITER

Kathy Cowan's blood curdled when she heard the chilling news that convicted chid killer Donald McDougall was about to be turned loose because Florida's prisons were too crowded to keep him.

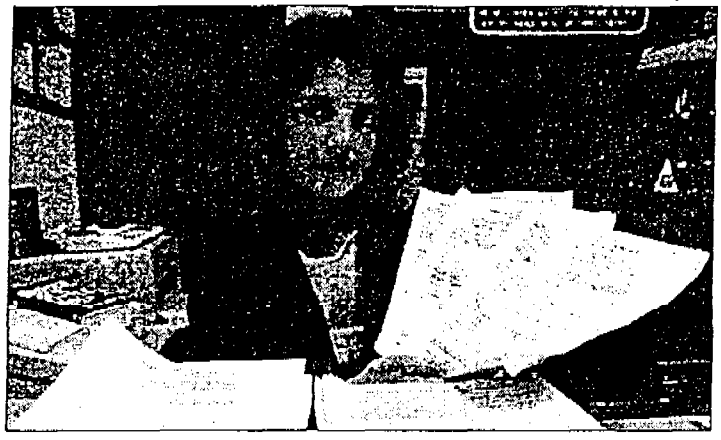
He had served 10 years of a 34-year sentence for the torture death of his girlfriend's S-year-old daughter, Ursula Sunshine Assaid. In the days preceding Sunshine's death, McDougall made her parade naked around a room reciting the alphabet, forced her to eat soap sandwiches and beat her.

McDougall's imminent release galvanized Ms. Cowan to collect thousands of signatures from outraged Floridians opposed to the early release of violent criminals. But here was another shock in store.

As many as 140 former prisoners convicted of murder, attempted murder and child abuse already were walking the streets, mistakenly freed since July 1 after serving only fractions of their sentences. About 1,550 others had been promised freedom because of prison overcrowding.

"It's just horrifying," says Ms. Cowan, a Winter Park business owner. "You always have to look over your shoulder, even in a grocery store. There's no telling who you're standing next to."

The appalled protesters got help from high grass-roots campaign spearheaded by Sen. Gary Siegel, the Republican chairman of the state Senate Corrections, Probation and Parole Committee, Florida Attorney General Bob, Butterworth on Dec. 31 ruled that McDougall, along with the 1,550 criminals promised early freedom, should stay behind bars.



Associated Press

Kathy Cowan **of Winter Park, Fla., 'rounded up 20,000 signatures to protest violent criminals' early release to ease prison crowding.**

Mr. Butterworth also ruled that 90 to 140 prisoners convicted of murder. attempted murder and child sexual abuse had been mistakenly released since July 1 and that they could be rounded up. Rut the Department of Corrections had picked up only six of the convicts when it was slapped with a lawsuit filed on behalf of Jeffrey Ipnar, a prisoner convicted of attempted murder who missed a welcome-home family bash when his early release was revoked at the last minute.

On Tuesday, the Florida Department of Law Enforcement announced it had abandoned the round-up until the state Supreme Court decides Ipnar's lawsuit.

"How would you like to be in [Corrections] Secretary [Harry] Singeletary's shoes?" asks Richard Belz, the Gainesville attorney representing Ipnar. "If he picks them up and he's wrong, he's got massive money-damage lawsuits.

The 48,000-bed prison system has been so overcrowded that 17,000 inmates won early releases in 1992.

"If he . . does not pick them up when he should have picked them up, what about the victims who get bopped on the head? The victims are going to sue him."

At the heart of the problem is a 48,000-bed prison system that has been so overcrowded that 17,000 inmates won early releases in 1992, most after having served one-third or less of their sentences.

To alleviate the overcrowding, many prisoners were given credits with which they could shave time off their sentences. Usually they got 10 days off for each month served and an additional 20 days off for each month of prison work and good behavior.

In the 1980s, two groups of prisoners were excluded from earning time credits: habitual offenders and those who had committed crimes, including drug *offenses,* that fell under minimum mandatory sentencing guidelines.

Donald McDougall, convicted of torturing a 5-year-old girl, was about to be given early release after serving 10 years of a 34, year sentence'

According to Rep. Kelley Smith, the Democratic chairman of the state House Corrections Committee, these developments significantly shrank the pool of inmates who could be released. This led to the early release of those convicted of murder, attempted murder and child molestation, who *were* not excluded from earning time credits.

Last summer, the **Florida** Legislature decided that this group of prisoners was no longer entitled to credits. The *Corrections* Department quit handing them out. But it did *not* believe it could remove credits already earned, so it continued freeing prisonet-s who had earned enough.

It is here that the attorney general believes the Corrections Department was mistaken. Mr. Butterworth has said prisoners are not entitled to the credits and that they tin be removed once earned.

Rep. Elvin Martinez, chairman of the House Criminal Justice Committee, has introduced -legislation to revamp sentencing guidelines so violent criminals **do not** get released early because of overcrowding. Gov. Lawton Chiles has talked about financing 3,600 **more** prison beds, drug treatment centers and community-based work camps for non-violent offenders.

The woman who said William Kennedy Smith raped her talks about the criminal justice system, B-3

The Orlando Se
FRIDAY, April

Local & state ,

Bob Morris

COLUMN WORLD

Expect the unexpected at the Fringe Festival

All Fringed up with too many places to go: So I'm walking down Orange Avenue Wednesday night when I am approached by a long-legged woman in tight. black pants. a tacky. white, patent-leather jacket and black. horn-rimmed glasses. And she says in a British accent, " 'Ello, luv, you look like a man with a little time on your hands."

And I. suave as can be and accustomed to propositions from exotic women, say: "Huh?"

Whereupon the woman. who has a lip sticky. red smile and dark. liquid eyes (maybe it's those glasses. 1 dunno), hands me a flier touting "The Lorraine Bowen Experience," one of the offerings at the Orlando International Fringe Festival.

"That's me, luv — Lorraine Bowen!" says the woman, giving herself both a faux fanfare and a drum roll, then dancing a little dance that looks something like the frug and something like the cha-cha and something like Nightmare on *Soul Train*.

And then she is off. saying: "Show's at 11:30 p.m. Do come see me. luv I need a

High court OKs roundup of inmates released early

☐ Florida's Supreme Court says 89 violent criminals, who mere freed because of prison crowding, must go back to jail.

By Linda Kleindienst
FORT LAUDERDALE SUN SENTINEL

TALLAHASSEE — The Florida Supreme Court gave the green light on Thursday to a statewide dragnet for 89 violent former inmates who should not have won early release from prison.

All were serving time on murder charges either second-degree, third-degree or attempted murder. They were released early because of prison crowding.

State and local law enforcement officials were LO begin picking up the men on Thursday

"They're all over the state. but we know where a significant number are." said Corrections Secretary Harry Singletary, who admitted that publicity could scare off some. "There are a lot of people who will be gone' hut how many? I don't know."

Central Florida former inmates could sleep well for at least Thursday night. Mike Brick special agent in charge of the Florida Department of Law Enforcement office in Orlando. said he hadn't received a list naming prisoners to be collected.

He said he expected to get some information today.

The high court ruled late Thursday that the state should not have granted the men early release credits given to nearly all inmates between 1987 and 1991 to relieve crowded conditions

Attorney General Bob Butterworth challenged the fact that they — ahd another 1,550 murderers still in prison — were getting those credits.

Butterworth issued an opinion on Dec. 29 allowing corrections officials to revoke the gain time on murder cases, saying the Legislature gave that authorization during the 1992 session

He wrote the opinion specifically to deny early release to Donald McDougall. convicted of the 1982 torture-murder of 5-year-old Ursula Sunshine Assaid of Altamonte

Please see PRISON, B-5

A tan and a test

ASSO

German consul ! wants tourists prote

Crime focus wron

☐ Top FDLE o says state shou crime on Flori instead of tour

By John C. Van G
SENTINEL TALLAHASSEE BUR

;eller is getting)use in months

om B-1

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> *"Here's a guy that's overcome all the physical handicaps in the world. You look at him and you think, 'If he can get out and do it, so can I.'*
>
> — Sgt. Pete Gauntlett

nated labor and materials. likely will supervise construction of McKnight's home.

"We would very, very much like to be involved in this." said Habitat director Paul Wolfe. "It's an exciting opportunity to help someone who really needs it."

McKnight, Gauntlett said, serves as an inspiration to many members of the **downtown** workforce. which numbers about 28,000.

"Here's a guy that's overcome all the physical handicaps in the world. He works 50-60 hours a week supporting his family . You look at him and you think, 'If he can get out and do it, so can I.' " Gauntlett said.

The generosity of Gauntlett and others, Dorothy McKnight said, has left the family shaking their heads in wonder.

"My main vocabulary now." she said, "is thank you, thank you, thank you."

'Good decision,' Chiles says of state Supreme Court ruling

PRISON from B-l

Springs.

McDougall, 37, was slated for **release on** Dec. **31. He had served only 10** years **of** A 34-year sentence. He now must serve another five years.

Corrections officials revoked the credits given to murderers after Butterworth's ruling. It could add more than five years on some sentences.

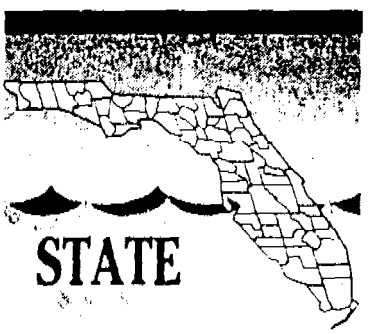
"I'm delighted with the ruling," said Gov. Lawton Chiles. "There **arc** some dangerous people out there. It's a good decision. The **court agrees** with the idea of trying to keep the most dangerous people in jail."

Singletary **said** the 89 new inmates will have little effect on the prison system's current crowding problem.

Sen. Gary Siegel, R-Longwood, who first raised the alarm on McDougall's release and then urged fellow legislators to start building **more prison beds,** praised **the court's** decision.

"My colleagues in the Legislature have to do their part to make **Florida's** neighborhoods as safe as they **should** be." Siegel said. "We need to keep violent criminals behind bars."

Sharon *McBreen* of *the* Sentinel *staff contributed* to this report.



Now, prosecutors want Lozano retried In Miami

MIAMI — Dade County prosecutors plan a last-ditch effort to move the manslaughter retrial of suspended Miami police officer William Lozano out of Orlando.

A hearing is scheduled Monday.

"We really believe a fair trial — the fairest trial — can be held in Miami," Assistant **Stale Attorney** Richard Shiffrin said Thursday.

Lozano was charged **in the** killing of two black men in January 1989. **A** jury found him guilty, but 'an appeals court ordered **a** new trial. Since then, the **retrial** has bounced **between Tallahassee and Orlando. The trial** now is scheduled for May 10.

...o insurance cost

By DAVID SATTERFIELD
Senior Business Writer

The insurance industry has unveiled a plan to help solve Florida's insurance crisis by creating a state-run fund that eventually would pay half the cost of major hurricanes.

The proposal, sent Monday to members of a state task force, calls for Florida homeowners, automobile owners and businesses to pay at least 25 percent higher insurance premiums to a special state fund. Those increases would be in addition to the double-digit rate hikes being sought in the wake of Hurricane Andrew.

Under the plan, if a major hurricane hits Florida, the fund would pay at least 30 percent, and, ultimately, 50 percent of all storm losses. If the fund did not have enough money to pay its share, the Legislature would be responsible for finding the cash to pay hurricane claims.

The proposal is one of several expected to be studied by a special commission appointed by Gov. Lawton Chiles to study the state's insurance crisis.

State Rep. John Cosgrove, the South Dade Democrat who heads the House Insurance Committee and sits on the study com-

PLEASE SEE INSURANCE, 7A

logical parents, Dan and Cara Brent said.

the plane, including a book

PLEASE SEE JESSICA, 6A

11 months after his release, Alvino Burrola, 23, was back in jail — because of a new interpretation of a state law

New state policy shatters freed convict's new life

By WILDA L. WHITE
Herald Staff Writer

After serving eight years of a 15-year sentence for attempted murder, Alvino Burrola stepped out of Hendry Work Camp on July 21, 1992, a free man.

No parole. No probation. Unconditional freedom, he was told.

With the clothes on his back and $100 in his pocket courtesy of the Department of Corrections, Burrola headed home to Dade County, certain of only one thing.

"I was never coming back to prison," Burrola said. "I was going to turn my life around."

He landed a well-paying construction job and moved with his wife and twins into a Hollywood duplex.

But 11 months after his release, Burrola, 23, was back in jail anyway. Applying a new interpretation of a new law, the state decided he had not been eligible for early release.

Burrola got the bad news while shopping for Texas Steer work boots at Kmart on State Road 7 in Hollywood. A police officer was escorting a handcuffed shoplifter out of the store, and the

PLEASE SEE PRISONER, 7A

DAVID BERGMAN / Miami Herald Staff

FATHER TAKEN AWAY: Elisha Burrola, with twins Carissa and Alvino Jr.

Plea for prc fails 8s Lari gets 3-mont

By BONNIE GREENE
Herald Staff Writer

Wiping away tears and proclaiming he "never stole a dime," retired U.S. Rep. Larry Smith tried to stay out of prison Monday but was sentenced to three months behind bars for financial misdeeds that sank his political career.

Smith, a Hollywood Democrat, coasted through elections to stay on Capitol Hill for 10 years, beloved by his constituents in South Broward and West Dade until reports surfaced last year that he laundered money from his re-election campaign to pay a pressing gambling debt.

Smith pleaded guilty in May to tax evasion and lying to election officials about his use of campaign cash to settle a $4,000 bill from the Paradise Island Resort, a popular Bahamas getaway. Smith ran up gambling debts there for years, prosecutors disclosed Monday, and paid the tab less than a month after receiving a demand letter and his marker from the casino.

On his judgment day, Smith

PLEASE SEE SMITH, 16A

New state policy shatters ex-con's re

Early releases canceled

PRISONER, FROM 1A

shoplifter bumped Burrola. Words were exchanged. The police officer asked Burrola to accompany him outside.

The officer ran a check on Burrola's driver's license, then told him he was going back to prison.

"You've got the wrong guy," cried his wife, Elisha. "This has got to be a mistake."

It wasn't, Elisha Burrola learned after a call to the Department of Corrections.

No release credits

It was Operation Retake.

Operation Retake rounded up prisoners who were released between July and December based on provisional release credits, one of three programs that cut time from a prisoner's sentence. Unlike time off awarded for good behavior or for working in the prison system, prisoners cannot earn provisional release credits. They are granted solely to relieve prison overcrowding.

Five months after Burrola was released, a convicted child killer named Donald McDougall was about to get out of prison — his sentence reduced by provisional release credits. State Sen. Gary Siegel, R-Altamonte Springs, asked Attorney General Bob Butterworth if anything could be done to keep McDougall behind bars.

Butterworth issued an opinion that kept McDougall in prison. A new law, Butterworth said, made prisoners convicted of murder or attempted murder ineligible for provisional release credits. In April, the Florida Supreme Court approved Butterworth's opinion, saying it was legal to cancel a prisoner's scheduled release from prison due to provisional credits.

JAILED AGAIN: Alvino Burrola says he wants to challenge the state's interpretation of the law that put him back in prison.

Through no fault of his own, Alvino Burrola says, he has received harsher treatment since his return to prison. He is now held in a medium-security prison.

89 back in prison

The Florida Supreme Court wasn't asked and didn't endorse picking up people already released.

But between April and July, 89 [illegible] — were picked up and returned to prison.

Burrola went to jail and his wife and two children went on welfare.

"I was in love, I was bringing home $550 a week, and I had a family," Burrola said. "I was living the American dream."

Of the 89 prisoners rounded up by the state, "ama one" has challenged t Susan A. Maher, dep counsel with the De Corrections.

The case of Will released in Decembe up five months later,

Burrola wants to c law, but can't afford i isn't constitutional, says about his return

Action to be challen

Many lawyers a Sleasman, an attorne ing in prison law, says tion of due process people already release to challenge the acti on behalf of severa picked up.

The attorney gene defends its actions. " were released by mis Assistant Attorney C Vait. "The Departm rections misunderstoo It's the same as if we Smith when we mean John Smith."

In a 1982 case, a fe did not allow the gov re-imprison a Califor released in error.

The court said: requiring service of sentence now would jeopardize his long-t ment to society, disru family, and his famil destroy his economic no purpose other tha blind obedience" to

Insurance industry unveils proposal for state-m h

INSURANCE, FROM 1A

HOW THE FUND WOULD WORK

The fund would pay part of all claims resulting from a storm.

tions in Florida.

In a letter to the stu