ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CLARENCE H. HALL, JR.,

Petitioner,

v.

CASE NO. 91,122
(Formerly 91,075)

STATE OF FLORIDA, et al.,

Respondents.
_____/

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT AND THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CARMEN F. CORRENTE
ASSISTANT ATTORNEY GENERAL
Florida Bar #304565
444 Seabreeze Boulevard
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENTS

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SUMMARY OF ARGUMENT

POINT I: There is clearly no conflict to be resolved. Even if one exists, it can be easily remedied by substituting the word "direct" with "recommend." This issue is purely a matter of "form over substance."

POINT II: The statute permitting forfeiture of gain time for the filing of frivolous suits is not a change in the law because the Department of Corrections has always had the authority to forfeit gain time where the inmate fails to obey any instruction duly given to him, violates the law, or violates any rule or regulation of the Department. Even if this Court determines that the statute is a change in the law, it is procedural, not substantive in nature; the amendment merely amplifies existing law. Finally, the amended statute does not affect in any way the original sentence handed down by the sentencing court. It does not affect the ability to earn future gain time. The new law does not retrospectively apply to events which occurred prior to the enactment of the law. It affects only a date in the future.

POINT III: Any presumed conflict between the two statutes is completely illusory. Both statutes exist independently, expressly address separate actions, and provide for divergent and distinct penalties. This Court should not fabricate a conflict where none exists.

POINT IV: Any forfeiture of Petitioner's gain time is being held in abeyance until final disposition of this litigation. It may be assumed that the DOC intends to forfeit Petitioner's gain

time pursuant to the provisions of law if this Court rules in Respondent's favor.

ARGUMENT

POINT I

THE DISTRICT COURT'S ORDER WAS ENFORCEABLE ONLY TO THE EXTENT THAT IT INVOKED STATUTORY PROCEDURES TO FORFEIT PETITIONER'S GAIN TIME.

This Court ordered Respondents, STATE OF FLORIDA and HARRY K. SINGLETARY, JR., to address four issues. The first issue concerns conflict between the decisions in Mercade v. State, 698 So.2d 1313 (Fla. 2d DCA 1997) and Hall v. State, 698 So.2d 576 (Fla. 5th DCA 1997)("Hall II"). (Appendix A) The procedural history of this case is quite unusual in that this Court originally denied jurisdiction.

The Court assigned case number 91,075 to this case when the notice to invoke discretionary jurisdiction was filed July 23, 1997. Briefs on jurisdiction were filed and on January 15, 1998 this Court declined to accept jurisdiction and further ordered that no motion for rehearing would be entertained. Then on February 12, 1998, this Court used Petitioner's motion to take judicial notice, which was filed nearly two months prior to the rendering of a decision, to open this new case (number 91,122) and ordered the State to file an "amended" jurisdictional brief in the new case. (case number 91,122)

None of the above proceedings changes the fact that there is no conflict. While the Mercade opinion discusses Hall v. State, 698 So.2d 576 (Fla. 5th DCA 1997), it does not certify conflict. The difference between this case and Mercade is merely one of semantics. It is a question of form over substance. Mercade

recommends that the DOC forfeit the defendant's gain time, while in this case the district court *directs* the DOC to forfeit Petitioner's gain time ***pursuant to section 944.28, Florida Statutes***. (slip opinion at 2) It is plain from a reading of the statute that the Department of Corrections ("DOC") can only accomplish the district court's directive by following the method or procedure outlined in 944.28(2)(c) and, necessarily, Mercade. It must be presumed that the district court was fully apprised of the statute to which they refer as authority for their holding. Thus there is absolutely no conflict with the ultimate holding in Mercade. The "form" of the written opinion does not affect the "substance" of the mechanics involved in implementing the decision.

It is uncontroverted that the DOC has not and will not forfeit a prisoner's gain time without complying with the procedural requirements found in §944.28(2)(c). (See Appendix F) Thus, the District Court's "directive" had no legal effect other than to initiate discretionary forfeiture procedures as mandated by law. The courts have the authority to direct an administrative agency to follow the dictates of a statute or to initiate proceedings in accordance with the law. That was all that was done in this case. The courts, however, cannot direct the outcome of future proceedings. The use of the word "direct" rather than "recommend" is the only substantial difference between Mercade and Hall II. This "semantic distinction" does not invoke conflict. This Court should simply substitute or interpret the word "direct" to mean either "refer" or "recommend."

Such an interpretation is not without precedent. In Martin v. State, 713 So.2d 1056 (Fla. 1st DCA 1998) the court reviewed a ***circuit*** court order which directed that the defendant "shall be subject to forfeiture of earned and unearned gain time as a penalty for instituting this frivolous proceeding in this Court." The First District Court of Appeal properly refused to construe the order as itself effectuating the loss of gain time. "The proceeding to determine whether forfeiture of gain time is appropriate ***must be instituted by the Department pursuant to its rules***." Martin at 713 So.2d 1057, emphasis supplied.

Regardless, if merely constructively or actually substituting the word "recommend" for "direct" in the District Court's opinion is deemed somehow insufficient to correct the "semantic anomaly," this Court must decide whether Petitioner's gain time, in whole or in part, may be forfeited and the manner in which the forfeiture must be accomplished. The subsequent points in this brief address those issues.

POINT II

THE FORFEITURE OF GAIN TIME FOR FILING A FRIVOLOUS PLEADING IS NOT AN *EX POST FACTO* VIOLATION.

The second issue concerns the forfeiture of gain time for the filing of a frivolous pleading where the statute authorizing said forfeiture was enacted after Petitioner's criminal offenses were committed. In Hall v. State, 698 So.2d 576 (Fla. 5th DCA 1997)("Hall II")(Appendix A) the court found that Petitioner filed frivolous pleadings and directed the DOC to forfeit Petitioner's gain time. Respondents maintain that such a forfeiture is not an *ex post facto* violation.

This Court has not ruled on the applicability of the *ex post facto* clause *vis a vis* §944.28(2)(a), Florida Statutes (Supp. 1996). This case presents a unique set of facts which force a conclusion that there was no violation of the *ex post facto* clause.

Initially, it is important to note that under the statutory scheme at the time Petitioner committed his crimes, §§944.28 (2)(a) and (3)(a), Florida Statutes (1981) provided that:

> [a]ll or any part of the gain-time earned by a prisoner and extra gain-time allowed him, if any, shall be subject to forfeiture...
>
> [a] prisoner's right to earn gain-time during all or any part of the remainder of the sentence...may be declared forfeited because of the seriousness of a single instance of misconduct...or [for] an accumulation of instances of misconduct.

(Appendix B) The content of the law remained intact at the time

Petitioner was sentenced for his crimes. See §§944.28 (2)(a)and (2)(b), Florida Statutes (1985). (Appendix C) Thus, Petitioner has always been subject to the forfeiture of both earned gain time and the *right* to earn future gain time.

In 1996 the legislature amended §944.28, adding the provision that the filing of a frivolous suit, action, claim, proceeding, or appeal could result in the forfeiture of gain time. Throughout the years pertinent to this case, the method by which gain time could be forfeited has remained consistent and entirely discretionary with the Department of Corrections. See §944.28 (3)(b), Florida Statutes (1981) and §§944.28(2)(c), Florida Statutes (1985 and Supp. 1996) Appendices B and C. ("Thereupon, the department may, *in its discretion*, declare the forfeiture thus approved...or any specified part thereof.")(Id., emphasis supplied).

Petitioner expressly does not contest the lower court finding that his latest postconviction motion is "untimely and without merit and clearly frivolous." (See, initial brief at 1, 2, n.1) Nor is there any question that Petitioner was warned in Hall v. State, 690 So.2d 754 (Fla. 5th DCA 1997), rev. denied, 705 So.2d 570 (1998)("Hall I") that *future* filings could result in a forfeiture of his gain time. The question presented is whether, under this set of facts, gain time may now be forfeited without violation of the *ex post facto* clause. Respondents submit the answer is an unqualified "yes."

Although Respondents do not believe that the amended statute created a "change" in the law, it is best to begin analyzing this

question in light of the cases which have addressed the topic in such a context. In Britt v. Chiles, 704 So.2d 1046 (Fla. 1997) this Court found that a change in the law which removed all discretion formerly associated with the forfeiture of gain time was a violation of the *ex post facto* clause. The case under review is clearly distinguishable because discretion is still a part of the statute under review; and because Britt was based upon a new statute that took away a right that had been previously granted, i.e., the ability to earn future gain time.

Respondents wish to draw the attention of this Court to the dissent written by Justice Grimes and Justice Wells' concurrence therewith. Said dissent eloquently states Respondent's argument on this point and should be adopted as the majority decision herein. Even though the Britt decision focused upon another statute, the principle espoused in the dissent is applicable: the law instituting punishment for the filing of frivolous pleadings does not take away anything which the prisoner has earned or to which the prisoner was entitled.

After a felon's entry into the state prison system, he is informed of a *presumptive* release date. The date is constantly subject to change depending on myriad factors devolving around the prisoner's behavior. If he misbehaves, his original sentence is not affected, but his release date will change. The later presumptive release date does not lengthen the prisoner's sentence that was meted out by the sentencing court. It does not change the fact that his gain time has always been subject to forfeiture. It

does not affect the prisoner's ability to earn future gain time. Only his *future* potential release date is affected.

The decision in Britt does not and cannot stand for the proposition that the Department of Corrections may never change a rule or that the legislature may never amend or enact a law which provides for additional or new penalties after an inmate is placed in state prison. On the contrary, it is clear that the Department of Corrections has wide discretion to promulgate rules and regulations regarding the ongoing conduct of inmates. Other courts agree. In Gilbert v. Peters, 55 F.3d 237, 238 (7th Cir. 1995) the court held that it is clear that "the *Ex post facto* Clause does not prohibit every alteration in a prisoner's confinement that may work to his disadvantage." (citing Ewell v. Murray, 11 F.3d 482, 485 (4th Cir. 1993), cert. denied, 511 U.S. 1111, 114 S.Ct. 2112, 128 L.Ed.2d 671 (1994)("[r]easonable prison regulations are not frozen at the time of each inmate's conduct, but rather, they may be subject to reasonable amendments.")

In this respect, there has been no "change" in the statute because the statute has never been all-inclusive. The situation is no different than if, for example, the DOC deemed it necessary to pass a regulation prohibiting the possession of certain benign items such as "colors," in the form of a bandana or armband, which become associated with identification in a gang. Even though possession of such an innocent object is not a crime and cannot be separately charged, it is also not a violation of the *ex post facto* clause to take away revocable gain time for a violation of the

rule. To hold otherwise would permit certain prisoners to be exempt from such regulations. Petitioner's original sentence has not and will not be affected by a forfeiture of gain time. His presumptive release date is always subject to change based upon his behavior. If he disobeys a direct court order he is disobeying the law and has always, at the very least, been subject to contempt proceedings which would result in a new consecutive sentence.

The fact that there is always a possibility to lose earned good time credits as a result of a disciplinary violation and never have them restored makes it clear that the statue does not increase Petitioner's punishment. As the California Supreme Court explained,

> [t]here is a critical difference between a diminution of the ordinary rewards for satisfactory performance of a prison sentence---the issue in Weaver--and an increase in sanctions for future misbehavior in prison--which is at issue here.

In re Ramirez, 39 Cal.3d 931, 218 Cal.Rptr. 324, 328-29, 705 P.2d 897, 901 (1985) (Appendix D). The court further found that where a new law did not substantially alter the consequences attached to a crime already completed, it thus did not change the quantum of punishment such that it is unconstitutional. Cf. Weaver v. Graham, 450 U.S. 24, 29, 33, 101 S.Ct. 960, 964, 966, 67 L.Ed.2d 17 (1981).

Ramirez held that a critical element of an *ex post facto* violation is an absence of forewarning, that is, that the change is unexpected. As the Supreme Court has explained, "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 that what was perceived when the crime was consummated." Weaver, supra, 450 U.S. at 30, 101 S.Ct. at 965. The gain time granted to Petitioner has always been subject to discretionary forfeiture for certain violations and thus there was indeed fair warning of the possibility of forfeiture of good time credits and the consequences thereof. See Hallmark v. Johnson, 118 F.3d 1073, 1079 (5th Cir. 1997); Offet v. Solem, 936 F.2d 363, 367 (8th Cir. 1991). Petitioner was additionally expressly warned that forfeiture of gain time would ensue if he continued to file pleadings challenging his 1981 crimes. If Petitioner is permitted to avoid the statutory consequences of his actions, this Court's inherent authority to prevent abuse of the judicial system will be severely compromised. See Attwood v. Singletary, 661 So.2d 1216, 1217 (Fla. 1995).

All cases analyzing a potential violation of the *ex post facto* clause use a basic two prong test: (1) the law must apply to events occurring before its enactment and (2) it must disadvantage the offender affected by it. See, Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997). However, the law prohibiting frivolous pleadings only applies to actions taken after its enactment. §944.28 simply creates another basis for forfeiting gain time that is *already* subject to *discretionary* revocation. The DOC has continuously possessed the authority to sanction inmates for any violation of court orders and even for lying to the court. See Fla. Admin. Code Ann. r.33-22.012, §9-10 (1998). In fact, the

Administrative Code lists 18 DOC violations, all of which were implemented after Petitioner's crimes were committed, that could result in the forfeiture of all of Petitioner's earned gain time. Additionally, 60 other violations are listed which can result in a forfeiture of a portion of Petitioner's gain time. See Fla. Admin. Code Ann. r.33-22.012. Section 9-32 of said rule gives the DOC authority to forfeit gain time where a court determines that a prisoner has filed a frivolous pleading subsequent to June 30, 1996. Utter chaos will result if the DOC cannot change or amend its rules and regulations and punish any failure to comply. New behaviors require the DOC to promulgate new rules against crimes and to institute new disciplinary actions. DNA screening or testing and mail regulations are just two of the areas that have required recent regulation by the DOC. If a law is enacted requiring every prisoner to allow DNA screening or to give a voice sample, how could it be enforced? Possession of certain substances which are innocuous today may be injurious or fatal in a prison setting tomorrow. The DOC has the authority to promulgate new rules and to enforce court orders and the law. This power is properly and necessarily placed in the hands of an executive agency.

A significant threshold question must be decided by this Court: whether any alleged change in the statute is procedural or substantive. For if it is merely procedural, there is no violation of the *ex post facto* clause. See, e.g., Trotter v. State, 690 So.2d 1234 (Fla. 1996) (applying community control extension of

existing aggravator retroactively); Valle v. State, 581 So.2d 40 (Fla. 1991); Hitchcock v. State, 578 So.2d 685 (Fla. 1990) (holding the "committed by a person under sentence of imprisonment" aggravator may be applied where defendant on parole at time of crime). To find that the "frivolous pleading" clause is a substantive change requires this Court to turn away from its own precedent. A change in the law which merely amplifies or extends the definition of conduct already described in the law is unquestionably a procedural modification. Pursuant to the 1981 statute, gain time has been subject to forfeiture if the prisoner

> ...by action or word refuse[s] to carry out any instruction duly given to him...or violate[s] any law of the state or any rule or regulation of the department or institution.

§944.28(2)(a), Florida Statutes (1981).

Respondents argue that the 1981 statute clearly gives the DOC the right to forfeit gain time if the prisoner fails "to carry out any instruction duly given to him." Hall I was a direct court order or an "instruction duly given" to Petitioner directing him to refrain from filing any further pleadings concerning his 1981 convictions. Accordingly, Petitioner's gain time could have been forfeited based upon the 1981 statute. Under the facts in this case, the amendment to the law did not alter the existent authority possessed by the DOC.

But even if the failing to "carry out any instruction" language is held inapplicable, the amended statute only alters the 1981 statute procedurally, essentially rewriting it thus:

> ...by action or word refuse[s] to carry out any instruction duly given to him...or violate[s] any law of the state or any rule or regulation of the department or institution, ***or any rule or order of court.***

It is tacitly understood in any controlled release that the prisoner is to follow all orders of court. Whether a defendant posts bond or is on probation, he must follow the directives of the court or his bond, probation, or controlled release may be revoked. Petitioner, who is in custody, cannot use his custodial status as a shield from court orders. "Early liberty" credits (i.e., gain time) should be subject to forfeiture under the law just as one's liberty is affected by actions taken pending trial or during probation.

Because the DOC has always had the power to forfeit gain time for a violation of law or if an inmate fails "to carry out any instruction duly given him," it is clear that the DOC may also step in if a prisoner violates a court order, which is certainly the equivalent of an instruction "duly" given to him, if not a "rule or law." It matters not that inmates may face contempt charges for disobeying orders of court; many disciplinary actions are taken as a result of separately charged (and punished) criminal offenses.

A probationer who is ordered not to violate any laws may have his probation revoked if he violates a court order or commits a crime, even if the act was not a crime at the time he was placed on probation. Similarly, Petitioner should suffer the consequences mandated by law for failing to obey court orders. A law that merely amplifies procedural rather than substantive matters is not

an *ex post facto* violation, even though it may work to the disadvantage of the prisoner. See Driskell v. Department of Corrections, 616 So.2d 191, 192 (Fla. 1st DCA 1993).

The "penalty" imposed in this cause is directed to the conduct which gave rise to the loss of gain time, not to the original offense. The punishment affects only a future date. Any revocable gain time that is forfeited has no effect on Petitioner's ability to earn future gain time. When Petitioner filed his latest appeal raising the question here under review, he knew the exact punishment he could receive for disobeying the court's order in Hall I. Petitioner is not being required to serve more time on the original crime, he is being punished for violating a direct court order. Had he not disobeyed a court order, the statute would not have affected him at all. See U.S. v. Reese, 71 F.3d 580 (6th Cir. 1995).

Petitioner relies upon Weaver, supra, a case which involves the availability of future gain time, to support his claim that the forfeiture effectively lengthens the sentence for an offense committed prior to the enactment of the statute. However, a closer examination of Weaver in the context within which the case arose (supervised or controlled release) reveals that the test to determine whether a statute is retrospective is measured from the time of the conduct which forms the basis of the criminal offenses. An *ex post facto* violation occurs "when the legislature increases punishment beyond what was prescribed ***when the crime was consummated***." Weaver 450 U.S. at 30, emphasis supplied. The

Weaver opinion states that a law raises *ex post facto* concerns only "if it changes the legal consequences of acts completed before its effective date." Id. at 31.

Under this interpretation, there could be no claim that the statute operated retrospectively because Petitioner engaged in the filing of frivolous pleadings long after the effective date of the amendment to the statute. There is no "change" in legal consequences because Petitioner's gain time has continuously been subject to forfeiture. Even if this Court determines that the application of this statute to gain time previously awarded is a violation of the *ex post facto* clause, then it follows that any gain time earned ***after*** the effective date of the statute is subject to forfeiture. In its ruling herein, this Court should address the remedies which are appropriate to curtail future actions similar to that of Petitioner. The statute is not an unconstitutional violation of the *ex post facto* clause because the DOC has always had the authority to forfeit gain time for the violation of any instruction or law. Certainly a published court opinion directing Petitioner to refrain from certain actions is an "instruction duly given" to Petitioner.

Moreover, it must be emphasized that the forfeiture of gain time which was not even earned until after the effective date of the statute presumably cannot be a violation of the *ex post facto* clause. Accordingly, this Court cannot simply rule that the statute violates the *ex post facto* clause. Even if a violation of said clause is deemed to exist, the statute can still be *applied* in

a constitutional manner as long as gain time earned only after enactment of the statute is affected. The statute can therefore be interpreted in a constitutional manner even if its sanctions cannot apply to gain time earned prior to enactment of the law. If courts can conceive of a rational basis for the enactment of a statute the law must be upheld. Jackson v. State, 23 Fla. L. Weekly D2251 (Fla. 1st DCA September 28, 1998). The statute is directed toward the control of actions by prisoners and to the orderly administration of the judiciary.

There simply is no *ex post facto* violation in this case. To hold otherwise would completely usurp the long established and necessary power of an executive agency to promulgate and enforce rules, regulations, and orders of court. The authority of the courts and the DOC to implement gain time forfeiture proceedings against a prisoner must be affirmed.

POINT III

SUBSECTION (2) OF §944.279, FLORIDA STATUTES (1997) IS INAPPLICABLE IN CRIMINAL POST-CONVICTION PROCEEDINGS.

The third question in this appeal, as stated by this Court, is whether subsection (2) of §944.279, Florida Statutes, (1997) authorizes the forfeiture of gain time for the filing of a frivolous postconviction motion by a "prisoner." The subsection reads as follows:

> This section does not apply to a criminal proceeding or a collateral criminal proceeding.

The answer to the question as phrased is "no." §944.279 applies exclusively to civil proceedings instituted by a prisoner. Not only are the terms "malicious" and "good faith," found in subsection (1) of the statute, usually associated with civil matters, but subsection (3) clearly defines a prisoner as a "person who is convicted of a crime." Thus, the law states that a person convicted of a crime may be subject to disciplinary proceedings as long as the frivolous pleading is ***not*** related to a criminal proceeding.

§944.28 is the companion statute to §944.279. In the former statute, the legislature is clearly addressing frivolous pleadings, suits, or actions in ***criminal*** proceedings. Evidence of the obvious intent of each provision can be found in the penalties prescribed. In the civil statute, the punishment for violation is the institution of general disciplinary procedures pursuant to §944.09, Florida Statutes, ***not*** §944.28(2)(c), Florida Statutes. There is no

stated penalty in either §944.279 or in §944.09. The penalty for filing frivolous pleadings and for other serious violations in a prisoner's criminal case is the forfeiture of gain time. The method of declaring the forfeiture is also distinct and described in subsection (2)(c) of §944.28. All the potential violations proscribed in §944.28 are directly associated with the prisoner's status as a convicted felon. The statute punishes escape, threats, crimes, bringing false information, and the failure to perform work, duties, and tasks assigned to the prisoner.

It is therefore clearly a mistake to presume that one statute supersedes or controls the other. They are companion laws, enacted to cover frivolous suits or actions in civil and criminal cases. There is no necessity to apply the rule of statutory construction, other than to acknowledge that, whenever possible, laws must be given their plain meaning and deemed constitutional.

Petitioner relies upon the dissent in Bradley v. State, 703 So.2d 1176, 1178 (Fla. 5th DCA 1997) and Saucer v. State, 23 Fla. L. Weekly D1972 (Fla. 1st DCA August 17, 1998), but neither of these cases address the separate punishments found in the two statutes. §944.279 requires the court to enter a written finding and issue a certified copy thereof to begin "disciplinary procedures." In comparison, §944.28 requires essentially that a criminal charging document be prepared alleging each instance of misconduct and the date of the offenses. The prisoner has notice of the hearing and is given an opportunity to be heard. A written finding must then be forwarded to the superintendent of the

institution and then to the Department of Corrections.

Thus, the conclusion in Saucer is incorrect -- the certification required for a violation of §944.279 is not remotely similar to that which is required to authorize a forfeiture in §944.28. Nor is the dissenting opinion in the Bradley decision correct in finding that §944.279 is "superfluous" because it is "entirely subsumed in [§944.28]." Id. at 703 So.2d 1178. The Bradley dissenter mistakenly believed that §944.279 required a certification while §944.28 "has no such procedural requirement." Id. This conclusion could not be further from the truth. The procedural requirements outlined in §944.28(2)(c) are ***much*** more rigorous.

Thus, any presumed conflict between the two statutes is completely illusory. Both statutes exist independently, expressly address separate actions, and provide for divergent and distinct penalties. This Court should not fabricate a conflict where none exists.

POINT IV

THE DOC HAS NOT FORFEITED PETITIONER'S GAIN TIME BASED UPON THE DECISION IN HALL II.

In its order dated July 28, 1998 this Court ordered the parties to inform the Court whether the DOC has already forfeited Petitioner's gain time or contemplates forfeiting Petitioner's gain time pursuant to Hall II. Petitioner initiated an inquiry which determined that the original District Court order was never forwarded to the appropriate DOC address for enforcement. (Appendix E) Nevertheless, the DOC maintains that it has the authority to forfeit Petitioner's gain time under these circumstances. The forfeiture is thus being held in abeyance until final disposition of this litigation. It may be assumed that the DOC intends to forfeit Petitioner's gain time pursuant to the provisions of §944.28(2)(c) and Fla. Admin. Code Ann. r.33-22.012 §9-32 if this Court rules in Respondent's favor.

CONCLUSION

Based on the foregoing argument and authority, Respondents respectfully request this Honorable Court to affirm the District Court's order initiating the forfeiture of gain time proceedings.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CARMEN F. CORRENTE
ASSISTANT ATTORNEY GENERAL
Fla. Bar #304565
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing answer brief in case number 91,122 has been furnished by U.S. Mail to Bruce Rogow and Beverly A. Pohl, attorneys for Petitioner, Broward Financial Centre, Suite 1930, 500 East Broward Boulevard, Fort Lauderdale, FL 33394 this 22nd day of October, 1998.

CARMEN F. CORRENTE
ASSISTANT ATTORNEY GENERAL

APPENDIX