Electronically Filed 09/19/2013 02:40:39 PM ET

RECEIVED, 9/19/2013 14:43:33, Thomas D. Hall, Clerk, Supreme Court

IN THE FLORIDA SUPREME COURT

ROBERT LEFTWICH, DC# 061242

Case Petitioner

CASE NO. SC12-2669
L.T. No. 1D12-1739
Leon County 2011 CA 002271

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

DEPARTMENT OF CORRECTIONS' ANSWER BRIEF ON THE MERITS

_____

On Review from the District Court
of Appeal, First District,
State of Florida

_____

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STATEMENT OF THE CASE AND FACTS

Preliminary Statement: The respondent Florida Department of Corrections will be referred to by name, the respondent or as "DOC." The Petitioner Robert Leftwich, will be referred to by his last name, as the inmate or as petitioner. The Record on Appeal has been prepared and submitted to the court and the parties. Nonetheless, it is not paginated and while it contains an Index to the Record, it lists only 2 documents totaling 3 pages. It is therefore, not useful for citation purposes. Accordingly, DOC will cite to its appendix.

Jurisdiction:

This case is before the Court on discretionary review of the First District's decision in Leftwich v. Florida Department of Corrections, 101 So. 3d 404 (Fla. 1st DCA 2012). There the First District denied Leftwich's petition based on its decision in McBride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001), and certified that McBride conflicts with the Second District's decision in Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004). The First District held in McBride that the Ex Post Facto clause is NOT violated when DOC retroactively applies 1992 clarifying legislation to make Habitual Offenders ineligible for certain overcrowding gain time known as Provisional Credits. The clarifying legislation made it clear that the intent of the prior law was to preclude an award of Provisional Credits if the

defendant is sentenced as an Habitual Offender at any time. The conflicting opinion from the Second District in Downs holds that an ex post facto violation does occur when DOC retroactively applies 1992 clarifying legislation to make Habitual Offenders ineligible for overcrowding credits and disagreed with the First District because, "[b]oth McBride and Mamone rely on the Rodrick court's impliedly overruled holding in determining that [overcrowding gain time] is not subject to ex post facto analysis." Downs, 874 So. 2d. at 650.

Facts and Procedural History:

1. Leftwich is an inmate in the custody of the Department of Corrections currently serving his Sixth (6th) commitment to prison. As relevant to this petition, Leftwich was received on August 7, 1989 to serve two St. Johns County non-Habitual Offender sentences totaling 12 years. Because, at the time, the Florida Department of Corrections was experiencing extreme prison overcrowding and Leftwich had not yet been adjudicated an Habitual Offender, he was eligible for Provisional Credits (a type of overcrowding reduction gain time). Thus, between his arrival in prison on August 7, 1989 and September 1990, Leftwich received 410 days of Provisional Credits. **APP. at 27-28, 49-50.**

2. Shortly after arriving in prison, on August 26, 1989, Leftwich committed a new crime resulting in an additional 30-year Habitual Violent Felony Offender

sentence from Bradford County. Leftwich was adjudicated an Habitual Offender on September 4, 1990. Thus, after that point, he was no longer eligible for Provisional Credits on any of his sentences. Leftwich kept the 410 days of Provisional Credits he had been awarded before being designated an Habitual Offender. **APP. at 27-28, 49-51.**

3. On August 18, 2011, Leftwich filed a petition for writ of mandamus in the circuit court in Leon County claiming he was and is entitled to the continued receipt of Provisional Credits on his St. Johns non-Habitual Offender sentences. He relied on Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004). **APP. at 5-19.**

4. On September 2, 2011, the Leon County Circuit Court issued an order to show cause. **APP. at 20-22.**

5. On November 7, 2011, the Department responded. **APP. at 26-73.**

6. On December 2, 2011, Leftwich replied. **APP. at 74-78.**

7. On March 7, 2012, the Leon County Circuit Court denied the petition stating, in pertinent part:

> ORDER DENYING PETITION FOR WRIT OF MANDAMUS
>
> THIS CAUSE is before the court upon Petitioner's "Petition for Writ of Mandamus," filed August 18, 2011. In his petition, Petitioner challenges the Department's refusal to continue to award him provisional credits on his non-habitual offender sentence.
>
> ***

In his petition, Petitioner argues that pursuant to Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004), he is entitled to provisional credits on his St. Johns County non-habitual offender sentences. He claims that since he had not yet been designated as an habitual offender when he received his St. Johns County sentences, (Case No. 89-310), he should not have become ineligible to receive them on that sentence after he was designated as a habitual offender in his subsequent Bradford County Case (Case No. 89-438).

Pursuant to section 944.277(1)(g), Florida Statutes, Petitioner is not eligible for provisional credits because he was sentenced as an habitual offender in his later Bradford County case. Section 944.277(l)(g), Florida Statutes (1988), as clarified by the Legislature in 1992, prohibits an inmate from receiving an award of provisional credits who "is sentenced, or has been previously sentenced, under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender." The First District Court of Appeal determined in McBride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001), that once an inmate is sentenced as a habitual offender, he is thereafter ineligible for credits on all of his sentences. The court finds that Petitioner was sentenced as a habitual offender on the 30-year sentence from Bradford County, Case No. 89-438. Therefore, he became ineligible for credits on any of his sentences as soon as he became a habitual offender.

Petitioner argues that Downs v. Crosby is the controlling case law. There, the Second District Court of Appeal held that an inmate sentenced as a habitual offender was entitled to provisional credits on his pre-1992 non-habitual offender sentence because the habitual offender designation was imposed subsequent to the non-habitual offender sentence. Downs conflicts with McBride. This court is bound by the First District Court of Appeal's decision in McBride. See Pardo v. State, 596 So. 2d 665 (Fla. 1992) ("if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it."). Accordingly, Petitioner is not entitled to mandamus relief.

APP. at 80-82.

8. Leftwich sought review in the First District. He argued, in part, that because the First District in McBride referred to a decision from this Court that is clearly no longer good law (Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991), the entire foundation for the decision in McBride is also no longer valid. He urged the First District to recede from McBride and instead, follow the conflicting decision from the Second District in Downs. After briefing, on November 26, 2012, the First District denied the petition. It explained that:

> In accordance with our decision in McBride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001), the circuit court correctly concluded that after being sentenced as an habitual offender, petitioner was ineligible for provisional credits on all his sentences, including those imposed before he was designated an habitual offender. Accordingly, we DENY the petition for writ of certiorari on the merits, but CERTIFY that our decision conflicts with Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004).

Leftwich v. Florida Department of Corrections, 101 So. 3d 404, 404 (Fla. 1st DCA 2012) (emphasis added), **APP. at 218-219**.

9. Leftwich then sought conflict review in this Court. The Department agreed that there was conflict between the two decisions which needed resolution.

10. On July 23, 2013, this Court granted review and appointed counsel for Leftwich, who has now filed the Initial Brief on the Merits. Leftwich again argues, as he did in the First District, that the decision in McBride is no longer good law because its reasoning was allegedly based on Dugger v. Rodrick.

SUMMARY OF THE ARGUMENT

Leftwich argues that Dugger v. Rodrick, was "the foundation for both McBride v. Moore and Mamone v. Dean," to which the First District in McBride referred. IB at 8. He asserts that that because Rodrick's holding that retroactive application of a change in Provisional Credits is not subject to an ex post facto analysis is no longer good law after Lynce v. Mathis, the First District's decision in McBride is no longer good law. This argument is a red herring. Of course Provisional Credits and all the other types of overcrowding gain time are now subject to ex post facto analysis, as that is what Lynce held. Thus, there is no argument that Rodrick is now invalid. The Department's point is, however, that Rodrick is not the foundation for McBride. It is simply a fallacy to state that McBride held that Provisional Credits were not subject to ex post facto analysis. On the contrary, McBride assumed that such credits were subject to ex post facto analysis, but after such analysis, it determined that there was no violation because there was no retrospective application of any new law. That is certainly not the same thing as saying that retrospective application of Provisional Credits is "ok" because Provisional Credits are not subject to ex post facto analysis. The First District's decision would have been the same even if the law under review there had concerned a type of "regular," or non-overcrowding gain time. In other words,

the fact that this case concerns Provisional Credits, a type of overcrowding gain time is, at least for ex post facto purposes, irrelevant. The point of McBride was that the Legislature had always intended to exclude Habitual Offenders from the award of the subject credits on ALL SENTENCES, once he or she is given an Habitual Offender sentence, regardless of whether the Habitual Offender is serving sentences imposed before or after receiving the Habitual Offender sentence and its later legislation was meant to clarify its ORIGINAL INTENT. This Court has held that a court may look to a later statutory amendment to determine the intent of the prior version of that statute if the amendment "is enacted soon after controversies as to the interpretation of the original act arise." Lowry v. Parole & Prob. Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985). Giving effect to clarifying legislation is not the same thing as retroactively applying completely new legislation. Since the 1992 amendments to the Provisional Credits statute were simply a clarification of the original intent of the prior version, there is no "**change**" in the law, only an explanation or correction of the original, proper meaning. In other words, the original law is the one that is being applied and there is really no retroactive application of any NEW or later-enacted law. That being the case, the first element of any valid ex post facto allegation − retrospective application − is not present in this case.

To be sure, the Legislature should not be allowed to retroactively **change the law** by simply asserting that it is "clarifying its intent" every time a court issues an opinion it does not like. When there is an actual change in legislative law, that change should not be applied retroactively. This is not such a case. As further explained in detail in Section E, the original wording could easily and should really have been read to exclude all inmates sentenced as Habitual Offenders − regardless of which sentence they were serving or when the Habitual Offender designation occurred. The First District, in its prior decision in Anderson, was simply mistaken in its interpretation and the amendment was put forth to correct that misinterpretation. While it is an elementary concept that the Legislative Branch makes "the law" and the Judicial Branch interprets "the law," separation of powers principles compel the conclusion that if a court has completely misunderstood law written by the Legislative Branch, the Legislative Branch should be permitted to correct that misinterpretation.

Like Petitioner Leftwich, in addition to misunderstanding the basis for the First District's decision in McBride, the Second District in Downs conducted an improper ex post facto analysis. The Second Districted analyzed whether the original law as clarified would disadvantage the offender as compared to the original law as misinterpreted, without realizing that if, as this Court has already

made clear, clarifying legislation corrects a court's interpretation of the original statute, the original law as clarified is the original law. The Second District, by analyzing the clarified law versus the non-clarified law, made clear that it did not understand that clarifying legislation can actually resolve what the original intent was. By ruling at it did, the Second District seems to believe that clarifying legislation can only work prospectively and cannot set straight what was always the intent of the original law.

ARGUMENT

I. RETROACTIVELY APPLYING LEGISLATIVE CLARIFICATIONS TO ORIGINAL INTENT DOES NOT VIOLATE THE EX POST FACT CLAUSE WHEN THE CLARIFICATION IS NOT A CHANGE IN THE LAW

A. History of Florida's Overcrowding/Early Release Statutes

In 1983, the Florida Legislature enacted the Emergency Gain Time statute, the first of several prison overcrowding gain time statutes. § 944.598, Fla. Stat. (1983). The statute allowed for the early release of certain inmates when prison overcrowding surpassed a certain level. § 944.598(1), Fla. Stat. (1983). The Emergency Gain Time statute was repealed effective June 17, 1993. Ch. 93-406, §§ 32, 44, at 2966, 2974, Laws of Fla.

In its place, in 1987, the Legislature enacted a second early-release, prison overcrowding statute − the Administrative Gain Time statute. § 944.276, Fla. Stat. (1987).[1] This statute specifically excluded certain violent or repeat offenders from

[1] As this Court noted in Gomez v. Singletary 733 So. 2d 499, 507 (Fla. 1998):

> [T]he Supreme Court's discussion of that statute [the Emergency Gain Time Statute] was merely a reaffirmation of the "core Ex Post Facto" argument that all the later overcrowding statutes were really the same, at least for purposes of deciding whether a later statute was merely a "revamping" of the prior statute. In other

receiving administrative gain-time credits. Inmates were able to receive credits unless such inmates:

(d) were sentenced under **s. 775.084** [the Habitual Offender statute].

§ 944.276(1)(d), Fla. Stat. (1987) (Emphasis added).

In 1988, the Legislature repealed the Administrative Gain Time statute, and replaced it with the Provisional Credits statute. § 944.277, Fla. Stat. (Supp. 1988); ch. 88-122, § 5, 6, at 535-37, 572, Laws of Fla. As this Court has recognized, in many ways, the new statute was very similar to the Administrative Gain Time statute, except that it excluded additional types of offenders.[2] It was, in essence, a refinement of the Administrative Gain Time statute and like the prior statute, the new statute allowed credits unless an inmate:

> words, we believe that the Supreme Court's discussion of that statute was only meant to reject the Department of Corrections' assertions in that case that all the separate overcrowding statutes had nothing to do with each other and that an inmate's entitlement to overcrowding credits under one statute terminated upon the enactment of a new statute.

[2] See Mayes v. Moore, 827 So. 2d 967, 973 (Fla. 2002) ("The Department had long considered administrative gain time to be forfeitable upon supervision revocation, and this Court had previously held that provisional credits were essentially the same as administrative gain time."). See Griffin v. Singletary, 638 So. 2d 500, 501 n. 1 (Fla. 1994).

> is **sentenced** or has previously been sentenced, **under s. 775.084**,[Habitual Offender statute] **or** has been **sentenced at any time** in another jurisdiction as a habitual offender.

§ 944.277(1)(g), Fla. Stat. (Supp. 1988) (Emphasis added).

Effective September 1, 1990, the Legislature enacted another version of the early release gain time statutes − the Control Release Program. This version essentially lifted much of the language from the Provisional Credits statute but also incorporated several of the more discretionary aspects of a traditional parole-type program. This was a further refinement intended to ensure that only the least dangerous inmates would be released early when prison overcrowding occurred. § 947.146, Fla. Stat. (1989); ch. 89-526, §§ 1, 2, 52, at 2659-61, 2690, Laws of Fla.; Gomez, 733 So. 2d at 501-502. Like the previous two statutes, an inmate sentenced as an Habitual Offender was STILL not eligible for prison overcrowding gain time under the Control Release program. § 947.146(4)(e), Fla. Stat. (1989).

B Judicial Interpretation of the Habitual Offender Disqualification in the Provisional Credits Statute.

Despite the Legislature's rather apparent intent that Habitual Offenders not be released early when overcrowding occurred, on February 7, 1992, in Dugger v. Anderson, 593 So. 2d 1134 (Fla. 1st DCA 1992), the First District interpreted the Habitual Offender disqualification of the Provisional Credits statute as making

Habitual Offenders ineligible for Provisional Credits on non-Habitual Offender sentences ONLY if the offender had PREVIOUSLY been adjudicated an Habitual Offender (in another case). In Anderson's case, since his Habitual Offender sentence was for a crime committed AFTER his non-Habitual Offender sentences, the First District felt that he should be eligible to receive Provisional Credits on the non-Habitual Offender sentences even though he was now an Habitual Offender. Dugger v. Anderson, 593 So. 2d 1134 (Fla. 1st DCA 1992).

Reviewing the statute and the holding in Anderson, one can see that apparently the First District thought the Legislature meant to prohibit out-of-state Habitual Offenders from receiving Provisional Credits regardless of when the Habitual Offender sentencing occurred and regardless of which sentence they were currently serving, but for in-state Habitual Offenders, the Legislature wanted these offenders kept in prison ONLY if they were currently serving their Habitual Offender sentences. Clearly this makes no sense. Why would the Legislature want to ensure that the out-of-state Habitual Offenders did not get out early but the in-state Habitual Offenders could be released early?

Immediately after the erroneous Anderson decision, **and in fact because of the decision**, the Florida Legislature added additional language to **further clarify its original intent** that Habitual Offenders not be released early from prison. The

Legislature added the following language (underlining indicates new language), indicating an inmate is not eligible for Provisional Credits if he or she:

> [i]s sentenced, or has previously been sentenced, or has been sentenced at any time under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender.

§ 944.277(1)(g), Fla. Stat. (Supp. 1992); Ch. 92-310, § 12, at 2967, Laws of Fla.

Shortly thereafter, the Fifth District took notice of this clarification in Mamone v. Dean, 619 So. 2d 36 (Fla. 5th DCA 1993), and stated:

> Based upon the case of Dugger v. Anderson, 593 So. 2d 1134 (Fla. 1st DCA 1992), Mamone contends he is entitled to the credit against the 3 1/2 -year [non-habitual] term. We disagree. After Anderson (and, indeed, because of it), the Florida Legislature remedied the language of section 944.277(1)(g), Florida Statutes, to show its clear intent that an inmate is precluded from receiving provisional credits once sentenced as a habitual offender.

Mamone, 619 So. 2d at 36.

In Downs, the Second District's appeared to recognize that the First District had, in its 2001 decision in McBride v. Moore, essentially receded from Anderson v. Duggar based on the 1992 legislation and recognized that the Fifth District[3] had

[3] See Mamone v. Singletary, 619 So. 2d 36 (Fla. 5th DCA 1993) (the 1992 amendments to section 944.277(1)(g) negated the effect of the Anderson decision because the Legislature **clarified its** intent that inmates who had 'been sentenced at any time' as an Habitual Offender were not entitled to receive administrative gain-time or provisional credits)

also held that applying this clarifying legislation retroactively "does not violate the Ex Post Facto Clause." Downs, 874 So. 2d at 648. Nevertheless, the Second District disagreed with the First and the Fifth Districts and decided to follow the reasoning of the First District's prior, (now-receded-from) decision in Anderson. In fact, the Second District instructed the lower court in Downs to apply the First District decision in Anderson. See Downs, 874 So. 2d at 650.

C. Mamone Is Still Good Law & Mcbride v. Moore Does Not Depend on The Now Invalid Decision in Rodrick.

Petitioner Leftwich asked the First District to recede from its decision in McBride because it relied, at least in part, on Mamone v. Dean, 619 So. 2d 36 (Fla. 5th DCA 1993), which relied in part on this Court's now-overruled[4] decision in Dugger v. Rodrick, 584 So. 2d (Fla. 1991). Lynce v. Mathis, 519 U.S. 433 (1997) essentially held that contrary to this Court's prior precedent, overcrowding gain time was just like "regular" gain time for purposes of the Ex Post Facto Clause,[5]

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[4] See Winkler v. Moore 831 So. 2d 63, 65-66 (Fla. 2002) (Lynce v. Mathis, . . . essentially overruled this Court's previous decisions holding that overcrowding gain time was not subject to ex post facto analysis. See, e.g., Blankenship v. Dugger, 521 So. 2d 1097 (Fla. 1988); Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991); Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994).").

[5] See Gomez v. Singletary, 733 So. 2d 499 (Fla. 1998) ("The State argued that with prison overcrowding credits . . . . [since] at the time of the plea bargain

thereby rending Rodrick invalid. Before discussing in depth the decision in McBride, analysis of Mamone is in order.

The Fifth District's decision in Mamone was issued before the United States Supreme Court decision in Lynce v. Mathis, 519 U.S. 433 (1997) and the Fifth district cited to a case that is clearly no longer good law (Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991)).[6] Nonetheless, a close reading of Mamone reveals that it

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and sentencing, the petitioner could not have reasonably expected to receive any such credits . . . [they were, thus,] speculative. The United States Supreme Court found this argument unpersuasive . . . The Court, therefore, made clear that, for ex post facto purposes, there is no difference between regular gain time and prison overcrowding gain time.")

[6] See Gomez v. Singletary, 733 So. 2d 499 (Fla.1998), State v. Lancaster, 731 So. 2d 1227 (Fla. 1998), Thomas v. Singletary, 729 So. 2d 369 (Fla.1998), Meola v. Department of Corrections, 732 So. 2d 1029 (Fla. 1998).

In Meola, this Court specifically mentioned Rodrick. It stated:

> Prior to the Supreme Court's recent decision in Lynce, this Court had always held that Administrative Gain Time and Provisional Credits were not subject to the Ex Post Facto Clause because the award of overcrowding gain time was based on unpredictable prison overcrowding. See Griffin v. Singletary, 638 So. 2d 500 (Fla.1994); Dugger v. Rodrick**,** 584 So. 2d 2 (Fla. 1991). The decision in Lynce, however, made clear that, like other forms of gain time, prison overcrowding gain time can constitute one determinant of a prisoner's sentence because a "prisoner's eligibility for reduced imprisonment is

contained two holdings: (1) the Legislature had merely clarified the old law when it amended the Provisional Credits statute; and (2) overcrowding credits are not subject to the Ex Post Facto Clause under Rodrick.[7] While holding (2) is clearly no longer valid under Lynce, holding (1) was not based on Rodrick and is still good law.

The First District's decision in McBride was issued some four (4) years after the decision in Lynce and approximately two (2) years after issuance of this

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a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.

[7] The First District in Mamone stated:

> **[HOLDING #1]** Based upon the case of Dugger v. Anderson, 593 So. 2d 1134 (Fla.1st DCA 1992), Mamone contends he is entitled to the credit against the 3 1/2-year term. We disagree. After Anderson (and, indeed, because of it), the Florida Legislature remedied the language of section 944.277(1)(g), Florida Statutes, to show its clear intent that an inmate is precluded from receiving provisional credits once sentenced as a habitual offender.
>
> **[HOLDING #2]** We find no merit in the appellant's other arguments. In the recent opinion of Dugger v. Grant, 610 So. 2d 428 (Fla.1992), the supreme court ruled that Florida's early release mechanisms, including the provisional credits statute, do not create protected liberty interests. In Dugger v. Rodrick, 584 So. 2d 2 (Fla.1991), c*ert. denied*, 502 U.S. 1037 (1992), the Supreme Court specifically ruled that changes to Florida's early release statute do not violate the ex post facto clause because the statutes do not affect substantive matters of punishment, but are merely administrative procedural mechanisms for controlling prison overcrowding.

Court's four (4) December 24, 1998 overcrowding gain time decisions applying Lynce, including the Florida Supreme Court's decision in Meola v. Department of Corrections, 732 So. 2d 1029 (Fla. 1998), which specifically noted the invalidity of its prior decision in Rodrick. The First District cited to and quoted from Mamone in McBride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001) and agreed with the Fifth District that the Legislature had merely clarified its prior intent with the 1992 amendments and thus, retroactive application of the clarifying language did not violate the Ex Post Facto Clause. Leftwich claims that the First District actually held in McBride that it was permissible to retrospectively apply new overcrowding gain time law because overcrowding gain time is not subject to ex post facto analysis. On the contrary, the First District held that there was no ex post facto violation because there was no retrospective application of any new law, only a corrected interpretation of the old law.

In order for there to be an ex post facto violation in the gain time arena this Court recognized in Winkler v. Moore, 831 So. 2d 63 (Fla. 2002) that the law:

> (1) [] must be retrospective, that is, "it must apply to events occurring before its enactment; " and (2) it must "disadvantage the offender affected by it."

Winkler v. Moore, 831 So. 2d 63, 67-68 (Fla. 2002) (quoting from Lynce v. Mathis, 519 U.S. at 441 (1997) (internal citations omitted).

This Court explained in Winkler that:

> the appropriate "event" for ex post facto purposes is the commission of the offense and the rights the offender had on the date he or she committed the offense. That means, for example, that if at the time of the criminal offense, inmate A had a right to receive 20 days per month of gain time and then later the Legislature **changed** the gain time [law] to five days per month and applied that **change** retrospectively to inmate A's earlier occurring offense (the relevant "event"), then there would be an ex post facto violation.
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> Winker, 831 So. 2d at 67 (emphasis added).

This explanation makes clear that in order to apply a law to events occurring before its enactment, that law must have been enacted after the events. Or in other words, the law that is being applied retrospectively has to be new to cause an ex post facto violation. Thus, there is really a third, or preliminary requirement for an ex post facto violation – that requirement is that there be a "new law."

Nonetheless, as already argued, if the 1992 amendments to the Provisional Credits statute was merely a clarification of the original law, the original law is the one that is being applied. Thus, there is no "**change**" in the law nor any **new law** – only a correction of a court's erroneous interpretation of the original law.

It is true, however, that in discussing the Fifth District's decision in Mamone, the First District indicated that the Fifth District also held that Mamone was not entitled to Provisional Credits because overcrowding credits were not subject to ex post facto analysis. In 1993, when Mamone was issued, that was the

law. But as is clear, the First District stated that it was not basing its decision on that part of the reasoning in Mamone because it stated:

> In summary, since the 1992 amendment merely clarified the intent of the legislature with regard to section 944.277(1)(g), the trial court correctly ruled that the statute has never distinguished between inmates who had habitual offender sentences, regardless of whether imposed before or after the original sentence. On **this** basis, we deny the petition for writ of certiorari.
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> Petition denied.

McBride, 780 So. 2d at 223.

That being the case, the First District determined that since the 1992 amendments only clarified the old law, there is no retroactive application of any **later-enacted law**. that retrospective application of the 1992 amendments to the pre-1992 law did not violate the Ex Post Facto Clause.

On the chance that the First District's decision in McBride could be read to base its denial on both parts of Mamone − that is − both because of Rodrick and because it had concluded that the Legislature was merely clarifying its original intent, then only the portion of the holding based on Rodrick should be disapproved. The portion of the holding in McBride based on the conclusion that there is no ex post facto violation because the 1992 amendments were a mere clarification of the original law should be approved.

This Court has previously held that a court may look to a statutory amendment to determine the intent of the prior version of that statute if the amendment "is enacted soon after controversies as to the interpretation of the original act arise." Lowry v. Parole & Prob. Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985); State v. Cotton, 769 So. 2d 345, 349 (Fla. 2000) ("Although the 1997 statute applies to these appeals, we accept the 1999 amendment as clarification of the Legislature's intent"); Finley v. Scott, 707 So. 2d 1112, 1116 (Fla. 1998) ("Although the 1993 statute applies to this case, we accept the addition of this sentence to the statute as clarifying legislative intent" as to how the trial court should calculate the guidelines).

When Mamone was pending in the lower court, DOC submitted, as part of the record, a copy of the House of Representative's Bill Analysis and Economic Impact statement for Bill PCB COR 92-03, which was the precursor of the 1992 clarifying legislation. The Bill Analysis specifically mentioned the First District's prior erroneous interpretation of the Provisional Credits Habitual Offender disqualification in Anderson and was one of the main reasons for the clarifying legislation. Reviewing this information, the Fifth District was able to see that, as in the case of Lowry, the clarifying legislation was enacted soon after controversies

as to the interpretation of the original act had arisen. The First District also recognized this fact in its 2001decision in McBride and stated:

> [T]he 1992 amendment makes it clear that the intent of t**he prior law** was to preclude an award of provisional release credits if the defendant is sentenced as a habitual offender at any time. As the court explained in Mamone v. Dean, 619 So. 2d 36 (Fla. 5th DCA 1993), the legislature actually amended section 944.277(1)(g) as a reaction to the Anderson decision.
>
> McBride v. Moore, 780 So. 2d at 222 (emphasis added).

D. Legislative Changes in "the Law" vs. Case Law Changes in "the Law"

To be sure, the Legislature should not be allowed to retroactively **change the law** by simply asserting that it is "clarifying its intent" every time a court issues an opinion it does not like. See e.g. Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989) (subsequent legislatures, in the guise of "clarification" cannot nullify retroactively what a prior legislature **clearly** intended); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995) (Lowry is still good law but "[i]t would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent"); Parole Com'n v. Cooper, 701 So. 2d 543, 544-545 (Fla. 1997) (while "we did state in Lowry that a subsequent amendment could be used to construe legislative intent if the amendment was enacted soon after the controversy arose . . . . it is inappropriate to use an amendment enacted ten years after the original enactment to clarify original

legislative intent.");

When there is an actual change in legislative law, that change should not be applied retroactively (if it increases punishment). This is not such a case, however. In this case, as further explained in Section E, the original law could easily and should have been read to exclude all Habitual Offenders regardless of when the offender received the Habitual Offender sentence and which sentence he or she was serving at the time. The First District was simply wrong in its interpretation and the amendment was put forth to correct that misinterpretation. While it is a basic concept that the Legislative Branch makes "the law" and the Judicial Branch interprets "the law," separation of powers principles compel the conclusion that if a court has completely misinterpreted law written by the Legislative Branch, the Legislative Branch should be permitted to correct that misinterpretation.

While the Second District in Downs seemed to agree that the Legislature had always meant for the Provisional Credits Habitual Offender disqualification to apply regardless of which sentence the offender was currently serving and regardless of whether the Habitual Offender sentencing occurred before or after receipt of the Non-Habitual Offender sentences, it seemed convinced that it could only apply the correction prospectively based on this Court's decision in State v. Smith, 547 So. 2d 613 (Fla. 1989). The Second District stated:

> Generally, a court may look to a statutory amendment to determine the intent of the prior version of that statute if the amendment "is enacted soon after controversies as to the interpretation of the original act arise." Lowry v. Parole & Prob. Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985). However, the amendment may not be considered to impliedly overrule case law interpreting the statute if the retroactive application of the amendment violates the Ex Post Facto Clause. State v. Smith, 547 So. 2d 613, 616 (Fla. 1989).

Downs, 874 So. 2d at 650-651.

In Smith, this Court held that the retroactive application of the legislature's amendment of a statute in response to a court decision would violate the Ex Post Facto Clause. This Court stated:

> First, it is a function of the judiciary to declare what the law is. Although legislative amendment of a statute may **change the law** so that prior judicial decisions are no longer controlling, it does not follow that court decisions interpreting a statute are rendered inapplicable by a subsequent amendment to the statute.

State v. Smith, 547 So. 2d 613, 615 (Fla. 1989) (Emphasis added).

Unfortunately, however, that only applies if the law is an actual **CHANGE** in the law. If it was always the intent of the Legislature that its legislation mean something in particular and it is a reasonable conclusion, then the law is not a CHANGE, it is merely a clarification of the original law and it is the original law that is really being applied.

In addition to misunderstanding the basis for the First District's decision in

McBride, the Second District in Downs conducted an improper ex post facto analysis. The Second District analyzed whether the original law as clarified would disadvantage the offender as compared to the original law as previously misinterpreted, without realizing that if, as this Court has already made clear, clarifying legislation corrects a court's interpretation of the original statute, the original law as clarified is the original law and the prior interpretation was never the law at all. The Second District, by analyzing the clarified law versus the non-clarified law, made clear that it did not understand that clarifying legislation can actually resolve what the original intent was. Instead, it seems to insist that clarifying legislation can only work prospectively and cannot set straight what was always the intent of the original law.

In finding an ex post facto violation, the Second District misunderstood this Court's decision in State v. Smith, 547 So. 2d 613 (Fla. 1989), because it failed to appreciate the difference between a change in legislation (one type of a change in "the law") and a change in case law (another type of change in "the law").

The Second District in Downs thought that this Court in Smith had prohibited courts from correcting improper interpretations of pre-existing statutory law. In Smith, this Court prohibited the retrospective application of new case law based on changes to statutory legislation (or new case law based on new statutory

legislation). In other words, if a court interprets a statute correctly but the Legislature does not like the result and changes the statute to change the result, that is a change in legislative law. When the court again looks at the statute (as amended) and sees that it is now means something different, that court's decision should not be applied retroactively (if it increases punishment) because that would be applying new law to people and things that should be controlled by the old law.

In this case, while there was new case law (the First District issued a new opinion - McBride v. Moore), there was no new statutory law - simply a clarification of old law that had been improperly interpreted in the first place.

Further, to the extent Smith could be read to prohibit the retroactive application of any new court decision, this Court has already implicitly receded from that holding in Mayes v. Moore, 827 So. 2d 967, 973 (Fla. 2002).

In Mayes, this Court recognized, in accordance with recent United States Supreme Court precedent that " the Ex Post Facto Clause of the United States Constitution does not generally apply to case law. . . . [unless] . . . it results in an "unforeseeable enlargement of a criminal statute."). Id. The Supreme Court has now made clear that unlike legislation, court decisions are not governed by the Ex Post Facto Clause but rather by the Due Process Clause. Further, all that is required under the Due Process Clause is that the judicial change be foreseeable.

Rogers v. Tennessee, 532 U.S. 451, 458-459 (U.S. 2001) (Bouie only restricted the retroactive application of judicial interpretations of criminal statutes to those that are unexpected and indefensible by reference to prior law); see also Marks v. United States, 430 U.S. 188, 191(1977) (the clause applies to a judicial opinion only when it results in "an unforeseeable enlargement of a criminal statute.") (*quoting* Bouie v. City of Columbia, 378 U.S. 347, 353_54 (1964)).

In Mayes, this Court examined whether retrospective application of its decision in State v. Lancaster, 731 So. 2d 1227 (Fla. 1998), might violate the Ex Post Facto Clause based on an allegation of unforeseeability. In Lancaster, the inmate argued that DOC did not have statutory authority to forfeit a certain type of gain time (Provisional Credits) upon probation revocation. While section 944.28(1), Florida Statutes had authorized DOC to forfeit all "gain time" upon probation revocation since 1988, DOC had not interpreted the term "gain time" to include Provisional Credits. This Court ruled that DOC's interpretation was incorrect and that it had actually had statutory authority to forfeit the gain time for many years. This Court stated:

> [L]ike other types of gain time, the State must have statutory authority to forfeit overcrowding gain time upon supervision revocation . . . . It appears that the State believes that neither of those sections includes Provisional Credits . . . . We believe, however, that sections 944.28(1) and 948.06(6) do provide the State with such authority but they can only be invoked for inmates whose underlying offenses were committed on or after

> October 1, 1989 (the effective date of the amendments providing for such forfeitures). Lancaster's original offense was committed before that date and thus the State cannot forfeit his Provisional Credits or Administrative Gain Time under those statutes."
>
> State v. Lancaster, 731 So. 2d 1227, 1230-31 (Fla. 1998).

Thereafter, DOC applied Lancaster to inmates whose offenses had been committed after the effective date of the statute. These inmates sued, however, arguing that the "retrospective application" of the 1998 decision in Lancaster to allow the forfeiture of gain time for offenses committed prior to the date Lancaster was decided was a violation of the Ex Post Facto Clause. This court rejected that argument stating:

> [T]he [1998] Lancaster decision did not create the statutory authority for the forfeiture of overcrowding gain time upon supervision revocation. That authority has been in effect since 1988, and it has provided for the forfeiture of "all gain time" upon conditional release supervision revocation. . . . Prior to Lancaster, the Department had not considered most types of overcrowding credits to be gain time. In Lancaster, this Court corrected that misinterpretation and made clear that the Department always had the authority to forfeit such credits--at least with regard to those inmates whose offenses were committed on or after the pertinent date in 1988. [citations omitted]
>
> **Lancaster's interpretation of the gain time forfeiture statutes was not an unforeseeable enlargement of that statute**. The Department had long considered administrative gain time to be forfeitable upon supervision revocation, and this Court had previously held that provisional credits were essentially the same as administrative gain time. [citations omitted] Therefore, we conclude that the portion of the holding in Lancaster concluding that all types of gain time (including overcrowding credits) are forfeitable under the general gain time forfeiture statutes was not unforeseeable and thus

there is no ex post facto violation.

Mayes, 827 So. 2d at 973 (emphasis added). Like the correction of DOC's interpretation of the gain time forfeiture statutes in Lancaster, when the Legislature advised the First District that it had mistakenly interpreted the Provisional Credits statute in Anderson in 1992, the First District graciously accepted the correction, held that the law had always excluded Habitual Offenders from receiving Provisional Credits and acknowledged that its prior decision in Anderson was no longer good law. See McBride v. Moore, 780 So. 2d at 222 ("Our decision in Anderson is of no benefit to McBride, however, because the 1992 amendment makes it clear that the intent of the prior law was to preclude an award of provisional release credits if the defendant is sentenced as a habitual offender at any time."). The Second District should have done the same in Downs.

E. Why an Interpretation of the Original Law, Even Before the Clarifying Legislation – That Habitual Offenders Were Rendered Ineligible For Provisional Credits Regardless Of When The Adjudication Occurred – Would Have Been A Reasonable Interpretation

When the Provisional Credits statute was initially enacted in 1988, the statute read:

> (1) **Whenever** the prison population of the correctional system reached 97.5 percent of lawful capacity . . . the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except an inmate who:
> * * *

(g) Is **sentenced** or has previously been sentenced, **under s. 775.084**,[Habitual Offender statute] **or** has been **sentenced at any time** in another jurisdiction as a habitual offender.

§ 944.277(1)(g), Fla. Stat. (Supp. 1988) (emphasis added).

The pertinent phrase in the legislation prohibiting the award of Provisional Credits is the phrase "**is** sentenced" as an Habitual Offender. The word "sentenced" is the main verb. Paired with the auxiliary verb, "is," the sentence works like a descriptive adjective. That is, the phrase is describing the types of offenders that are not eligible - and those types of offenders designated as Habitual Offenders are among the ineligible.

The use of the verb "to be" in the present does more than describe the offender, however. It also makes clear that the concern was with the offenders' description or designation at the time the credits are being awarded. In order to understand this emphasis on the present, it is necessary to understand how the Department's computers were programmed to determine eligibility. As soon as the Department acknowledged that the prison population had reached the triggering level, it tasked its computers to programmatically scan the prison population and to determine: "who is currently sentenced as an Habitual Offender?" Any such inmate was ineligible for an award for that particular incident of overcrowding. This concentration on the present (or the moment when the prison population

reached the triggering threshold) is because when legislators and prison officials are forced to release inmates early, they attempt to release only those that seem least dangerous or least apt to commit more crimes. And it is right before the credits are awarded that the examination of the offender is done.

Obviously, an Habitual Offender is more likely to reoffend if released early because offending is his or her "habit," hence the name ("Habitual Offender"). Thus, once a court has found that a person is likely to commit more crimes as evidenced by their habits, that conclusion is unlikely to change knowing that the inmate was also convicted of a number of crimes before he was adjudicated an Habitual Offender. While courts have a tendency to examine individual sentences, when determining who should be released to the public, DOC early release statutes have always been concerned with the characteristics of the offender so as to avoid danger to the public. Thus, such statutes do not focus on each individual sentence. For law enforcement and corrections, when determining risk to the public, the person is adjudicated an Habitual Offender, not the sentence. Since the early release statutes were intended to reduce unconstitutional prison overcrowding, yet release the inmates least likely to reoffend, it is reasonable to conclude that the Legislature intended to prohibit persons adjudicated as a Habitual Offender from

being eligible for early release. Accordingly, once an offender "**is** sentenced" as a Habitual Offender, the person is a Habitual Offender.

Further, it is important to understand how the award of overcrowding credits was done. Between 1988 and 1991, when Provisional Credits were being awarded, prison population levels were monitored daily. Provisional Credits were awarded when the prison population reached the statutory threshold in order to immediately lower the population. For instance, if in October 1990, the prison population rose to a level sufficient to trigger the award of Provisional Credits, all inmates statutorily eligible in October 1990 would receive an award of such release credits in October 1990.

The pool of eligible inmates was not fixed. Eligibility was determined programmatically based on a snapshot of the prison population on the date the prison system became overcrowded. For example, an inmate who was usually eligible, could have been deemed ineligible in October 1990 because he had committed a disciplinary infraction that month. (§ 944.277(1)) Or, an inmate previously ineligible due to service of a mandatory, could have completed service of the mandatory by October 1990 so that he was now eligible. (§ 944.277(1)(b)) For purposes of Habitual Offender ineligibility, the question asked in October 1990 was: "is this inmate sentenced as an Habitual Offender?" If the answer is "yes",

the inmate was ineligible for the October 1990 award. Applying this test to inmate Leftwich, since he had been designated an Habitual Offender in September, 1990, by October 1990, Leftwich had become the type of offender the Legislature deemed an unreasonable early release risk. The Legislature did not care what sentence he was currently serving or when he received this designation. They were worried that certain types of offenders should not be released early. Thus, after the Habitual Offender designation, Leftwich became the type of offender the Legislature had made ineligible for the receipt of such credits.

The First District, in its prior decision in Anderson apparently did not appreciate the differences between this DOC statute and true criminal statutes when it defined the "temporal span" of § 944.277(1)(g), Fla. Stat, (Supp. 1988). Typically, a criminal sentencing statute is applied at one point in time only. The defendant stands before the judge and the judge reviews all relevant facts in existence at that time necessary to impose a proper sentence.

DOC statutes, on the other hand, are designed to react to changing conditions, such as the actions of inmates or the make-up of the prison population. DOC statutes pertain to conditions of confinement, awards of gain time, and other on-going issues that arise over and over throughout the course of incarceration. Thus, under the DOC statute, the question of whether the inmate "is sentenced" as

an Habitual Offender is asked every time there is an episode of overcrowding. Once the person "is sentenced" as a Habitual Offender, he is ineligible for further Provisional Credits.

Perhaps if DOC had been able to more thoroughly brief the First District in Anderson, that court might have come to the conclusion it ultimately did in McBride, after the Legislature clarified its original intent. If the First District had so concluded in Anderson, such a conclusion would have been **completely reasonable** considering the purposes of the statute. That being the case, applying the First District's *later conclusion* in McBride to that effect does not violate the Ex Post Facto Clause because it is not an **unreasonable interpretation** of even the original wording – without the subsequent clarification.

Further, that the First District would correct its prior interpretation in Anderson of the Provisional Credits disqualification and recede from it in McBride v. Moore, was completely foreseeable. As discussed above, the Legislature tailored each overcrowding program more narrowly than the preceding program to ensure that only the least dangerous inmates would be released early when prison overcrowding occurred. The Legislature, in creating an Habitual Offender disqualification, recognized that Habitual Offenders present a greater risk to the public than non-Habitual Offenders. When and where a person is sentenced as an

Habitual Offender does not lessen the risk associated with releasing them early under an overcrowding statute. By including the Habitual Offender disqualification as part of the Provisional Credits statute the Legislature intended to keep the most dangerous offenders off the streets and meant to preclude DOC from awarding Provisional Credits to all inmates sentenced as Habitual Offenders.

CONCLUSION

The Legislature has always intended that when prison overcrowding forces the early release of prison inmates, Habitual Offenders should not be among them. This was the intent of the Legislature in 1988 when it enacted the Provisional Credits statute, and the Legislature did not "change" the intent or substance of the disqualification when it amended the statute in 1992 to clarify its original intent and correct the prior erroneous interpretation of the statute by the First District in Anderson. In McBride v. Moore, the First District recognized its error and properly receded from Anderson, and held that Habitual Offenders are ineligible to receive Provisional Credits on any of their sentences. The Ex Post Facto clause does not prohibit the retrospective application of clarifying amendments because they are not a change in the law. Thus, when the Second District refused to apply the 1992 clarification, it erred. After reviewing its earlier decision in McBride in Leftwich, the First District determined that there was no reason to recede from McBride and reaffirmed it in the case below. This Court should approve and uphold the First District's decision in this case (Leftwich), approve the First District's decision in McBride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001), and disapprove the Second District's decision in Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response is submitted in New Times Roman 14-point font in accordance with the Fla. R. App. P. 9.210(a)(2).

Barbara Debelius

BARBARA DEBELIUS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email on the 19th day of September, 2013, to:

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IN THE FLORIDA SUPREME COURT

ROBERT LEFTWICH, DC# 061242

Case Petitioner

CASE NO. SC12-2669
L.T. No. 1D12-1739
Leon County 2011 CA 002271

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

DEPARTMENT OF CORRECTIONS'

APPENDIX

TO

ANSWER BRIEF ON THE MERITS

Appendix
(RECORD ON APPEAL)

INDEX TO APPENDIX

DISTRICT COURT DOCUMENTS