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IN THE SUPREME COURT OF FLORIDA

RUSSELL CALAMIA,

Petitioner,

vs.

CASE NO.: 84, 088

HARRY K. SINGLETARY, JR., ETC.

Respondent.

JEFFREY LYNN HOCK,

Petitioner,

v.

CASE NO. 86,182

HARRY K. SINGLETARY, JR., ETC.,

Respondent.

_____/

REPLY BRIEF OF PETITIONER CALAMIA

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Both administrative credits awarded under repealed section 944.276, Florida Statutes (1987) and provisional credits awarded under repealed section 944.277, Florida Statutes (Supp. 1988) will be referred to as "early-release credits" to avoid confusion with other forms of gain-time or credit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

Respondent Singletary's Consolidated Response will be referred to as "Response" followed by the page number where the information is located.

REPLY ARGUMENT

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

Respondent recycles two discredited arguments to uphold the retroactive repeal of awarded early-release credits.

First, Respondent claims the change to early-release laws was procedural, and therefore, outside the *Ex Post Facto* Clause. (Response at 14-19). In support, Respondent cites prior decisions of this Court and the Eleventh Circuit of U.S. Court of Appeals characterizing the laws as procedural. (Response at 14-15, 20-23).

Respondent's claim is contrary to *California Department of Corrections v. Morales*, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995). *Morales* holds a retroactive increase of confinement is punishment violating the *Ex Post Facto* Clause. *California Dept. of Corrections v. Morales*, 115 S. Ct. 1597, 1604, 131 L. Ed. 2d 588, 599 (1995). An increase in punishment violates the *Ex Post Facto* Clause, whether the change in law was procedural or not. The Florida trilogy of *ex post facto* cases all emphasize this point.

In *Dobbert v. Florida* the United States Supreme Court drew a contrast between a change in the procedure for sentencing and a law imposing a "change in the quantum of punishment attached to the crime." *Dobbert v. Florida*, 432 U.S. 282, 294, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977). Justice Thomas cited this difference in the

Morales majority opinion, referring to *Dobbert* as "contrasting change in the 'quantum of punishment' with statute that merely 'altered the methods employed in determining whether the death penalty was to be imposed.'" *California Dept. of Corrections v. Morales*, 115 S. Ct. 1597, 1602, 131 L. Ed. 2d 588, 596 (1995).

In *Weaver v. Graham*, the Court again emphasized increased punishment is different from a mere procedural change in the law: "We have also held that no *ex post facto* violation occurs if the change effect is merely procedural, and does 'not increase the punishment . . . .'" *Weaver v. Graham*, 450 U.S. 24, 29, n.12, 101 S. Ct. 960, 67 L. Ed. 2d 351 (1981) (emphasis supplied).

In *Miller v. Florida* the Court made the identical distinction: "[N]o ex post facto violation occurs if the change in the law is merely procedural and does 'not increase the punishment . . . .'" *Miller v. Florida*, 482 U.S. 423, 433, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987) (quoting *Hopt v. Utah*, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884)). The Court flatly dismissed the State's contention the change in law was procedural: "Although the distinction between substance and procedure might sometimes prove elusive . . . the change at issue . . . simply inserts a larger number into the same equation." *Miller v. Florida*, 482 U.S. 423, 433, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987).

The Supreme Court's holding on this same point in *Collins v. Youngblood* could not be plainer. The Court unambiguously ruled: "[T]he constitutional prohibition is addressed to laws, whatever

their form, which . . . increase the punishment." *Collins v. Youngblood*, 497 U.S. 37, 46, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990) (emphasis supplied, internal quotation marks omitted). Respondent pointedly omits this quotation from its analysis of *Collins*. (Response at 15-17).

Respondent wrongly relies on the *Collins* decision as precedent. *Collins* dealt with a change in the law that was not within the traditional categories of the *Ex Post Facto* Clause. After itemizing the types of prohibited *ex post facto* law contained in the decisions of *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798) and *Beazell v. Ohio*, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925), the Court stated:

> Respondent concedes that [the Texas statute] does not fall within any of the Beazell categories and, under that definition, would not constitute an ex post facto law as applied to him. The new statute is a procedural change that allows reformation of improper verdicts. It does not . . . increase the punishment for which he is eligible as a result of that conviction.

Collins v. Youngblood, 497 U.S. 37, 44, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). By contrast, the issue now before the Court in this action is whether the change in law increases punishment, a recognized category under both the *Calder* and *Beazell* decisions.

This is not the first time the State has urged this Court to dismiss a blatant *ex post facto* violation. Changes to basic gain-time were presented to this Court as merely an act of grace. Response at 1-2, *Harris v. Wainwright*, 376 So. 2d 855 (Fla. 1979)

(No. 56,716). This Court accepted this characterization and held gain-time to be an "administrative method" that "tentatively calculated" sentence expiration but was only an "act of grace" that created no "vested right." *Harris v. Wainwright*, 376 So. 2d 855, 856 (Fla. 1979). The United States Supreme Court reversed. *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 351 (1981) (without dissent). Again in the later case of *State v. Jackson* dealing with Florida's change to the sentencing guidelines, the State pitched the change to this Court as a procedural change. Petitioner's Brief On the Merits at 6-10, *State v. Jackson*, 478 So. 2d 1054 (Fla. 1985) (No. 65,857). Again this Court, over Justices Ehrlich's and Shaw's partial dissent, concluded the change in law did "not change the statutory limits of the sentence imposed" and was "merely a procedural change, not requiring the application of the ex post facto doctrine." *State v. Jackson*, 478 So. 2d 1054, 1056 (Fla. 1985) (citing *Dobbert v. Florida*, 432 U.S. 282 (1977)). Again the United States Supreme Court reversed. *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987) (unanimous opinion).

Each decision above, *Dobbert*, *Weaver*, *Miller*, and *Collins*, holds a change in law that retrospectively increases punishment is not excepted from the *Ex Post Facto* Clause as a procedural change. The complete cancellation of already-awarded credits increases punishment, and therefore, can in no way be considered procedural exception to the *Ex Post Facto* Clause after the *Morales* decision.

Likewise, the complete abolition of the early-release laws nullifies future eligibility for additional early-release credits. Such credits were given through 1994 to other inmates. (Exhibits D-I, Petition for Writ of Mandamus by Hock). The cancellation of continued eligibility therefore also increased punishment and can in no way be considered a procedural change in the law after the *Morales* decision.

The second canard Respondent recycles is that a law is *ex post facto* only if it lengthens the "overall terms of imprisonment." (Response at 25).

This flies in the face of *Weaver v. Graham* . The Court's ruling warrants full quotation:

> [R]espondent contends that the State's revised gain-time provision is not retrospective because its predecessor was 'no part of the original sentence and thus no part of the punishment annexed to the crime at the time petitioner was sentenced.' This contention is foreclosed by our precedents. First, we need not determine whether the prospect of the gain time was in some technical sense part of the sentence to conclude that it in fact is one determinant of petitioner's prison term--and that his effective sentence is altered once this determinant is changed. We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed. Second, we have held that a statute may be retrospective even if it alters punitive conditions outside the sentence.

Weaver v. Graham, 450 U.S. 24, 31-32, 101 S. Ct. 960, 67 L. Ed. 2d 351 (1981) (citations omitted). Like basic gain-time in *Weaver*,

early-release credits are one determinant of the actual prison term. § 921.001(10)(d), (11)(b), (11)(d), *Fla. Stat.* (Supp. 1988). Like *Weaver*, the loss of the credits indisputably lengthens the sentence actually served.

Respondent's assertion that the overall term of the sentence imposed is the benchmark inexplicably contradicts and ignores Respondent's earlier reliance on *Weaver* for the following quotation: "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." (Response at 14). Clearly, this means the overall term of the sentence imposed is not the benchmark.

California Department of Corrections v. Morales, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995) is not to the contrary as Respondent asserts. (Response at 25). *Morales* relies upon, and does not change, the *Weaver* decision. *California Dept. of Corrections v. Morales*, 115 S. Ct. 1597, 1601, 131 L. Ed. 2d 588, 594-595 (1995).

Petitioners and Respondent absolutely differ on whether *Morales* requires a court to determine the actual effect on length of confinement when deciding whether a law change is an *ex post facto* punishment. (Response at 25).

Petitioners assert the *Morales* decision mandates an examination of the actual effect on the duration of confinement. The whole purpose of *Morales* is to separate speculative impacts from concrete impacts upon the length of actual confinement. After

Morales, there is no legal support for any test other than effect on the length of actual confinement.

Respondent disingenuously suggests revocation of already-awarded credits "potentially" increased the penalty. (Response at 25). The actual, not potential, increase in confinement was 420 days for Petitioner Calamia and 360 days for Petitioner Hock.[1] There were actual, delayed release dates for 4,300 other inmates in custody. (Appendix D attached to the Reply Brief).

Petitioners and Respondent do agree, however, that the *Ex Post Facto* Clause holds a special position in the body of the Constitution itself. (Response at 12). James Madison wrote that "ex post facto laws . . . are contrary to the first principles of the social compact and to every principle of sound legislation." *The Federalist No. 44*, p. 301 (J. Cooke ed. 1961). Alexander Hamilton, arguing for adoption of the Constitution which did not yet contain a bill of rights, declared the protection against *ex post facto* laws equal to any right appearing in a state constitution and described the protection as one of three providing "greater securities to liberty and republicanism than any [other the Constitution] contains." *The Federalist No. 84*, pp. 576-577 (J. Cooke ed. 1961). Hamilton also repeats Blackstone's realistic observation that *ex post facto* laws are especially menacing because after confinement in prison the person's

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1 Another example is the 1,320 days lost by inmate Magnotti. (Respondent's Exhibit B attached to the Consolidated Response, Report of the Magistrate Judge at 2).

"sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." *Id.* at 577.

It has been three full years since the summary revocation of early-release credits in December, 1992. Over 4,300 Florida inmates received longer sentences as a result. Former Justice Thorton presciently wrote in 1960 that:

> In recent years much has been written regarding federal . . . review of state court judgments in criminal matters. . . . [W]e have the view that a contributing factor in this development has been the apparent reluctance of some state courts to take cognizance of and apply many of these basic concepts of due process . . . . In following such a course we think the State jurisdictions merely invite further inroad on their sovereignty. . . . We have no desire to contribute further to this development.

Cash v. Culver, 122 So. 2d 179, 186 (Fla. 1960). This Court should grant relief.

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

Respondent concedes an act is a Bill of Attainder if it is a historical form of punishment or shows a motivational intent to punish. (Response at 27). Petitioner and Respondent disagree whether lengthening actual duration of confinement is historically punishment, or, whether the retroactive revocation of already-awarded credits showed a motivational intent to punish.

Petitioner relies upon the arguments made in Petitioner's Initial Brief that retroactive revocation of already-awarded credits which lengthens confinement is both a historical form of punishment and shows a motivational intent to punish.

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

Petitioner Calamia adopts the arguments of co-petitioner Hock regarding due process that appear in Petitioner Hock's Reply To Respondent Singletary's Consolidated Response.

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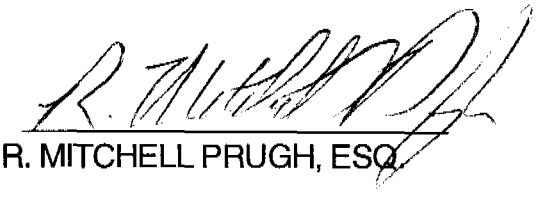
CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner On Remand was sent to SUSAN MAHER, ESQ., Deputy General Counsel, Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida, 32399-2500, and JOHN C. SCHAIBLE, ESQ., Florida Institutional Legal Services, Inc., 1110-C N.W. 8th Avenue, Gainesville, FL, 32601, by U.S. Mail this 4th day of October, 1995.



R. MITCHELL PRUGH, ESQ.

APPENDIX D

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
LAWTON CHILES

Secretary
HARRY K. SINGLETARY, JR.

2601 Blair Stone Road • Tallahassee, Florida 32399-2500 • (904) 488-5021

August 11, 1995

RECEIVED AUG 14 1995

Florida Institutional Legal Services, Inc.
1110-C N. W. 8th Avenue
Gainesville, Fla. 32601

Attn: Gayle E. Russell

Dear Ms. Russell:

The following information is provided in response to your request dated July 24, 1995:

1. Attached is a list of each award of provisional credits made by the Department between July 1, 1988, and January 18, 1991.

2. We do not have a definite total of all inmates whose provisional credits were cancelled as a result of the 1992 amendment to, and subsequent repeal of, s. 944.277. These actions were taken over a period of time and no total compilation has been retained.

   However, we can share some approximate numbers. As a result of the 1992 amendment, just under 2,800 inmates had provisional credits cancelled. Upon cancellation of s. 944.277, just over 4,300 inmates had either provisional credits or administrative gain-time cancelled, or both. Some of these 4,300 inmates may be counted twice, i.e., a murderer who had provisional credits cancelled as a result of the 1992 amendment would also be counted as a part of the 1993 repeal if administrative gain-time had also been awarded.

3. This office has no information available as to the number of inmates affected by cancellation of provisional credits who are currently committed to the Department. In order to determine this figure, a unique computer program would need to be written. Due to the demand on our computer programmers, this request could involve a considerable delay and would run somewhere between $250 and $500. If you still desire this information, you may advise me and I will submit the request.

Sincerely,

Bobbie Glover

Bobbie Glover, Chief
Admission and Release Authority

g/
xc: LeeAnn Knowles

PROVISIONAL CREDITS

7-14-88 - 20 DAYS	
7-21-88 - 20 DAYS	
	40
8-09-88 - 20 DAYS	
8-15-88 - 20 DAYS	
8-23-88 - 20 DAYS	
	100
9-09-88 - 20 DAYS	
9-21-88 - 20 DAYS	
9-28-88 - 20 DAYS	
	160
10-12-88 - 20 DAYS	
10-20-88 - 20 DAYS	
10-27-88 - 20 DAYS	
	220
11-10-88 - 20 DAYS	
11-18-88 - 20 DAYS	
11-29-88 - 20 DAYS	
	280
12-14-88 - 20 DAYS	
12-20-88 - 20 DAYS	
12-22-88 - 20 DAYS	
12-29-88 - 20 DAYS	
	360
PC 1988 = 360	
1-19-89 - 20 DAYS	
1-26-89 - 20 DAYS	
	400
2-06-89 - 20 DAYS	
2-16-89 - 20 DAYS	
2-24-89 - 20 DAYS	
	460
3-10-89 - 20 DAYS	
3-16-89 - 20 DAYS	
3-22-89 - 20 DAYS	
3-30-89 - 20 DAYS	
	540
4-18-89 - 20 DAYS	
4-25-89 - 20 DAYS	
4-28-89 - 20 DAYS	
	600
5-12-89 - 20 DAYS	
5-18-89 - 20 DAYS	
5-25-89 - 20 DAYS	
	660
6-07-89 - 20 DAYS	
6-15-89 - 20 DAYS	
6-21-89 - 20 DAYS	
6-28-89 - 20 DAYS	
	740
7-07-89 - 20 DAYS	
7-17-89 - 20 DAYS	
7-25-89 - 20 DAYS	
7-31-89 - 20 DAYS	
	820
8-08-89 - 20 DAYS	
8-22-89 - 20 DAYS	
8-28-89 - 20 DAYS	
	880
9-07-89 - 20 DAYS	
9-15-89 - 30 DAYS	
9-25-89 - 30 DAYS	
	960
10-05-89 - 30 DAYS	
10-18-89 - 30 DAYS	
10-27-89 - 30 DAYS	
	1,050
11-16-89 - 30 DAYS	
	1,080
12-07-89 - 30 DAYS	
12-14-89 - 30 DAYS	
12-26-89 - 30 DAYS	
	1,170
PC 1989 = 810	

---------- 1,170
01-10-90 - 30 DAYS
01-26-90 - 30 DAYS
---------- 1,230
02-08-90 - 30 DAYS
02-19-90 - 30 DAYS
02-28-90 - 30 DAYS
---------- 1,320
03-16-90 - 30 DAYS
03-28-90 - 30 DAYS
---------- 1,380
04-13-90 - 30 DAYS
04-26-90 - 30 DAYS
---------- 1,440
05-11-90 - 30 DAYS
05-24-90 - 30 DAYS
---------- 1,500
06-14-90 - 30 DAYS
06-27-90 - 30 DAYS
---------- 1,560
07-09-90 - 30 DAYS
07-26-90 - 30 DAYS
---------- 1,620
08-16-90 - 30 DAYS
08-31-90 - 30 DAYS
---------- 1,680
09-13-90 - 30 DAYS
---------- 1,710
10-05-90 - 30 DAYS
10-19-90 - 30 DAYS
---------- 1,770
11-08-90 - 30 DAYS
11-28-90 - 30 DAYS
---------- 1,830
PC 1990 = 660

01-18-91 - 30 DAYS 1,860