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IN THE SUPREME COURT OF FLORIDA

RICHARD BING GWONG,

Petitioner,

vs. Case No. 87,824

HARRY K. SINGLETARY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR EXPEDITED WRIT OF MANDAMUS WITH APPENDIX

Petitioner seeks the invocation of the original jurisdiction of and a writ of mandamus from the Supreme Court of Florida pursuant to Article V, Section 3(b)(8), Florida Constitution, declaring invalid Rule 33-11.0065(1)(a)6 (1996), Florida Administrative Code, and granting petitioner other relief.

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PETITION FOR EXPEDITED WRIT OF MANDAMUS WITH APPENDIX

Richard Bing Gwong ("Gwong"), Florida Department of Corrections Inmate Number 070461, by undersigned counsel, files this petition for writ of mandamus, stating:

Nature of the Case and the Need for the Expedited Invocation of Original Jurisdiction

1. The petition is filed per the provisions of Art. V, §3(b)(8), Fla. Const., which invests the supreme court with original jurisdiction to "...issue writs of mandamus..." The specific relief sought is this court's writ of mandamus invalidating Fla. Admin. Code Rule 33-11.0065(1)(a)6 adopted April 21, 1996 (Appendix, Exhibit C, pages 115-118) which illegally denies Gwong and other similarly situated prisoners (18,381 of them, see Appendix, Exhibit A, page 17) eligibility to earn incentive gain time per the provisions of §944.275 (4)(b), Fla. Stat. (1983), and compelling the respondent to perform his ministerial duty imposed by law by continuing to make incentive gain time available to be earned by the petitioner and others similarly situated. Issuance of the writ by the supreme court is the proper, recognized

remedy. See Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990). The extraordinary writ is sought on an expedited basis from this high court not just because of a clear* violation of Gwong's constitutional rights, but also because of the torrent of court clogging litigation which is sure to follow (and the potential of harm** to Department of Corrections' employees) as a result of the adoption of the rule. The essential facts necessary to determine whether the writ should be issued as set out below are undisputed. Gwong has no other adequate legal or administrative remedy.

2. Gwong is a Florida resident, United States citizen and state prisoner. He is incarcerated at Hardee Correctional Institution, Hardee County, Florida in the custody of the respondent, Hon. Harry K. Singletary, Jr., Secretary, Florida Department of Corrections ("DOC"), whose official headquarters are located in Tallahassee, Leon County, Florida.

3. Gwong is serving a 22 year prison sentence for second degree murder committed on January 13, 1987. He was

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* As demonstrated below, the state has repeatedly violated the *ex post facto* clause of the Constitution of the United States regarding the matter (gain time) presented herein in the course of wasteful, expensive protracted litigation. See for example Weaver v. Graham, 450 U.S. 24 (1981), Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990), Harris v. Wainwright, 376 So. 2d 855 (Fla. 1979), and Raske v. Martinez, 876 F.2nd 1496 (11th Cir. 1989). It has done so once again by the adoption of Fla. Admin. Code Rule 33-11.0065(1)(a)6.

** See Lowry v. Parole Commission, 473 So.2d 1248 (Fla. 1985) where expedited relief was granted by this court under similar circumstances. In that case, the Florida Parole Commission adopted an emergency policy denying parole consideration to hundreds of Florida prisoners based upon an errant attorney general's opinion. The supreme court granted the writ and invalidated the commission's illegal action. See page 5 of this petition.

sentenced on February 24, 1989 in Pinellas County, Florida Circuit Court Case No. 87-529-CF. He has not yet served 85% of the sentence. His current tentative release date ("TRD") according to the DOC is December 5, 1998.

4. On January 13, 1987, the date of the commission of the petitioner's crime, §944.275, Fla. Stat. (1983), provided in part that Gwong was eligible to earn what is called "incentive gain time" as follows:

> "(4)(b) For each month a prisoner works diligently ...the department may grant up to 20 days of incentive gain time, which shall be credited and applied monthly."

5. Effective April 21, 1996, The DOC adopted Fla. Admin. Code Rule 33-11.0065, which makes Gwong and many others similarly situated ineligible to earn incentive gain time after that date. The rule provides in part:

> "Rule 33-11.0065 Incentive Gain Time
>
> (1) Ineligibility
>
> (a) No inmate shall receive or accumulate gain time:
>
> **********
>
> 6. If convicted of any of the following offenses committed before October 1, 1995 and has 85% or less of any sentence remaining to be served. The provisions of (1) (a) 6 shall also apply to work, extra, and constructive gain time for inmates convicted of offenses committed between July 1, 1978 and June 14, 1983." (Appendix, Exhibit C, pages 115-117.)

This is followed by an enumeration of violent offenses which

make the inmate ineligible to "...receive or accumulate (incentive) gain-time" and includes second degree murder.

6. Based upon the new rule, the DOC no longer allows Gwong and many others similarly situated to earn incentive gain time. Were he able to earn incentive gain time, he could be released from incarceration in December, 1997 or sooner.

7. The DOC's analysis of the rule (Appendix, Exhibit A, page 17) has determined that some 18,381 violent felony offenders will be impacted by the rule because they no longer will be allowed to earn incentive gain time.*

8. It is obvious that the adoption of the rule will cause great bitterness, anger and resentment among this very large number of violent felons. The frustration will most certainly result in acts of violence directed at corrections officers and others who must come in contact with some of the affected inmates on a daily basis. It will also cause a torrent of lawsuits filed by many of the 18,000 plus inmates in virtually every circuit and appellate court in Florida. This and the illegality of the rule is reason enough for this court to resolve the issue quickly.

9. As we shall conclusively show below, Rule 33-11.0065(1)(a)6 is a clear violation of Art. I, §10, cl. 1, U.S. Const., which provides that "(no) state shall...pass any...*ex post facto* law..." In an unbroken line of Florida

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* The rule specifically targets violent and sex offenders.

and federal decisions, the courts have invalidated state efforts to improperly curtail prisoners' eligibility to earn incentive gain time based upon amendments to and bureaucratic tinkering with §944.275, Fla. Stat. Furthermore, as we shall also demonstrate, the rule by the DOC's own admission is not based upon a change in the laws of Florida. On the contrary, the rule is in direct contravention of §944.275(4)(b), Fla. Stat. (1983), the controlling law at the time Gwong committed his crime, and the 1995 amendment thereto.

10. Adoption of the subject rule is just the latest in a series of failed attempts to flaunt the constitution, ignore decisions of this Court and federal courts, and deny Gwong and other similarly situated prisoners their right to earn incentive gain time. This court's writ should be issued to invalidate the rule and bring order out of the chaos which is sure to follow if the problem is left to fester.*

The Flawed Justification for the Rule

11. The DOC rule was prompted by Attorney General

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* As mentioned on page 2, supra, in Lowry v. Parole Commission, 473 So.2d 1248 (Fla. 1985), this court expedited the disposition of an inmate's habeas corpus/mandamus petition after the parole commission denied him (and effectively hundreds of other similarly situated prisoners) eligibility for parole as a result of an erroneous attorney general's opinion. Although not referenced in the opinion, the inmate's counsel urged and was granted a swift decision due to the high degree of hostility among the prison population created by the ill advised opinion and the commission's reliance thereon. The respondent may counter this concern by asserting that no court should be coerced into action based upon inmate anger. That is certainly true. By the same token, as in Lowry, the attorney general has once again ignited a firestorm within the prison system which he can walk away from -- but the DOC officers at the various prisons and the prisoners whose rights have been violated cannot.

Opinion 96-92 a copy of which is included in the appendix to this petition as Appendix, Exhibit B, pages 1-6. The attorney general's argument is twofold: First, since the rule is to be applied "prospectively," it is not *ex post facto*. Secondly, the agency has the "discretion" to employ a "procedure" which make certain classes of inmates ineligible for incentive gain time even though the "procedure" is adopted after the date of the particular inmate's offense. (Appendix, Exhibit B, pages 1-4, AGO 96-92.)

Is the Rule *Ex Post Facto*?

12. First of all, the attorney general states that "(t)he rule would be applied prospectively* and would not affect any such gain-time already awarded." (See Appendix, Exhibit "B", page 1, AGO 96-92.) This argument begs the question and is so lacking in merit as to be frivolous.** The Supreme Court of the United States expressly rejected this contention in Weaver v. Graham, 450 U.S. 24, 31 (1981), when it observed:

> "The respondent maintains that Florida's 1978 law altering the availability of gain time is not

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* All emphasis by underlining or bold print is added unless indicated otherwise.

** This argument which is cited at page 1,2 of AGO 96-92 (Appendix, Exhibit B, page 2) is so specious that not even the DOC has advanced it since Weaver was decided in 1981. In this regard, the attorney general of Florida represented the respondent in Weaver (450 U.S. at 24) thus the office cannot deny knowledge of the emptiness of same. We ask that the court consider the attorney general's rehash of the rejected legal position in light of calls from him and other public officials to sanction inmates for presenting successive/previously rejected claims in administrative and legal proceedings.

> retrospective because, on its face, it applies only after its effective date. (Reference to brief omitted.) This argument fails to acknowledge that it is the effect, not the form of the law that determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast as asking whether Fla. Stat. §944.275(1) (1979) applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative. The respondent concedes that the State uses §944.275(1), which was implemented on January 1, 1979, to calculate the gain time available to petitioner, who was convicted of a crime occurring on January 31, 1976. Thus, the provision attaches legal consequences to a crime committed before the law took effect."

13. In Waldrup v. Dugger, 562 So.2d 681 (Fla. 1990), Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989) and Weaver v. Graham, supra, neither the legislature nor the DOC attempted to recapture gain time that prisoners had earned (or been credited with) before the various revisions of §944.275, Fla. Stat. went into effect. On the contrary, just as in the case at bar, the legislature and the DOC were attempting to limit the availability of gain time that could be awarded after the effective date of the revision. But the courts found that the amendments still violated the *ex post facto* clause because they limited the extent of the prisoner's eligibility for gain time under §944.275, Fla. Stat. as that law existed at the time the prisoner committed the offense for which he or she was incarcerated. As aptly stated in Waldrup v. Dugger, 562 So.2d 681, 691 (Fla. 1990):

> "It is well established that a penal statute violates the ex post facto clause **if, after a crime has been committed, it increases the penalty attached to that crime**. The United States Supreme Court clearly established this principle in the early case of Calder v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 963,67 L.Ed.2d 17 (1981). (Other citations omitted.)
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> The policy underlying this prohibition is 'to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.' Id., 450 U.S. at 280-29, 101 S.Ct. at 963-64 (citing Dobbert v. Florida, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L. Ed. 2d 344 (1977). (Other citations omitted.)
>
> A retroactive law, however, is not ex post facto unless two critical elements are present: The law must apply to events occurring before its enactment, and it must disadvantage the offender."* (Citations omitted.)

In applying the first of the "two critical elements" to incentive gain time, the court said in part:

> "We have no doubt that both the incentive and basic gain-time statutes challenged by Waldrup contain the first of these elements."
>
> **********
>
> "Both of these gain-time revisions, then, apply to a large class of inmates like Waldrup whose offenses occurred before June 1983, when the act took effect."

(Id.)

14. It is therefore crystal clear that the attorney

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* The DOC's rule fails the second critical test of an *ex post facto* violation as well because it "disadvantages the offender." This is so because before the rule was enacted, up to 20 days/month in incentive gain time were available to Gwong thereby affording him the ability to hasten substantially his actual release date. §944.275(4)(b), Fla. Stat. (1983).

general's first argument -- that Rule 33-11.0065(1)(a)6 is not an *ex post facto* law because it is to be applied after its effective date ("prospectively")-- is without merit. This is so because at the time Gwong committed the offense for which he is incarcerated (January 13, 1987), he could earn up to 20 days each month of incentive gain time -- and thereby substantially shorten his actual period of incarceration. See §944.275(4)(b), Fla. Stat. (1983). Gwong is no longer eligible to do so. Thus the rule is *ex post facto* -- and violates Art. I, §10 (1), U.S. Const.

Did the DOC have the Inherent Discretion to Enact the Rule?

15. The attorney general next advises that by changing its rules to make certain classes of prisoners (violent and/or sex offenders) -- who heretofore were eligible to earn incentive gain time -- ineligible to do so in the future -- the DOC is simply modifying its "procedure" within the very broad limits of its discretion. In so doing, the attorney general relies upon Conlogue v. Shinbaum, 949 F.2d 378 (11th Cir. 1991) and language taken completely out of context from Waldrup, supra, at 562 So.2d 692, 693, which provides

> "(n)othing 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."

The attorney general then claims incorrectly:

> "The courts, however, 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. The adoption of the rule by the DOC does not limit the agent's discretion but rather reflects the agency's procedure to grant incentive gain-time. From the time an inmate is incarcerated, he is on notice that the award of gain-time is subject to the discretion of DOC. The proposed rule merely states and justifies that exercise of discretion by DOC. The determination as to which class of inmates may be subject to the DOC rule would also appear to be within the department's discretion."

(See Appendix, Exhibit B, page 4.)

16. This tired argument -- which has been rejected by this and other courts time after time -- also has no merit for the reasons set out below.

17. In Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989), the court dealt specifically with Florida's incentive gain time statute, §944.275, Fla. Stat. -- and specifically with the contention that the discretionary authority of the DOC renders it immune to legal challenge when the department decides in its infinite wisdom to curtail it. Thus, the Raske court said (when analyzing basic and incentive gain time):

> "The State contends that basic gain time is fundamentally different than incentive gain time because basic gain time is automatically earned by prisoners, ***while incentive gain time is earned only at the discretion of prison officials***. Because incentive gain time is discretionary in nature, **the State contends that petitioner has no right to receive incentive gain time** and **that the State therefore can alter the method by which incentive gain time is calculated without violating the ex post facto clause of**

the Constitution."

Raske v. Martinez, 876 F.2d at 1499. But because Raske did have a right -- a constitutional right -- not to have his ability to earn incentive gain time ripped away from him -- the court found that "**...we do not find the State's argument to be persuasive.**" (Id.)

18. The Raske court, finding that its decision was "controlled by the principles announced by the Supreme Court in Weaver v. Graham..." (Raske, 876 F.2d at 1498) then recognized that the ability to earn incentive gain time was a privilege granted by the legislature ("...the duties that allow a prisoner to earn such [incentive] gain time are a matter of legislative grace..." Raske, 876 F.2d at 1499) -- not the DOC --, that at the time Raske committed his crime, §944.275(4)(b), Fla. Stat. (1978) was controlling and afforded him that ability -- and while that statute contained the word "may,"

> "(w)e see no fundamental distinction between **the conditions that a prisoner must satisfy** to receive basic gain time and **the conditions that a prisoner must satisfy to earn discretionary gain time. In both cases, the department decides in its sole discretion whether the prisoner has behaved well enough or worked diligently enough to earn gain time.**"

Raske, 876 F.2d at 1497, 1499. The court added:

> "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)."*

Raske, supra, 876 F.2d 1499, footnote 6. The Raske court concluded at page 1499:

> "Thus even though the opportunity to earn incentive gain time is dependent on the grace of the legislature and the availability of jobs, we conclude that if the State affords its inmates such work, it is bound to reward prisoners for their services at a gain time rate at least equally advantageous to that in effect at the time those prisoners' offenses."

Thus when this court noted in Waldrup, 562 So.2d at 693, that:

> "(n)othing 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,"

it was making it clear that the DOC's discretion was hardly unbridled -- and had to be exercised "under the...incentive gain-time statutes." (Id.) And as the court in Raske at 1499 held, that discretion is strictly controlled by the

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* The court is asked to note that the Raske court considered Pettway v. Wainwright, 450 So.2d 1279 (Fla. 1st DCA 1984), in arriving at its decision. Thus, the DOC can hardly claim that Pettway affords it discretion to completely gut the incentive gain time eligibility Mr. Gwong is entitled to by virtue of §944.275(4)(b), Fla. Stat. (1989) -- new rule 33-11.065(1)(a)6 notwithstanding.

particular incentive gain time statute in effect at the time Raske committed his crime -- and the department was "**...bound to reward prisoners (including Raske) for their services at a gain time rate at least equally advantageous to that in effect at the time of those prisoners' offenses.**" Likewise, in the case at bar, the DOC is "bound" to afford Mr. Gwong the ability to earn incentive gain time (depending of course on how hard and well he works) based upon §944.275(4)(b), Fla. Stat. (1983), the incentive gain time statute in effect on January 13, 1987.

19. In Waldrup, supra, the petitioner claimed that the 1983 revision to §944.275(4)(b), Fla. Stat., which reduced the amount of incentive gain time a prisoner could earn each month, from 37 to 20 days/month, constituted an *ex post facto* violation. The DOC countered by claiming that the *ex post facto* provisions of the constitution were not pertinent since incentive gain time is not a "..vested right..." protected by the *ex post facto* clause -- and is instead a "...'mere expectancy' dependent entirely on the discretion of DOC." Waldrup, 562 So.2d at 692. This honorable court disagreed stating:

> "The state argues that this does not render the law ex post facto, since the availability of incentive gain-time is nothing but a 'mere expectancy' dependent entirely on the discretion of DOC. Be that as it may, we are forced to conclude that the 1983 amendment renders the statute ex post facto because it actually disadvantages Waldrup within

the meaning of the relevant case law.

Indeed, the argument advanced by the state sounds very much like the discredited analysis employed by this court in Harris v. Wainwright, 376 So.2d 855 (Fla. 1979). In Harris we had denied relief after an inmate was subjected to a retroactive gain-time statute that had reduced the maximum number of gain-time days that could be awarded to him. We held that

> gain-time allowance is an act of grace rather than a vested right and may be withdrawn, modified or denied.

Harris, 676 So. at 856.

The United States Supreme Court in Weaver directly overruled Harris finding that [c]ontrary to the reasoning of the supreme court of Florida, a law need not impair a vested right to violate the ex post facto provision.... Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases the punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Weaver, 450 U.S. at 29-31, 101 S.Ct. at 964-65. The Weaver Court went on to reject the state's argument that an alteration in gain-time was not actually an alteration in sentence. Gain-time, held the Weaver Court, "is one determination of petitioner's prison term." Id. at 32, 101 S.Ct. at 966. In conclusion, the Weaver Court found the retroactive gain-time statute void to the extent that it "reduces the number of monthly gain-time credits *available* to an inmate *who abides by prison rules and adequately performs his assigned tasks*." Id. at 33, 101 S.Ct. at 967.

It could not be clearer that the analysis in Weaver applies as fully to discretionary gain-time as it does to "mandatory" gain-time, if the latter has

> ever truly existed in Florida. The Eleventh Circuit has reached this conclusion in a recent case raising exactly the issue before this Court today. Raske, 876 F.2d at 1499-1500. We agree with the Eleventh Circuit's analysis in Raske. Even the "grace" of the legislature, once given, cannot be rescinded retrospectively. Id. The Weaver opinion makes it plain that the ex post facto clause applies with equal vigor to a retroactive reduction in DOC's discretion to grant gain-time. Such plainly is the case before us today.
>
> Accordingly, upon this opinion becoming final, DOC shall be barred from applying the 1983 reduction in incentive gain-time to inmates convicted of offenses occurring before the effective date of the 1983 act. As to Waldrup and similarly situated inmates the effect of this holding is two-fold: To reinstate the incentive gain-time statutes in force at the time of offense and to declare unconstitutional the 1983 incentive gain-time revisions as applied to these inmates. DOC thus shall recompute incentive gain-time for Waldrup and similarly situated inmates based on the formulas, and in light of the criteria, contained in the pre-1983 statute."

Waldrup v. Dugger, 562 So.2d at 692.

20. Thus Waldrup and the other cases cited herein make it clear that the DOC's discretion in awarding incentive gain time relates to the quality and quantity of work performed by the prisoner, not the eligibility of the prisoner to earn such incentive gain time.*

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* In other words, the DOC's discretion is limited to determining how much incentive gain time if any it will award each inmate on an individual basis depending how much and how well he/she works during a particular month. As the court in Raske noted (876 F.2d at 1499) "in both cases (with regard to basic and incentive gain time), the department decides in its sole discretion whether the prisoner has behaved well enough or worked diligently enough to earn gain time."

21. The attorney general attempts to mask the true nature of the rule by inferring that, as in Conlogue v. Shimbaum, 949 F.2d 378 (11th Cir. 1991), supra, it (the rule) "...reflects only the agency's procedure in deciding whether to grant incentive gain-time..." (AGO 96-92, Appendix B, page 4.) That is simply false because the effect of the rule is to absolutely, positively prevent Gwong (who is sentenced for an offense covered by the rule) from receiving incentive gain time. With apologies for being repetitive, we again quote from Weaver v. Graham, 450 U.S. 24 (1981) at page 31 where the supreme court noted that

> "...it is the effect, not the form of the law that determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts completed before its effective date."

And as that same court so eloquently stated many years before Weaver:

> "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."

Cummings v. Missouri, 4 Wall. 277, 325 (1867). Rule 33-11.0065(1)(a)6 is nothing more than a shadow. AGO 96-92 is just smoke and mirrors. Together they are an illegal attempt to repackage previously failed efforts to deny prisoners like Mr. Gwong the benefits of the Florida incentive gain time statute in existence at the time he committed his offense.

22. In fact, the Conlogue case supports Gwong's position in all respects. In Conlogue, the Alabama DOC awarded Incentive Good Time ("IGT") to certain inmates who met the criteria as established within an administrative regulation. Conlogue, whose offense was committed in 1977, was recommended by prison officials to be placed on IGT status. The DOC denied him this status because he did not meet the requirements of the regulation. The original (1977) regulation was revised in 1986. Conlogue contended that his denial of IGT status was based on the "revised" 1986 regulation and that he should have been eligible for IGT under the 1977 regulation. The court held that the 1986 revision only served to further define and clarify the original regulation; therefore, it was not unconstitutionally applied. The 1977 regulation stated:

> "Psychological and/or Sociological. Any inmate whose psychological or sociological profile contraindicates an early release back to society will not receive IGT. A history of repeated disciplinaries will constitute evidence of an inability to adjust and, therefore, a contra-indication to IGT status."

Conlogue, supra, 949 F.2d at 380.

The 1986 addition provided:

> "Since criminal record is an important element of sociological profile, repeated convictions for violent crimes against persons may be a contraindication to award of IGT status." (Id.)

The court held with regard to Conlogue's *ex post facto* claim:

> "The Alabama regulation in effect in 1977 awards

> IGT on a discretionary basis. The terms 'psychological or sociological profile' are broad and not defined. Disciplinary history and criminal record are only 'evidence' or an 'element' of such a profile. This leaves the Department discretion to consider other factors. There is no suggestion that 'repeated disciplinaries' were the only criteria contraindicating early release in 1977.
>
> The 1986 addition makes no mandatory constraints on the regulation's original discretion. An inmate's criminal record 'may' be considered in determining IGT status. The addition thus serves only to further define the meaning of 'sociological profile', not create new law."

Conlogue, 949 F.2d at 380. The Conlogue court noted further that "...there is no *ex post facto* violation if the change in law is only procedural, and there is neither change in the substance of the offense nor in its punishment." Conlogue, supra, 378 F.2d at 381. The court then specifically distinguished the Alabama regulation -- where the 1986 addition merely further defined the meaning of terms within the original rule -- from §944.275, Fla. Stat. -- where the state action necessarily resulted in an extension of the amount of time the prisoner would be incarcerated. It also utterly destroys the DOC justification for the rule in this case by holding:

> "We distinguish this case from Weaver v. Graham, 450 U.S. 24 101 S.Ct. 960, 67 L.Ed.2nd 17 (1980). A non discretionary statutory amount of gain time was available to Florida prisoners solely for good conduct and avoiding disciplinary infractions. **A new regulation drastically reduced the gain time an inmate could earn. Since the new regulation reduced the amount of gain time a prisoner could obtain for the exact same behavior, it constricted the prisoner's opportunity to earn an early release, making**

his sentence more onerous in violation of the ex post facto clause."

(Conlogue, supra, 378 F.2d at 381, footnote 9.)

24. Unlike the situation in Conlogue, Rule 33-11.0065(1)(a)6 is not a "procedural" change regarding the definition of words, -- it is a substantive change because it directly and onerously affects the degree of Gwong's punishment by substantially extending his period of incarceration due to his inability to earn (up to 20 days/month) incentive gain time per §944.275(4)(b), Fla. Stat. (1983).

The Rule Clearly Contravenes §944.275.(4)(b), Fla. Stat. (1983)

25. Nowhere in AGO 96-92 is there any decisional support for the most fallacious aspect of the rule which attempts to hide the *ex post facto* issue by eliminating incentive gain time eligibility for inmates like Gwong (whose crimes were committed before October 1, 1995) based upon the severity (violent/sexual nature) of those crimes. See Fla. Admin. Code Rule 33-11.0065(1)(a)6(a)-(g). (Appendix, Exhibit C.)

26. §944.275(4)(b), Fla. Stat. (1983) -- which has not been repealed -- provides for up to 20 days/month of incentive gain time for "each month in which an **inmate** works diligently..." -- not just a non-violent inmate. There is no restriction whatsoever regarding the kind or class of inmate who can earn that incentive gain time -- certainly none

regarding the type offense for which he/she is incarcerated. This is consistent with the definition of "prisoner" in §944.02(5), Fla. Stat. which makes no distinction between violent and non-violent offenders. It is also consistent with the 1995 amendment to §944.275, Fla. Stat., which requires all prisoners to serve at least 85% of their sentences, but is limited to only "for sentences imposed for offenses committed on or after October 1, 1995...". See S. 2, Ch. 95-294, Laws of Florida (1995), §944.275(4)(b)(3), Fla. Stat. (1995).

27. Thus it is clear that the legislature means for the new 1995 "85% law" to apply legally -- that is to prisoners who commit their crimes after the effective date of the act. Fla. Admin. Code Rule 33-11.0065(1)(a)6(a)-(g) flies in the face of that new law.

28. It therefore follows that Rule 33-11.0065 (1)(a)6 is not just an *ex post facto* violation -- it is also illegal, void and without force or effect because it is in direct contravention of the acts of the Florida Legislature as described above. As the First District Court of Appeal stated in Grove Isle, Ltd. v. State Dept. of Environmental Regulation, 454 So.2d 571, 573 (Fla. 1st DCA 1984):

> It is a cornerstone of administrative law that administrative bodies or commissions, unless specifically created in the constitution, are creatures of statute and derive only the power specified therein. (citations omitted) As such, administrative bodies have no inherent power to promulgate rules and must derive that power from that statutory base.

Lack of Adequate Administrative or other Remedy

29. §120.52 (12)(d), Fla. Stat. (1992) precludes state prisoners from being considered parties in certain agency proceedings including rule challenges under §120.56, Fla. Stat. The latter statute also provides that "(f)ailure to proceed under this section shall not constitute a failure to exhaust administrative remedies." See Endress v. Florida Department of Corrections, 612 So.2d 645 (Fla. 1st DCA 1993). (§120.52.[12][d], Fla. Stat. "...no longer authorizes prisoners to obtain or participate in section 120.56 proceedings, or to seek judicial review under section 120.68, Florida Statutes, with regard to such agency action.") See also Department of Revenue v. Young American Builders, 330 So.2d 864 (Fla. 1st DCA 1976) holding that attacks on agency rules on constitutional grounds cannot be entertained in Chapter 120, Florida Statutes, administrative proceedings.

30. Thus the petitioner has no other adequate remedy, need not exhaust any administrative remedy prior to consideration by this honorable court, and will be irreparably injured unless relief is granted here.

Specified Claim for Relief

Wherefore, this honorable court is requested to provide the petitioner with the following relief:

1. Consider this petition, take jurisdiction of the matter, and issue an order to show cause why the mandamus writ should not be issued.

2. Require the Florida, Department of Corrections to file a prompt response to the petition and grant oral argument.

3. Grant the petition for writ of mandamus.

4. Declare Fla. Admin. Code Rule 33-11.0065(1)(a)6 unconstitutional because it violates the *Ex Post Facto* Clause of the United States Constitution and illegal because it is in direct contravention of §944.275(4)(b), Fla. Stat. (1983).

5. Declare that the petitioner is still eligible for and entitled to earn incentive gain time per the provisions of §944.275, Fla. Stat. (1983).

6. Order the Florida Department of Corrections to recompute and award incentive gain time for the petitioner and similarly situated inmates based on the formulas contained in §944.275, Fla. Stat. (1983) and Fla. Admin. Code Rule 33-11.0065 as that rule existed prior to its revision on April 21, 1996.

7. Grant the petitioner such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing and the index which follows have been provided Hon. Susan Maher, Deputy General Counsel, Florida Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida, 32399-6584, and Hon. Bob Butterworth, the Office of the Attorney General of Florida, The Florida Capital, Plaza Level One, Tallahassee, Florida 32399-1050, by hand delivery, this 29th day of April, 1996.

Baya Harrison, III