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IN THE

SUPREME COURT OF FLORIDA

RONALD THOMAS, Petitioner, v. HARRY K. SINGLETARY, JR., etc., and THE FLORIDA PAROLE COMMISSION, Respondents.	Case No. 90, 128

PETITIONER'S REPLY
TO
"DEPARTMENT OF CORRECTIONS' LIMITED RESPONSE TO ORDER TO SHOW CAUSE"
AND
PETITIONER'S REPLY
TO
"FLORIDA PAROLE COMMISSION'S RESPONSE TO COURT'S ORDER TO SHOW CAUSE"

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The Petitioner, RONALD THOMAS, by and through undersigned counsel, does hereby reply to the Limited Response filed by the Department of Corrections and the Response of the Florida Parole Commission as follows:

A. REPLY TO ISSUES OF FACT

Attached to this Reply are excerpts of the exhibits filed by the Department of Corrections and the Florida Parole Commission which are hereby incorporated by reference. The excerpts of the exhibits will be attached as an Appendix to this pleading and will hereafter be referred to by "A." The records provided by Respondents refute some of the factual assertions made by Respondents.

In particular, the Department of Corrections (DOC) responded with a general day/date calculation showing (Response at page 2):

Max Release Date	06-30-2007
Sentence (converted to days)	6,570
	- 66
Maximum Release Date	June 30, 2007
Additional Gain Time	- 1,702
Tentative Release Date	November 1, 2002

The records provided show, (A 9-10), that after 26 November 1993 "Critical Depletion Transfer," Mr. Thomas received almost weekly credits called "Advancement of CRD," which were calculated in days which mathematically total 3,186 days. The Limited Response merely adds the gain time credits (A 11-12) and makes a mathematical calculation.[1] The DOC response ignores the advancement dates set during the time period Mr. Thomas was eligible for CRD (A 9-10), and the CRD credit awarded during this window of time.

The Florida Parole Commission (FPC) states the issue:

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[1] The gain time total is actually - 1,742 days. (A 11-12).

> Did the voiding of Petitioner's Control Release Date by the Legislature as a result of the total capacity of the state prison system being within lawful limits violate the Constitutional *ex post facto* prohibition?

The FPC argues that no *ex post facto* violation occurred. FPC does acknowledge that "Pursuant to subsequent legislation [Ch. 93-406, Laws of Florida], Petitioner became temporarily eligible for Control Release consideration for a specific period of time from June 17, 1993 until June 1, 1995." (FPC Response, pp. 8-9). The records (A 9) reflect that on 18 June 1993 "Inmate stat[us] ch[an]g[ed] - inelig[ible] to elig[ible]," and beginning on 07 December 1993 through 13 December 1994, Mr. Thomas' CRD was advanced incrementally forty different occasions totaling 3,186 days. The records also reflect that on 04 November 1994, Mr. Thomas was interviewed about his release plan. (A 10). On 05 September 1995, Mr. Thomas' "inmate stat[us] ch[an]g[ed]" from "elig[ible] to inelig[ible]." (A 10). On 17 January 1995, Mr. Thomas' "CRD reset to TRD." (A 10). But as FPC notes (Response, p. 10), habitual offenders were advanced to their max release dates.

The DOC records reflect that on Mr. Thomas' Progress Report of "11/04/94" (A 3) that Mr. Thomas' "CRD: 07/31/1996." Mr. Thomas' Progress Report of "05/08/95" (A 5) reflects his CRD was changed to 04/24/2004. The 3,186 days (8.72 years/8 years, 8 months, 26 days) of CRD is the obvious factor.

Respondent FPC's argument that the Legislative mandate abolishing CRD did not disadvantage Petitioner Thomas (FPC Response, p. 11) because his TRD became his release date, is not factually borne out by the records.

B. REPLY TO ISSUES OF LAW

Petitioner would restate the issue:

> Did the voiding of Mr. Thomas' CRD by the Legislature, Chapter 96-422, §19 [§947.146 (1996)], have the *effect*[2] of ex post facto application regardless of the *intent* of the lawmakers?[3]

The ex post facto prohibition forbids the Legislature from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Cummings v. Missouri*, 4 Wall. 277, 325-326, 18 L.Ed. 356 (1867). *See Lindsey v. Washington*, 301 U.S. 397 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937); *Rooney v. North Dakota*, 196 U.S. 319, 324-325, 25 S.Ct. 264, 265-266, 49 L.Ed. 494 (1905); *In re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 387, 33 L.Ed. 835 (1890); *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798). Through this prohibition, the Framers sought to assure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977); *Kring v. Missouri*, 107 U.S. 221, 229, 2 S.Ct. 443, 449, 27 L.Ed. 506 (1883); *Calder v. Bull, supra,*, 3 Dall. at 387. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation. *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S.Ct. 507, 508, 59 L.Ed. 905 (1915); *Kring v. Missouri, supra*, 107 U.S., at 229, 2 S.Ct., at 449; *Fletcher v. Peck*, 6 Cranch 87, 138, 3 L.Ed. 162 (1810); *Calder v. Bull, supra*, at 395, 396 (Paterson, J.); the Federalist No. 44 (J.

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[2] *Weaver v. Graham*, 450 U.S. 24, 31; 101 S.Ct. 960, 965 (1981). ...[I]t is the effect, not the form, of the law that determines whether it is ex post facto." (footnote omitted).

[3] *Lynce v. Mathis*, --U.S.--, 117 S.Ct. 891, 896 (1997). "In our view, both of these submissions place undue emphasis on the Legislature's subjective intent in granting the credits rather than on the consequences of their revocation."

Madison), No. 84 (A. Hamilton). *See Weaver v. Graham*, 450 U.S. 24, 27; 101 S.Ct. 960, 964 (1981).

Weaver v. Graham teaches that two critical elements must be present for a criminal or penal law to be ex post facto: (1) it must be retrospective, that is it must apply to event occurring before its enactment, citations omitted, and (2) it must disadvantage the offender affected by it.

> 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 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.

Id., 450 U.S. at 30-31; 101 S.Ct. at 964.

FPC has seized on this wording, "the law in effect on the date of the offense," (FPC Response, p. 21) to argue that Mr. Thomas was "not disadvantaged, nor his punishment increased." The argument neatly avoids the critical question: [W]hether the law changes the legal consequences of acts completed before its effective date." *Weaver v. Graham, supra*, 450 U.S. at 31, 101 S.Ct. at 965. The critical question cannot be avoided. Before the effective date of §96-422, §19,[4] Mr. Thomas would have been released on 31 July 1996. (A 3). After the effective date of the law, Mr. Thomas would not be released until 24 April 2004. (A 5). As early as *Lindsey v. Washington*, 301 U.S. 397, 401-402; 57 S.Ct. 797, 799; 81 L.Ed. 1182 (1937), the Supreme Court of the United States has reasoned "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term." "Here, petitioner is similarly disadvantaged by the reduced

[4] Became a law without the Governor's approval 07 June 1996.

opportunity to shorten his time in prison simply through good conduct." *Weaver v. Graham, supra,* 450 U.S. at 33-34; 101 S.Ct. at 967.

Lynce v. Mathis, --U.S.--, 117 S.Ct. 891 (1997) addressed the issue of specific overcrowding credits which had been awarded pursuant to statutes enacted after the date of petitioner's offense. *Id.*, 117 S.Ct. at 894. "In this case the operation of the 1992 statute to the effect of canceling overcrowding credits ...was clearly retrospective." *Id.*, 117 S.Ct. at 896.

The Supreme Court of the United States made its holding in *Weaver v. Graham* perfectly clear in *Lynce v. Mathis,* 117 S.Ct. at 898:

> As we recognized in *Weaver,* retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits are "one determinant of petitioner's prison term ... and ... [the petitioner's] effective sentence is altered once this determinant is changed." *Ibid.* We explained in *Weaver* that the removal of such provisions can constitute an increase in punishment, because 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." *Ibid.*

Respondents in *Lynce* argued, as they argue here, the reasoning does not apply because Mr. Thomas, being habitualized, could not reasonably have expected any such credits. "Given the fact that this petitioner was actually awarded 1,860 days of provisional credit and the fact that those credits were retroactively canceled as a result of the 1992 amendment, we find this argument singularly unpersuasive." *Lynce v. Mathis, supra,* 117 S.Ct. at 898. The legislation in question unquestionably disadvantaged Mr. Thomas. Given the fact that Mr. Thomas was actually awarded 3,186 days (A 9-10) advancement of his release date to 31 July 1996, the statute voiding CRD resulted in prolonging Mr. Thomas' imprisonment more than 8 years to 2004. In this case unlike

others,[5] the actual course of events makes it unnecessary for the Court to speculate about what might have happened.

> The Constitution deals with substance, not shadows. Its inhibition was levelled 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 18 L.Ed. 356 (1867).

> The ex post facto prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law. *Cf. Ogden v. Blackledge*, 2 Cranch 272, 277, 2 L.Ed. 276 (1804).

Weaver v. Graham, supra, 450 U.S. at 27; 101 S.Ct. at 964.

As noted above "the ex post facto clause upholds the separation of powers." Paraphrasing the words of the Court (J. Kogan), "Grace of the legislature, once given, cannot be rescinded retroactively." *Waldrup v. Dugger*, 562 So.2d 687, 692 (Fla. 1990). As clearly addressed by the Court, the Ex Post Facto Clause applies with equal vigor to a retroactive reduction in DOC's discretion to grant gain-time. "Such is plainly the case before us today." *Id.* The only appreciable difference is identity of the parties, particularly the Florida Parole Commission. "As the department conceded at oral argument, if the legislature had passed a statute retroactively eliminating Gwong's eligibility for incentive gain-time, the statute would violate the ex post facto clause." *Gwong v. Singletary*, 683 So.2d 109, 114 (Fla. 1996). The argument of the FPC fails to acknowledge that it is the effect, not the form of the law, which controls the application of the ex post facto clause.

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[5] *California Department of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995).

C. CONCLUSION

It is too simplistic to argue that an ex post facto violation can occur only with regard to substantive law, not procedural law. *Dugger v. Williams*, 593 So.2d 180, 181 (Fla. 1991). Ex post facto is clearly an issue of effect not form. The arguments of Respondents are familiar. The arguments have been previously rejected by the courts. It is again up to the judicial branch to rein in the political branches of government. Well intended law is not the test. Good motivations is not the test. Under our system of laws even citizens in Mr. Thomas' position are entitled to protection from retroactive governmental enactments, and under our system of government the judiciary has been entrusted the checks and balances. In this day of mandatory minimum erosions of judicial discretion, the makers of the law cannot have been blind to the holdings of *Weaver, Lynce,* and *Waldrup*. The lawmakers have squarely placed the burden of lessening the prison population at the bar of the Court. Certainly the Court has the judicial courage for the task, *Gwong v. Singletary*, 683 So.2d 109 (Fla. 1996); it is respectfully submitted that again the Court must wield the sword.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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by ~~hand~~/mail delivery this 22d day of August, 1997.

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Respectfully submitted,

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