OA 5-30-96

IN THE SUPREME COURT OF FLORIDA

RICHARD BING GWONG,

Petitioner,

-vs-

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

Respondent.

CASE NO. 87,824

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF THE FACTS AND CASE

This petition does not ask the Court to decide whether some change in the state's incentive gain-time statute violates the ex post facto clauses of the Florida and United States Constitutions. Instead, this Court must decide whether the exercise by the Department of Corrections of its broad discretion in implementing the statute is unconstitutional. In short, does the department's decision to withhold the availability of incentive gain-time to the petitioner--a power it has had since the inception of the gain-time--violate the ex post facto clause.

In response to a request from Mr. Harry K. Singletary, Secretary for the Department of Corrections (DOC), the Attorney General on March 20, 1996, issued Attorney General Opinion 96-22. The opinion addressed the authority of the Department of Corrections to adopt an administrative rule denying the award of work, extra, and incentive gain-time to certain categories of violent offenders pursuant to section 944.275, Florida Statutes. The Attorney General concluded that the department, in the exercise of its statutory grant of discretion, may adopt such a rule.

The Department of Corrections subsequently adopted Rule 33-11.0065, effective April 21, 1996, which provides that inmates convicted of certain crimes may not receive incentive gain time if such inmate has 85% or less of any sentence remaining to be served. On April 29, 1996, a petition for writ of mandamus was filed with this Court by the Petitioner. In light of issues raised in the petition for writ of mandamus concerning Attorney General Opinion 96-22, the Attorney General requested leave to file an amicus brief.

SUMMARY OF ARGUMENT

Petitioner mistakenly asserts that Attorney General Opinion 96-22 condones the unlawful withholding of incentive gain-time by DOC. This is not a situation where a law seeks to alter penal provisions established by the Legislature and impose more onerous conditions than the law in effect on the date of the offense. The adoption of a rule by DOC limiting the availability of incentive gain-time is merely an exercise of the discretion, granted under the gain-time statute since its inception, to decide whether or not to offer incentive gain-time.

For these reasons, the Attorney General held in Attorney General Opinion 96-22 that the adoption of a rule limiting the availability of incentive gain-time by the Department of Corrections is an exercise of its discretion under the statute in effect at the time of an inmate's offense and does not, therefore, constitute an ex post facto violation.

ARGUMENT

THE ADOPTION OF A RULE BY THE DEPARTMENT OF CORRECTIONS THAT IMPLEMENTS ITS DISCRETION GRANTED UNDER THE STATUTE IN EFFECT AT THE TIME OF AN INMATE'S OFFENSE DOES NOT CONSTITUTE AN EX POST FACTO VIOLATION.

Petitioner's request for an expedited writ of mandamus relies on Weaver v. Graham, 450 U.S. 24 (1981), Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990), and Raske v. Martinez, 876 F. 2d 1496 (11th Cir. 1989), to assert that Attorney General Opinion 96-22 is erroneous. Such reliance is misplaced. These cases address the retroactive application of legislative alterations to the gain-time statute. Attorney General Opinion 96-22 recognized the constraints placed on the Legislature in amending the gain-time statute and retroactively applying such amendments to inmates whose offenses occurred prior to the statute's amendment.

The issue addressed in the opinion and now before this Honorable Court, however, is not whether the Legislature may amend the statute and the Department may retroactively apply such amendment, but rather whether the department may exercise its discretion which has been granted under section 944.275, Florida Statutes, since the statute's adoption in 1978. As Attorney General Opinion 96-22 points out, the authority to award incentive gain-time by the Department of Corrections under

section 944.275, Florida Statutes, has always been discretionary. This Court in Waldrup v. Dugger specifically recognized such discretion when stating:

> Nothing in this opinion, however, shall be read as restricting the discretion accorded DOC under 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. (e.s.)

562 So. 2d at 692-693.

The United States Supreme Court in Weaver v. Graham, supra, has also acknowledged the discretionary nature of incentive gain-time, stating that the award of extra gain-time is "purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate . . . ." (e.s.) 450 U.S. at 25. To conclude that an inmate's good conduct is the sole criterion for determining whether incentive gain-time is awarded runs counter to the United States Supreme Court's statement that section 944.275 is contingent on both the wishes of the department and the conduct of the inmate.

The Attorney General recognizes that the award of both basic gain-time and incentive gain-time involves the exercise of

discretion by the department. See, Raske v. Martinez, supra. Florida's gain-time statute, however, recognizes a distinction between the discretion that may be exercised by DOC when awarding basic gain-time and when awarding incentive gain-time. In providing for basic gain-time, section 944.275 states that if the inmate performs as specified therein, the department "shall" grant such gain-time. See, e.g., s. 944.275(1), Fla. Stat. (1981); s. 944.275(4)(a), Fla. Stat. (1983); s. 944.275(4)(a), Fla. Stat. (1993). In contrast, the statute, referring to the department's grant of incentive gain-time, states only that if the inmate performs as provided therein, the department "may" or "is authorized" to grant such gain-time. See, e.g., s. 944.275(2)(b) and (3)(a), Fla. Stat. (1981); s. 944.275(4)(b), Fla. Stat. (1983); s. 944.275(4)(b), Fla. Stat. (1993).

This Court has recognized that the term "shall" has a mandatory connotation in the absence of contrary intent evidenced in the statute, while the term "may" has a permissive connotation. See, e.g., Drury v. Harding, 461 So. 2d 104 (Fla. 1984); Holloway v. State, 342 So. 2d 966 (Fla. 1977); Neal v. Bryant, 149 So. 2d 529 (Fla. 1962) (word "shall" normally

connotes a mandatory requirement); Fixel v. Clevenger, 285 So. 2d 687 (Fla. 3d DCA 1973); City of Miami v. Save Brickell Ave., Inc., 426 So. 2d 1100 (Fla. 3d DCA 1983) (word "may" when given its ordinary meaning, denotes permissive term rather than mandatory connotation of the word "shall"). The Legislature's use of both mandatory and permissible language within the same statute in prescribing DOC's responsibilities in awarding incentive and basic gain-time reflects the Legislature's intent to give greater discretion to the department in awarding incentive gain-time.

Nothing in the statute, whether in its 1978, 1983, or current version, requires DOC to grant incentive gain-time or precludes the department from adopting a policy which states that no such gain-time shall be given. DOC has the discretion to offer or not to offer such gain-time. While the statute may prescribe the conditions which DOC will use in determining whether an inmate has earned such incentive gain-time if DOC decides to make such gain-time available to the inmate, it does not require DOC to offer such gain-time.

Petitioner relies on a footnote in Raske to assert that the department's discretion in awarding incentive gain-time is limited to determining only whether the inmate has worked

diligently enough to have earned such gain-time. However, the Raske court stated:

> We agree, of course, that incentive gain time is discretionary. We note, however, that this discretion is not complete. Thus, for example, the State does not contend that a prisoner who has performed his work in an outstanding manner can legally be denied incentive gain-time for that work, despite its so-called "discretionary" nature. See Pettway v. Wainwright, 450 So. 2d 1279 (Fla. 1st DCA 1984).

The Court cites the decision of the First District Court of Appeal in Pettway v. Wainwright, supra, as support for this conclusion. The Pettway court, however, in considering the DOC's discretion to award incentive gain-time, concluded only that the exercise of such discretion must be uniform unless some justification and authority exists for classifying and treating some prisoners differently than others. The court stated:

> While it is true that [section 944.275(4)(b), Florida Statutes (1983)] is not mandatory and the DOC may deny incentive gain-time, the DOC must uniformly grant or deny incentive gain-time unless there is some justification and authority for classifying and treating some prisoners different [sic] from other prisoners. The DOC argues that it needs a cut-off date for granting incentive gain-time in order to determine a definite release date sufficiently in advance of a prisoner's release and in order to properly prepare for the prisoner's release. While this might be a justifiable basis for adopting a rule authorizing such

> a procedure, no such rule has been adopted. Until the DOC adopts a rule in accordance with the Administrative Procedure Act and affected parties have had an opportunity to contest the validity of such a rule, the DOC is without authority to arbitrarily deny incentive gain-time to prisoners during their last month or more of incarceration.

The department subsequently adopted a rule providing such a cut-off date which was upheld by the court in DeAngelis v. Wainwright, 455 So. 2d 639 (Fla. 1st DCA 1984).

Nothing in Pettway provides support for reading Raske to conclude that DOC lacks the discretion to limit the availability of incentive gain-time. It does, however, require such a procedure to be administered pursuant to a rule so that persons affected are given an opportunity to challenge its validity.

Moreover, after its decision in Raske, the Eleventh Circuit Court of Appeals upheld the application of an administrative rule limiting the award of incentive good-time to prisoners who were already incarcerated and had a record of multiple violent offenses. The court in Conlogue v. Shinbaum, 949 F. 2d 378 (11th Cir. 1991), concluded that such an application did not violate the ex post facto clause and did not violate equal protection since such a denial was rationally related to the state's interest in preventing the early release of serious offenders.

Such a conclusion is consistent with earlier Eleventh Circuit Court cases which have held that the prohibition against ex post facto laws does not prohibit changes in stated policy rules that show how an agency's discretion is likely to be exercised. See, e.g., Paschal v. Wainwright, 738 F. 2d 1173 (11th Cir. 1984); Dufresne v. Baer, 744 F. 2d 1543 (11th Cir. 1984).

Petitioner erroneously asserts that Attorney General Opinion 96-22 states that since the rule applies prospectively, no ex post facto violation can occur. In fact, the reference in the opinion to prospective application is merely a recognition that the rule will not affect an inmate's vested right in gain-time that has already been awarded.

Without question, a law need not impair a vested right to violate the ex post facto prohibition. See, Weaver v. Graham, supra; Waldrup v. Dugger, supra. Nowhere in Attorney General Opinion 96-22 is it stated that the ex post facto prohibition is inapplicable because the proposed DOC rule will apply prospectively. The reference in the opinion to prospective application only relates to a recognition that DOC's prior award of incentive gain-time would not be compromised by the adoption of the rule

and thus would not affect an inmate's vested right in any gain-time already awarded.

This is not, however, a situation where a law seeks to alter penal provisions established by the Legislature and impose more onerous conditions than the law in effect on the date of the offense. The adoption of the rule by DOC is merely an exercise of discretion granted under the incentive gain-time statute since its inception, to limit the availability of incentive gain-time, to decide whether or not to offer incentive gain-time.

As the United States Supreme Court in Weaver v. Graham, 450 U.S. at 31, "The critical question is whether the law changes the legal consequences of acts completed before its effective date." Here the law has remained static, its legal consequences the same today as they were a year ago. The petitioner's constitutional rights are unaffected, his punishment unchanged.

CONCLUSION

For the foregoing reasons, the Attorney General urges this Honorable Court to recognize that the adoption of a rule limiting the award of incentive gain-time by the Department of Corrections is an exercise of its discretion under the statute in effect at the time of an inmate's offense and does not, therefore, constitute an ex post facto violation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies the foregoing MOTION TO INTERVENE AS AMICUS CURIAE have been sent by U.S. mail to the following: Mr. Baya Harrison, III, Esq., Post Office Box 656, Monticello, Florida 32345-0656; Mr. Bernard F. Daley, Jr., Esq., Daley and Associates, 1210 East Park Avenue, Tallahassee, Florida 32303; Mr. Louis A. Vargas, General Counsel, and Ms. Susan Maher, Deputy General Counsel, Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida 32399-2500, this 15th day of May, 1996.

Joslyn Wilson
Assistant Attorney General