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MAR 7 1995
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

Case No.: 84,945

HENRY HAMILTON,

Respondent.

ON PETITION FOR REVIEW FROM CERTIFIED QUESTION
FIRST DISTRICT COURT OF APPEAL
Case No.: 93-288

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Appellant is Harry K. Singletary, Secretary for the Florida Department. He will be referred to as Appellant, the agency or DOC. Henry Hamilton, the Appellee, is a former inmate in the custody of the Florida Department of Corrections. He will be referred to by name. References to the appendix will be by the letters "App." followed by the corresponding page number(s). References to the incentive gaintime rule, found in the appendix, are to the rule in effect prior to April 1994.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision of the First District Court of Appeal, reversing an Order of the Circuit Court of Leon County denying Hamilton's Petition for Writ of Mandamus. Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), the panel certified the following as a question of great public importance:

> MAY THE DEPARTMENT OF CORRECTIONS, CONSISTENT WITH THE DECISION OF THE FLORIDA SUPREME COURT IN WALDRUP V. DUGGER, 562 So.2d 687 (FLA. 1990), IMPLEMENT A PRO RATA CONVERSION OF INCENTIVE GAIN-TIME EARNED UNDER CHAPTER 83-131, § 8, LAWS OF FLORIDA, TO WORK AND EXTRA GAIN-TIME AVAILABLE UNDER SECTION 944.275, FLORIDA STATUTES (1979)?

At issue in this case is whether the Department of Corrections may rely on incentive gaintime awards in order to apply the work and extra gaintime statutes for that period of time after the repeal of the work and gaintime statues in 1983 and before this Court's decision in Waldrup, supra., when the Department learned that it would have to apply the repealed statutes to inmates who had offended while these statues were in effect.[1]

At the time Hamilton filed his petition he was serving an overall seventeen (17) year term imposed for lewd and lascivious assault and lewd and lascivious assault in the presence of a child.

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[1] The work and extra gaintime statutes were in effect between July 1, 1978 and June 14, 1983. See, Ch. 78-304, Laws of Florida, (for the effective date of work and extra gaintime); Ch. 83-131 § 8, Laws of Florida (for the repeal of work and extra gaintime).

(See, App. 1.)[2] He was first received to serve these sentences on December 1, 1988. (Id.) These offenses were of a continuing nature, occurring between July 1979 and June 1987. (Id.) Because the Department looks to the beginning point of a continuing offense in order to determine eligibility for work and extra gaintime, (see, Ivey v. Chiles, 604 So.2d 542 (Fla. 1st DCA 1992)), and because Hamilton's offenses began while work and extra gaintime were in effect, he is eligible for the application of the work and extra gaintime statutes, rather than the application of incentive gaintime. (See App. 1.)

When the work gaintime statute was in effect, DOC developed a complex scheme to implement the statute. (See, App. 7-10.)[3] The work supervisor recorded the actual number of hours worked. (App. 7, 8, 10.) Performance of work was evaluated for quality, quantity and diligence, with each of the three categories receiving a rating of outstanding, above satisfactory, satisfactory or unsatisfactory. (App. 9.) Jobs were categorized as skilled, semi-skilled, or unskilled. (App. 9-10.) Detailed documentation reflecting this information was produced. (See, Id.) Because this detailed

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[2] Hamilton is now serving the probationary portion of his sentences, with supervision to continue until July 25, 2007. His release does not moot the issue before this court. In the event that DOC is unable to utilize the incentive gaintime awards for the purpose of awarding work and extra gaintime for the transitional period, Hamilton may well have additional time to serve on his sentences.

[3] When work and extra gaintime were in effect, they were implemented by Policy and Procedural Directive, ("PPD"), rather than administrative rule. The Appellant requests that this Court take judicial notice of the PPD pursuant to 90.202(9) and (12), Florida Rules of Evidence.

documentation was not necessary in order to access awards of incentive gaintime,[4] the agency was faced with the dilemma of how to apply statutes that had been repealed for over seven years. In order to comply with Waldrup and apply the long since repealed statutes, DOC converted the awards made as incentive gaintime to work and extra gaintime on a percentage basis. (App. 1-2.) Thus, an inmate who had received 100% of an incentive gaintime award would receive 100% of the potential work gaintime award for a month (30 days in a month with 30 days) and 100% of the extra gaintime available or six days. (Id.) When Hamilton's awards were converted, his average monthly award was 29.4 days. (Id.)

Below, Hamilton argued that this conversion amounted to an abuse of discretion and that he was entitled to 37 days a month under the pre-1983 statutes based upon his outstanding incentive gaintime ratings and awards. (App. 2.) The First District determined that Hamilton was not entitled to 37 days each month, but found that,

> the application of the DOC's "conversion" is tantamount to the drafting and implementation of a new statute by the DOC, thus circumventing the legislative process. After all, the 1979 statute is available to the DOC. The DOC should apply it, as it was clearly instructed to do in Waldrup.

(App. 3.)

The First District went on to note that it could not determine

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[4] In accessing incentive gaintime awards, skill levels of jobs is not a factor. (See, App. 18-20.) Further, there is one overall performance rating, rather than three separate ratings for quality, quantity and diligence. (See, App. 19.) Moreover, the number of hours worked is irrelevant. (Id.) A job is either full or part time, regardless of the number of hours worked. (Id.)

whether the conversion violated the ex post facto prohibitions, but that it was not difficult

> to conclude that the implementation of the "conversion" deprived appellant of due process of law, as the "conversion" was implemented in lieu of the applicable statute and without regard for the decision of the Florida Supreme Court in Waldrup v. Dugger.

(App. 3-4.)

SUMMARY OF THE ARGUMENT

Seven years after work and extra gaintime had been repealed, the Waldrup, surpa. and Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989) decisions were rendered and DOC learned that it would have to apply long repealed statutes. The only documentation routinely maintained in inmate files reflecting the performance of work and efforts toward rehabilitation were the incentive gaintime awards. These awards reflected whether an inmate had worked, the level of involvement and how well work was performed in general terms. See, Fla. Admin. Code. R. 33-11.0065; App. 18-20.) Thus, the incentive gaintime awards contained indicia necessary to apply the pre-1983 work gaintime statutes and the conversion of these awards on a pro rata basis allowed DOC to comply with Waldrup and apply the pre-1983 statues.

The work and extra gaintime statute accorded DOC broad discretion in implementing the statute and the decision of Waldrup v. Dugger did not limit that discretion. See, Waldrup, supra at 692-693. As noted by this Court in Waldrup, implementation of the statute after the Waldrup decision could only be challenged as an abuse of discretion. (Id.) The conversion does not constitute an abuse of discretion as the awards of incentive gaintime subsumed the criteria necessary to apply work and extra gaintime. Further, they are the only records uniformly available to apply the statutes.

Hamilton's outstanding incentive gaintime rating and corresponding awards indicated in general terms whether he was

working, the quantity of work, and quality of his performance. These are factors that make up an award of work gaintime under § 944.275(2)(b), Fla. Stat. (1979) repealed (1983). Further, a 20 day award of incentive gaintime should indicate participation in self-betterment programs, (see, Fla. Admin. Code R. 33-11.0065(3)(d)1., App. 19) and thus, an effort toward rehabilitation. This is a factor for the award of extra gaintime award under § 944.275(3)(a), Fla. Stat. (1979) repealed, (1983). Thus, the use of incentive gaintime ratings and awards to apply work and extra gaintime allow DOC to apply the repealed statutes and do not amount to an abuse of discretion.

The First District incorrectly concluded that incentive gaintime awards have no correlation to work and extra gaintime awarded under the pre-1983 statutes because the eligibility for an award of incentive gaintime requires diligent participation in work while the pre-1983 statues required merely a satisfactory performance of work in order to be eligible for an award. DOC was aware of this and awarded inmates who had been ineligible for incentive gaintime because of a performance level of "satisfactory", a gaintime award of one day work gaintime. All other inmates, such as Hamilton, were awarded work and extra gaintime on a percentage basis. That is, an inmate who had been rated outstanding, worked full time and awarded the full 20 days incentive gaintime available in a month was awarded the full potential award of work and extra gaintime in that month -- in a month with 30 days, 30 days of work gaintime and six days of extra

gaintime was awarded during the conversion. This represents a reasonable and generous method to apply work and extra gaintime seven years after the statutes' repeal. Further, there is no other documentation uniformly available to evaluate inmates for work and extra gaintime during this seven year period and unless DOC is permitted to convert incentive gaintime awards, it has no other way to implement the statues.

ARGUMENT

Issue I

THE DEPARTMENT OF CORRECTIONS, CONSISTENT WITH THE DECISION OF THE FLORIDA SUPREME COURT IN WALDRUP V. DUGGER, 562 So.2d 687 (FLA. 1990), MAY IMPLEMENT A PRO RATA CONVERSION OF INCENTIVE GAIN-TIME EARNED UNDER CHAPTER 83-131, § 8, LAWS OF FLORIDA, TO WORK AND EXTRA GAIN-TIME AVAILABLE UNDER SECTION 944.275, FLORIDA STATUTES (1979).

The First District concluded that the conversion of incentive gaintime to work and extra gaintime does not comply with this Court's holding in Waldrup as it fails to apply the repealed statutes. DOC strenuously disagrees. DOC submits that it has applied the repealed statutes and it has done so based upon the only records it uniformly has available to it, seven years after the repeal of work and extra gaintime, which indicate whether an inmate worked and his performance in work. These records are the awards of incentive gaintime.

The incentive gaintime statute, effective on June 15, 1983, provided for the award of twenty (20) days each month for diligent participation in work.

> For each month in which a prisoner works diligently, participates in training, uses time constructively, or otherwise engages in positive activities, the department may grant up to 20 days incentive gain-time, which shall be credited and applied monthly.

Section 944.275(4)(b), Fla. Stat. (1983). As implemented by rule, the number of hours actually worked is not recorded. See, Fla. Admin. Code. R. 33-11.0065(3)(d)(1)(2) (1983). Instead, assignments

are categorized as full or part-time. (Id.)[5] An inmate receives one overall rating of either unsatisfactory, satisfactory, above satisfactory or outstanding. See, Fla. Admin. Code. R. 33-11.0065(3)(c). In arriving at a rating, the evaluator considers an inmate's achievement, attitude, work habits, and the development of skills, among other factors. See, Fla. Admin. Code. R. 33-11.0065(3)(b).

The work gaintime statue in effect on July 1, 1978 provided as follows:

> [t]he department is authorized to grant additional gain-time allowances on a monthly basis, as earned, up to 1 day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished, in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gaintime allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of the work performed, and the skill required for performance of the work.

§ 944.275(2)(b), Fla. Stat. (Supp. 1978) repealed (1983). Thus, the award of work gaintime depended on the diligence of the inmate, quality and quantity of the work and the skill required to perform the work. (Id.) As indicated earlier, DOC implemented the statute so that the number of hours worked were recorded and the job performance rated in each of the three areas of diligence, quantity and quality. (App. 9-10.) Jobs were categorized by skill level and the awards reduced 50% and 25% for the performance, respectively,

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[5] DOC's policy is for every inmate is receive a job. Because there are not enough jobs available, an inmate may only work one hour a day and nonetheless receive a maximum award because his assignment is full-time.

of unskilled and semi-skilled jobs, as opposed to skilled jobs. (Id.)

Seven years after the repeal of work gaintime, this court rendered its Waldrup decision. Since incentive gaintime had been in effect for seven years, DOC did not produce the records it would have if work and extra gaintime had not been repealed. Instead, DOC used the only records uniformly available which indicate, in general terms, whether an inmate worked and whether his assignment was full or part time. Inmates such as Hamilton, who had received 20 days incentive gaintime, had to have been assigned full time and participated in self-betterment programs if properly awarded 20 days incentive gaintime. (App. 19; Fla. Admin. Code R. 33-11.0065(3)(d) 1.) Thus, the incentive gaintime awards provided information necessary to apply the work and extra gaintime statutes. The overall rating for incentive gaintime evaluates the inmate in a number of areas, including, work habits and achievement. (App. 19; Fla. Admin. Code. R. 33-11.0065(3)(b). Thus, the overall rating under incentive gaintime subsumes the factors of diligence and achievement required under the repealed work gaintime statute. Further, an inmate was not eligible for 20 days incentive gaintime unless he participated in self-betterment programs or other positive activities. (App. 19; Fla. Admin. Code R. 33-11.0065(3)(d) 1.) While imprecise, this indicates an effort toward rehabilitation, which is a factor in the award of extra gaintime under § 944.275(3)(a). Thus, incentive gaintime awards provided information in order for DOC to apply the repealed

statutes. While not precise and not the method DOC would have chosen had it known that the repealed statues would be resurrected, the incentive gaintime awards allowed DOC to apply work and extra gaintime for that period of time before Waldrup issued, after which time DOC began documenting performance under the statutes directly.

Instead of fashioning a new rule to apply in lieu of the 1979 statute as the First District determined, DOC out of necessity, fashioned a new rule to implement the 1979 statute. Time sheets were not routinely maintained because the time worked was unimportant for the award of incentive gaintime. Further, evaluations by work supervisor were not maintained as an overall rating was simply provided to classification for calculation of an award. The incentive gaintime awards indicated whether an inmate worked, how often, (if not the number of hours worked), and whether his performance was outstanding, above satisfactory or satisfactory. Utilizing this information, DOC converted incentive gaintime to work and extra gaintime. This Court itself recognized that DOC has a great deal of discretion under the repealed statutes. Waldrup at 692-693. After directing DOC to apply the work and extra gaintime statutes to inmates who had offended during the time the statues were in effect, the Waldrup Court noted that DOC retained full discretion in how to apply and implement the statues.

> DOC thus shall recompute incentive gaintime for Waldrup and similarly situated inmates based on the formulas, and in light of the criteria, contained in the pre-1983 statute.
>
> **Nothing in this opinion, however, shall be read as restricting the discretion accorded DOC under the earlier incentive gain-time statutes. This discretion remains**

> **intact. If DOC withholds all or some of the incentive gain-time available to Waldrup or similarly situated inmates under the earlier statutes, then DOC's actions cannot be challenged unless they constitute an abuse of discretion.**

Waldrup, at 692-693 (emphasis supplied). As this Court implicitly recognized, the ex post facto prohibitions, which underlie the Waldrup decision, do not apply to rules or regulations as these are not laws. See, Conlogue v. Shinbaum, 949 F.2d 378 (11th Cir. 1991). Statutes may be applied in different ways without violating the ex post facto clauses. Thus, DOC's discretion under the statues remains intact and the agency may implement the statues in a different manner than it had when work and extra gaintime were in effect. This discretion is broad enough to allow DOC to convert incentive gaintime awards to work and extra gaintime.[6]

The First District Court concluded that the incentive gaintime statute imposed more stringent criteria for awards and thus the conversion of incentive gaintime to work and extra gaintime amounted to an abuse of discretion because "the percentage of gain-

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[6] Further, the conversion produced generous awards. In Hamilton's case, upon conversion produced an average monthly award of 29.4 days. (App. 2.) In order to have received an award of 30 days a month of work gaintime as the statue was applied when in effect, an inmate would have had to work eight hours each day for thirty days. (See, App. 8-10.) The inmate's performance in at least two of the three categories of quality, quantity, and diligence would have to have been outstanding, with the third category rated no lower than above satisfactory. (Id.) Further, the job performed would have had to have been one categorized as skilled. (Id.) If unskilled, the same participation and rating would have produced only a 15 day award. (Id.)

It is worthy of note that Hamilton was not received into DOC's custody until after work and extra gaintime had been repealed; therefore, he had not received awards as they were made when the statutes were in effect. Further, the awards after the conversion decreased.

time actually awarded under the 1983 incentive gain-time statute may not correlate directly or approximately with the percentage of available gain-time actually awarded under the pre-1983 statute for the same conduct." (App. 3.) This conclusion is flawed. Both statutes awarded gaintime based on participation in work based upon performance of that work. This not to say that there are no differences between the statutes. Under work gaintime, an inmate is eligible for an award if he performs at a satisfactory level. § 944.275(2)(b), Fla. Stat. (1979). An inmate is not eligible for an award of incentive gaintime unless he performs at a level of above satisfactory or higher. See, § 944.275(4)(b), Fla. Stat. (1983); Fla. Admin. Code R. 33-11.0065(3)(d) 1. - 3, found at App. 19-20.) While this was not Hamilton's issue, as he was complaining about not receiving 37 days for his outstanding rating, DOC notes that when converting incentive gaintime to work and extra gaintime DOC took this difference into consideration. Inmates who were rated satisfactory and thus had received no incentive gaintime were awarded one day of work gaintime during the conversion. All other awards were made on a pro rata basis. It appears that the First District seized on the distinction between the pre and post 1983 statutes regarding the eligibility for an award and improperly concluded that the incentive gaintime awarded under the 1983 statues may not correlate with work and extra gaintime. While it is not the method that DOC would have used had it known it would have to apply the repealed statutes, as indicated earlier, the incentive gaintime awards reflect in general terms, whether work was

performed, the performance of that work and the quantity of performance. While the skill level of the work was not factored into the rating or award of incentive gaintime, as DOC did not categorize jobs by skill after 1983, when converting awards, DOC treated all jobs as if they were skilled and thus, did not take any deduction for the performance of unskilled or semi-skilled awards. the conversion was necessary, fair and generous.

An abuse of discretion does not encompass unwise or mistaken decisions. Hasam v. Realty Corp v. City of Hallendale, 393 So.2d 561 (Fla. 4th DCA 1981). An abuse of discretion exists only where there is no conceivable basis for the decision. (Id.) The critical question is then, whether there is no conceivable basis for the use of incentive gaintime awards in applying the work and extra gaintime statutes as a transitional tool. As the incentive gaintime awards generally indicate that work was performed and how it was performed, their use in awarding work gaintime is not one without any conceivable basis. Further, an award of 20 days incentive gaintime indicates that the inmate participated in self-betterment programs, indicating an effort toward rehabilitation needed for an award of extra gaintime. Thus, it is not accurate to characterize awards of extra and work gaintime on the basis of the conversion of incentive gaintime as one without any basis. Therefore, the conversion cannot constitute an abuse of discretion.

The First District states that the 1979 statues are there and DOC should apply them. (App. 3.) DOC agrees. The issue is how does DOC apply them when it has no records other than incentive

gaintime ratings and awards indicating whether an inmate worked and his efforts toward rehabilitation. It appears that the First District fails to appreciate the difficulty in applying the statues seven years after their repeal to thousands of inmates. Detailed records that were utilized while those statues were in effect, were not necessary to implement the 1983 incentive gaintime statue and thus do not exist. The only records uniformly available are incentive gaintime awards and rating. The manner that the statute is applied is within DOC's discretion. The agency has exercised that discretion and applied the statute. Further, Hamilton failed to show any abuse of discretion. Instead, he simply wanted 37 days each month for his outstanding rating.

Moreover, the First District believes that DOC flouted the direction of this court in Waldrup and that DOC has been careless in the application of the gaintime statues. In fact, the First District has included a gratuitous criticism of DOC by footnote, indicating that DOC has playing "fast and loose" with statutory formula for the award and forfeiture of gaintime. This language is likely to encourage frivolous prisoner litigation and the characterization is unfair. When the legislature repealed work gaintime in 1983 and replaced it with incentive gaintime, DOC of course, applied the new statute. It had no authority to do otherwise. It was years later, when the Raske v. Martinez, supra., and the Waldrup decisions were rendered, that DOC learned that it would have to apply long repealed statutes. This created a dilemma. Records to apply work gaintime as applied before the statute's

repeal did not exist; the only records uniformly available were the incentive gaintime. After considerable time and effort considering how to apply the statues under these circumstances, DOC used these records -- the only one uniformly available. Further, the conversion itself was suggested by Jeffrey Raske, the inmate who filed Raske. As noted by the court in Raske,

> During the course of the appeals in Plaintiff's case and the pendency of the Waldrup case, the DOC adopted a pro-rata conversion of Plaintiff's incentive gaintime for the period between June 15, 1983 and May 19, 1988. This pro-rata method was proposed by Plaintiff in his petition to the District Court. The pro-rata method was necessary because Plaintiff's methods only contained data that was necessary to permit gaintime to be calculated under the 1983 Act. These records did not contain the documentation necessary that would have allowed the DOC to make an assessment of the gaintime that should have been awarded between 1978 and 1983 pursuant to the Act.
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> The District Court, in Raske v. Martinez, No. 87-779 - CIV-ORL-18 (M.D. Fla. 1987), ordered the DOC to apply the statue in effect at the time of Plaintiff's offense. Thus, Plaintiff was eligible to earn more gaintime credits than he would have been under the 1983 Act. However, Plaintiff's gaintime earned prior to the District Court's order was re-calculated using a pro-rata method which was proposed by Plaintiff himself. The pro-rata formula was a transitional tool. After the District Court's order, the DOC obtained the appropriate documentation, and the determination of Plaintiff's gaintime was based on the appropriate statutes and rules. Moreover, the fact that Plaintiff suggested the pro-rata formula be used to convert his gaintime serves to mitigate Plaintiff's position.

(App. 23,37.)

The conversion was a transitional tool necessitated by a lack of documentation. It allows DOC to apply the pre-1983 statues as some of the same factors are subsumed into the incentive gaintime rating and awards. The conversion of incentive to work and extra

gaintime after the Waldrup and Raske decisions took two years to complete and affected five thousand inmates. Records do not exist to apply day for day gaintime as it was applied before the repeal. The DOC knows of no other way to apply the pre-1983 statues as there is simply no other indicia to apply the statue. If the decision of the First District is not overturned, DOC will be faced with the total inability to apply the pre-1983 statues.

CONCLUSION

The Appellant, Harry K. Singletary, requests that this Court accept jurisdiction and answer the certified question in the affirmative, reversing the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **FLORIDA DEPARTMENT OF CORRECTIONS' INITIAL BRIEF** has been furnished by U.S. Mail to **HENRY HAMILTON**, 1815 S.W. MAPLE, NAPLES, FLORIDA, on this 6 day of MARCH, 1995.

Judy Bone

hamilton.ib