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IN THE SUPREME COURT
STATE OF FLORIDA

ROBERT BLAINE LEFTWICH,

Petitioner,

vs.

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. SC12-2669
Lower Tribunal No(s): 1D12-1739
2011 CA 002271

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL
PETITIONER'S INITIAL BRIEF ON THE MERITS

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II. PRELIMINARY STATEMENT

Because counsel for the petitioner received no copy of the record on appeal before the deadline for this brief, counsel cites relevant portions of the petitioner's jurisdictional brief ("PB.__") and the respondent's jurisdictional brief ("RB.__"). These citations are followed by the abbreviation "R.__," which will hold the place for eventual record citations. As soon as counsel for the petitioner receives the record on appeal, counsel will (with the court's leave) file an initial brief with record citations.

III. STATEMENT OF THE CASE AND FACTS

On August 7, 1989, the petitioner Robert Leftwich entered the custody of the Florida Department of Corrections (the "DOC") after receiving two sentences under the Florida Sentencing Guidelines.[1] At that time, Florida's prison system suffered from severe overcrowding.[2] Over the years, the Florida legislature enacted an array of overcrowding and gain-time statutes designed to alleviate the swelling prison population.[3] When Leftwich entered prison, the "Provisional Credits" statute allowed the Secretary of the DOC to award incremental provisional credits to an inmate when the prison population reached 97.5 percent of lawful capacity.[4] Among others, Section 944.277(1)(g) (Supp. 1988) excluded from eligibility any inmate who "[i]s sentenced, or has been previously sentenced, under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender." In August, 1989, Leftwich had not received a sentence under Section 775.084

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[1] Petitioner's Jurisdictional Brief ("PB") 1; Respondent's Jurisdictional Brief ("RB") 1; R. ___.

[2] *See Gomez v. Singletary*, 733 So. 2d 499, 500 (Fla. 1998).

[3] *Id.* at 500-02.

[4] Fla. Stat. § 944.277 (Supp. 1988).

(Florida's "habitual offender" statute) and had not received a habitual offender sentence in another jurisdiction.[5]

Between August 7, 1989, and September, 1990, Leftwich earned 410 days of provisional credits.[6] In September, 1990, Leftwich received a habitual offender sentence for possessing marijuana while in DOC custody.[7]

In 1992, two years after Leftwich's habitual offender sentence, the Florida Legislature amended Section 944.277(1)(g) to exclude from eligibility for provisional credits any inmate who "[i]s sentenced, or has previously been sentenced, *or has been sentenced at any time* under s. 744.084, or has been sentenced at any time in another jurisdiction as a habitual offender" (the "1992 Amendment").[8] Relying on *McBride v. Moore*,[9] the DOC interpreted the 1992 Amendment as rendering Leftwich ineligible for the 410 days of provisional credits that Leftwich earned under the former version of Section 944.277(1)(g).[10]

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[5] PB. 1; RB. 1; R. ___.

[6] RB. 1; R. ___.

[7] PB. 1 n.1; RB. 1; Fla. Stat. § 944.47(1)(a) (Supp. 1988); Fla. Stat. § 775.084 (Supp. 1988).

[8] Fla. Stat. § 944.277(1)(g) (Supp. 1992, 1993) (emphasis added).

[9] 780 So. 2d 221 (Fla. 1st DCA 2001).

[10] RB. 1-2; R. ___.

The DOC refused Leftwich's request to apply the 410 days of provisional credits to his pre-habitual offender sentences and effectively revoked Leftwich's provisional credits based on the 1992 Amendment and Leftwich's 1990 habitual offender sentence.[11]

Leftwich petitioned *pro se* for a writ of mandamus from the Leon County Circuit Court and argued (1) that the 1988 version of Section 944.277(1)(g) requires the DOC to apply the 410 days of provisional credits to his pre-habitual offender sentences and (2) that the DOC's retroactive application of the 1992 Amendment and revocation of Leftwich's provisional credits under *McBride* violates the constitutional prohibition on *ex post facto* laws. The Circuit Court denied the petition.[12] Shortly thereafter Leftwich petitioned for certiorari review in the First District Court of Appeal ("DCA").[13] The First DCA denied the petition in a *per curiam* opinion citing *McBride*.[14] At the same time, the First DCA certified a conflict with *Downs v. Crosby*, 874 So. 2d 648 (Fla. 2d DCA 2004). This Court accepted jurisdiction on July 23, 2013, and appointed the undersigned counsel to represent Leftwich in this appeal.

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[11] RB. 1-2; R. ___.

[12] PB. 1; RB 1-2; R. ___.

[13] PB. 1-2; RB. 2; R. ___.

[14] *Leftwich v. Fla. Dept. of Corrections*, 101 So. 3d 404 (Fla. 1st DCA 2012).

IV. SUMMARY OF ARGUMENT

This Court should reject the First DCA's retroactive application of the 1992 Amendment in *McBride v. Moore*[15] as an impermissible *ex post facto* application of the law. For Leftwich and similarly situated inmates, Section 944.277(1)(g) (Supp. 1988) permitted the award of provisional credits at the time of his crime and incarceration. Similarly, after Leftwich received a habitual offender sentence in 1990, Section 944.277(1)(g) (Supp. 1988) allowed him to continue earning provisional credits. The 1992 Amendment eliminated a habitual offender's ability to earn provisional credits. Here the First DCA's application of the 1992 Amendment is retrospective because the First DCA applies the new law to a habitual offender sentence occurring before the amendment's enactment. That application unquestionably disadvantages Leftwich and similarly situated inmates by revoking credits earned under the former statute and effectively lengthening an otherwise truncated prison term.

As recognized in *Gomez v. Singletary*, "[t]his Court has repeatedly accepted the State's view concerning retroactive legislation restricting gain time. Each of those times the United States Supreme Court vacated our decisions."[16] Among

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[15] *McBride v. Moore*, 780 So. 2d 221 (Fla. 1st DCA 2001).

[16] 733 So. 2d at 508.

those vacated decisions is *Dugger v. Rodrick*,[17] which is the foundation for both *McBride v. Moore* and *Mamone v. Dean.*[18] *Rodrick* erroneously held that the retroactive application of a change in provisional credits is not subject to an *ex post facto* analysis. Subsequently, the United States Supreme Court in *Lynce v. Mathis* disagreed and overruled *Rodrick*, along with similar decisions from this Court.[19] Yet, despite this Court's recognition that *Lynce* overrules *Rodrick* and despite this Court's admonition that "if a 'new provision constricts [an] inmate's opportunity to earn early release . . . [the provision] runs afoul of the prohibition against *ex post facto* laws,'" the First and Fifth DCAs continue to enforce *Rodrick*.[20]

In contrast, the Second DCA's opinion in *Downs v. Crosby*[21] correctly recognizes that prevailing law forbids retroactive application of the 1992 Amendment to preclude an inmate from applying provisional credits to reduce his sentence. In *Crosby*, the DOC denied an inmate's request for 822 days of

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[17] 584 So. 2d 2 (Fla. 1991).

[18] 619 So. 2d 36 (Fla. 5th DCA 1993).

[19] *Lynce v. Mathis*, 519 U.S. 433, 446 (1997); *see Winkler v. Moore*, 831 So. 2d 63, 65-66 (Fla. 2002) (recognizing that *Lynce* "essentially overruled" previous decisions holding that overcrowding gain time is not subject to the *ex post facto* analysis).

[20] *See Winkler*, 831 So. 2d at 65-66; *Gomez*, 733 So. 2d at 508 (quoting *Weaver v. Graham*, 450 U.S. 24 (1981)); *Leftwich*, 101 So. 3d at 404-05.

[21] 874 So. 2d 648 (Fla. 2d DCA 2004).

provisional credits for two sentences preceding the inmate's habitual offender sentence. Section 944.277(1)(g) (Supp. 1988) governed the inmate's request. *Crosby* overrules both the trial court and the DOC and finds that the retroactive application of the 1992 Amendment violates the *Ex Post Facto* Clause. *Crosby* is the accurate interpretation of current state and federal constitutional law.

Similar to the DOC's conduct in *Crosby*, here the DOC's revocation of Leftwich's provisional credits violates both the state and the federal prohibitions on *ex post facto* laws.[22] When Leftwich entered prison in 1989, Section 944.277(1)(g) (Supp. 1988) allowed Leftwich to accumulate provisional credits. When Leftwich became a habitual offender under Florida law in 1990, Section 944.277(1)(g) (Supp. 1988) allowed Leftwich to accumulate provisional credits. The 1992 Amendment substantially altered the substantive right of a habitual offender by excluding from eligibility for credits an inmate who "has been sentenced at any time" as a habitual offender. Thus the retroactive application of the 1992 Amendment in *McBride* results in additional punishment for Leftwich by denying him credits to which he is otherwise entitled based on a sentence that he received before the amendment's enactment. For this reason, the Court should resolve the conflict in favor of the Second DCA's decision in *Crosby*, reverse the decision of the court below, and issue a writ of mandamus to the DOC.

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[22] U.S. CONST. art. I, § 10; Fla. CONST. art. I, § 10.

V. ARGUMENT

A. The 1988 statute entitles Leftwich to apply provisional credits to sentences preceding his habitual offender sentence.

Under Florida law, "the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed."[23] Over the years, the Florida legislature "enacted a maze of overcrowding and gain time statutes with differing names and requirements" to deal with a surfeit of inmates entering Florida's prison system.[24] In 1988, the legislature repealed the existing gain time statute in favor of a provisional credits statute.[25] The 1988 statute—Section 944.277—permitted the Secretary of the DOC to award provisional credits to an inmate when the inmate population reached 97.5 percent of lawful capacity.[26] Section 944.277 excluded from eligibility certain classes of inmates, for example, an inmate serving a sentence for a sexual offense.[27] Section 944.277(1) also excluded any inmate who:

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[23] *State v. Miranda*, 793 So. 2d 1042, 1044 (Fla. 3d DCA 2001); *Winkler v. Moore*, 831 So. 2d 63, 66 (Fla. 2002).

[24] *Gomez*, 733 So. 2d at 500.

[25] *Id*. at 501; Fla. Stat. § 944.277 (Supp. 1988).

[26] Fla. Stat. § 944.277(1) (Supp. 1988).

[27] Fla. Stat. § 944.277(1)(a)-(f) (Supp. 1988).

> (g) *Is sentenced, or has previously been sentenced*, under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender.[28]

This was the law when Leftwich committed his crimes and entered DOC custody. At that time, Leftwich had not received a habitual offender sentence.

In early 1992, the First District Court of Appeal analyzed Section 944.277(1)(g) after the DOC appealed an order establishing that an inmate was eligible for provisional credits on a sentence preceding his habitual offender sentence.[29] In *Dugger v. Anderson*, the inmate received a 30-month sentence followed by a five-year habitual offender sentence.[30] Relying on Section 944.277(1)(g), the DOC refused to allow the inmate any provisional credits in calculating the inmate's release date.[31] *Anderson* rejects the DOC's argument and explains that Section 944.277(1)(g) "imposes a temporal requirement with regard to the habitual offender exception."[32] *Anderson* contrasts Section 944.277(1)(g)'s

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[28] Fla. Stat. § 944.277(1)(g) (Supp. 1988). Section 775.084, Florida Statutes, is Florida's habitual offender statute, which imposes extended prison terms and enhanced penalties for a criminal defendant previously convicted of two or more felonies in Florida. Fla. Stat. § 775.084 (Supp. 1989).

[29] *Dugger v. Anderson*, 593 So. 2d 1134, 1134 (Fla. 1st DCA 1992).

[30] *Id.*

[31] *Id.*

[32] *Id.*

exclusion of an inmate who "is . . . or has previously been sentenced" as a habitual offender with the subsequent phrase excluding an inmate who receives a habitual offender sentence "at any time" in another jurisdiction.[33] *Anderson* concludes that, because the inmate's 30-month sentence preceded the inmate's habitual offender sentence, the inmate was entitled to provisional credits toward his 30-month sentence.[34]

Shortly after *Anderson*, the Second DCA adopted *Anderson*'s analysis of the language "is . . . or has previously been sentenced" and applied that analysis to identical language in the Florida Administrative Code.[35] And the First DCA consistently applied *Anderson*'s interpretation of Section 944.277(1)(g) until the Florida legislature enacted the 1992 Amendment.[36] Thus *Anderson* confirmed that Leftwich could—before the 1992 Amendment and despite his 1990 habitual offender sentence—earn and apply provisional credits to the sentences that he received in 1989.

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[33] *Id.*

[34] *Id*. at 1134-35.

[35] *McBride v. State*, 601 So. 2d 1335, 1337 (Fla. 2d DCA 1992).

[36] *See Senko v. Singletary*, 599 So. 2d 137, 137 (Fla. 1st DCA 1992); *Singletary v. Hayes*, 596 So. 2d 168, 168 (Fla. 1st DCA 1992); *Dugger v. Hugelier*, 595 So. 2d 274, 274 (Fla. 1st DCA 1992).

B. Retroactive application of the 1992 Amendment violates the *Ex Post Facto* Clause.

i. The 1992 Amendment causes a substantive change in a habitual offender's right to earn early release.

In reaction to *Anderson*, the Florida legislature amended Section 944.277(1)(g) to eliminate the temporal requirement in the 1988 statute. Accordingly, the amended version of Section 944.277(1)(g) excludes any inmate who receives a habitual offender sentence no matter when the sentence occurs; that is, any inmate who:

> Is 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.[37]

As recognized in *Crosby*, by adopting the 1992 Amendment "the legislature has made clear that it did not intend for inmates who are sentenced as habitual felony offenders after they receive guidelines sentences to receive provisional credits."[38] In removing all habitual offenders from eligibility for provisional credits, the legislature "did more than simply remove a mechanism that created an *opportunity* for early release for a class of prisoners whose release was unlikely."[39] Rather,

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[37] Fla. Stat. § 944.277(1)(g) (Supp. 1992, 1993).

[38] 874 So. 2d at 650.

[39] *See Lynce*, 519 U.S. at 446-47 (analyzing the retroactive application of a 1992 amendment canceling provisional credits for certain classes of offenders after the credits were awarded).

through adoption of the 1992 Amendment, the legislature "made ineligible for early release a class of prisoners who were previously eligible . . . ."[40] In other words, the 1992 Amendment rendered ineligible for provisional credits all inmates like Leftwich who received a habitual offender sentence after entering prison.

In *Lynce v. Mathis*,[41] the United States Supreme Court reviewed a similar issue under Florida's provisional credits scheme. *Lynce* rejects the argument that the retroactive application of an amendment canceling provisional credits for certain classes of inmates causes no disadvantage to the inmate.[42] The DOC argued that the provisional credits were not an integral part of the inmate's punishment.[43] However, *Lynce* reviews whether "objectively the new statute 'lengthen[s] the period that someone in [the inmate's] position must spend in prison.'"[44] The amendment rendered ineligible for provisional credits any inmate convicted of murder or attempted murder. The Florida Attorney General interpreted the amendment as retroactively canceling all provisional credits awarded to such

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[40] *Id.*

[41] 519 U.S. at 446-47.

[42] *Id.* at 445-47.

[43] *Id.* at 439.

[44] 519 U.S. at 442-43 (quoting *Weaver*, 450 U.S. at 33).

inmates.[45] *Lynce* finds that "it is quite obvious that the retrospective change was intended to prevent early release of prisoners convicted of murder-related offenses who had accumulated overcrowding credits."[46] Accordingly, *Lynce* finds that the amendment "unquestionably" disadvantaged the inmate because the retroactive application of the amendment resulted in his re-arrest and prolonged imprisonment.[47]

The same is true here. The 1992 Amendment mandates a longer prison term for an inmate who at any time receives a habitual offender sentence. Under the former statute, an inmate like Leftwich who entered prison without a habitual offender sentence could earn provisional credits and reduce his sentence. The 1992 Amendment revoked Leftwich's right to earn provisional credits based on Leftwich's 1990 habitual offender sentence, which was not an impediment to his earning provisional credits before the 1992 Amendment. Thus retroactive application of the 1992 Amendment increases Leftwich's (and every similarly situated inmate's) prison term by removing from eligibility for provisional credits a class of habitual offenders who accumulated provisional credits under the former statute.

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[45] 519 U.S. at 437.

[46] *Id.* at 445.

[47] *Id.* at 446-47.

ii. The 1992 Amendment cannot impliedly overrule judicial interpretation and retroactively change the law.

"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 of the statute."[48] A court may examine 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.'"[49] However, a court cannot construe the amendment as impliedly overruling precedent interpreting the statute "if the retroactive application of the amendment violates the Ex Post Facto Clause."[50] Thus, even if the purpose of the amendment is simply to clarify the statute's intent, retroactive application of the "clarification" may nonetheless violate the *Ex Post Facto* Clause.[51] As this Court reasoned in *State v. Smith*, the proper analysis is not the subjective intent of the legislature but the effect of the change in the statute:

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[48] *State v. Smith*, 547 So. 2d 613, 616 (Fla. 1989); *Valdes v. State*, 3 So. 3d 1067, 1072 (Fla. 2009) (recognizing that the statute analyzed in *Smith* was superceded by statute, ch. 88-131, section 7, Laws of Florida).

[49] *Crosby*, 874 So. 2d at 650-51 (quoting *Lowry v. Parole & Prob. Comm'n*, 473 So. 2d 1248, 1250 (Fla. 1985)).

[50] *Id.* at 651.

[51] *Id.* at 651; U.S. CONST. art. I, § 10; Fla. CONST. art. I, § 10.

> [I]t 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. Instead, the nature and effect of the court decisions and the statutory amendment must be examined to determine what law may be applicable after the amendment.[52]

In criminal cases, the effective law at the time of the crime governs "the offenses for which the perpetrator may be convicted as well as the punishments which may be imposed." [53] Accordingly, the state cannot apply retroactively a statutory amendment increasing a defendant's sentence.[54]

Here, even if the 1992 Amendment is a "clarification" of the legislature's original intent, the DOC cannot apply the 1992 Amendment to retroactively change the law. Before the 1992 Amendment, both Section 944.277(1)(g) (Supp. 1988) and prevailing precedent allowed Leftwich and similarly situated inmates to accrue provisional credits. Retroactive application of the 1992 Amendment increases Leftwich's sentence by depriving him of the 410 days of provisional credits that he earned. As explained below in Section C, this application of the 1992 Amendment to Leftwich and similarly situated inmates violates the *Ex Post Facto* Clause.

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[52] *Id.* at 616.

[53] *Miranda*, 793 So. 2d at 1044 (citing cases).

[54] *Id.*

iii. The law provides a presumption against retroactive application of statutory amendments.

"The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible to any other."[55] This presumption is especially strong if "retrospective operation of a law would impair or destroy existing rights."[56] And if a law effects a punishment greater than that prescribed at the time of the crime, the presumption against retroactivity applies with singular force.[57] The primary constitutional concern underlying the presumption against retroactivity is "'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'"[58]

In this instance, nothing in the text of the 1992 Amendment suggests that the amendment is retrospective. (And even if the legislature clearly intended a retrospective application, the law would nonetheless forbid this application under the *Ex Post Facto* Clause.) Furthermore, a retrospective application of the 1992 Amendment impairs Leftwich's existing rights and inflicts a punishment greater

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[55] *United States Fid. & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908).

[56] *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983).

[57] *Lynce*, 519 U.S. at 441 (quoting *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed 648 (1798)).

[58] 519 U.S. at 441 (quoting *Weaver*, 450 U.S. at 30).

than the punishment that existed at the time of Leftwich's crimes. This application of the 1992 Amendment (1) constitutes a lack of fair notice to Leftwich and to similarly situated inmates of a habitual offender's right to earn early release and (2) warrants a presumption against retroactivity of the 1992 Amendment.

iv. ***McBride* and *Mamone* are no longer good law because they rely on an obsolete analysis of legislative changes to early release provisions.**

Both *McBride* and *Mamone* rely on this Court's decision in *Rodrick*, which held that the award of provisional credits was unconstrained by the prohibition on *ex post facto* laws.[59] *Rodrick* determined that "[t]he award of provisional credits is a procedure utilized by the Department of Corrections to reduce prison population and is not a substantive matter of punishment or reward."[60] Accordingly, *Rodrick* concluded that "a retrospective law that alters procedural rather than substantive matters is not an *ex post facto* law, even though it may work to the disadvantage of the prisoner."[61]

As recognized by this Court several times, the United States Supreme Court overruled *Rodrick* and similar precedent allowing the retroactive revocation of

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[59] 584 So. 2d at 4; *McBride*, 780 So. 2d at 222-23; *Mamone*, 619 So. 2d at 36.

[60] *Id.*

[61] *Id.*

provisional credits.[62] As *Lynce* explains, the revocation of provisional credits effects a substantive change in the inmate's punishment and is not simply a matter of procedure:

> [R]etroactive 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." [T]he 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."[63]

Thus, after *Lynce*, Florida courts must analyze retroactive laws affecting gain time, provisional credits, and the like to determine (1) whether the law applies to events occurring before the statute's enactment and (2) whether the law disadvantages the affected offender.[64] If the retrospective application of a new law lengthens the period of a person's incarceration based on events occurring before the law's enactment, that application of the law violates the *Ex Post Facto* Clause.[65]

Nonetheless, the First and Fifth DCAs adhere to *McBride* and *Mamone*, both of which adopt *Rodrick* and the rejected notion that a change in an early release

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[62] *Winkler*, 831 So. 2d at 65-66; *Gomez*, 733 So. 2d at 508.

[63] 519 U.S. at 445-46.

[64] *Winkler*, 831 So. 2d at 67-68 (quoting *Lynce*, 519 U.S. at 441).

[65] 519 U.S. 442-47.

statute "is not substantive in nature but merely provides 'administrative procedural mechanisms for controlling prison overcrowding.'"[66] The unequivocal precedent of this Court and the United States Supreme Court holds otherwise.

McBride and *Mamone* are undoubtedly erroneous under prevailing state and federal law. *Crosby* recognizes this error and rejects the DOC's argument that the retroactive application of the 1992 Amendment requires no evaluation of *ex post facto* principles.[67] In *Crosby*, the inmate requested provisional credits on a guidelines sentence preceding his habitual offender sentence. The inmate's request—similar to Leftwich's request—was governed by the 1988 version of Section 944.277(1)(g).[68] *Crosby* determines that the retroactive application of the 1992 Amendment (1) applies to events occurring before the amendment, that is, the inmate's intervening habitual offender sentence and (2) disadvantages the inmate by revoking 822 days of provisional credits earned under the former statute.[69]

The *Crosby* analysis is correct and should govern the outcome of this appeal. Similar to the inmate in *Crosby*, Leftwich's guidelines sentences preceded his

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[66] *McBride*, 780 So. 2d at 222-23; *Mamone*, 619 So. 2d at 36.

[67] 874 So. 2d 651-53; U.S. CONST. art. I, § 10; Fla. CONST. art. I, § 10.

[68] *Id.* at 650.

[69] *Id.* at 652.

habitual offender sentence. Leftwich is entitled to apply provisional credits to his pre-habitual offender sentences under the operative language of Section 944.277(1)(g) (Supp. 1988), which governed when Leftwich committed his crimes and entered DOC custody.

C. The DOC's refusing to apply provisional credits to Leftwich's sentence is an impermissible *ex post facto* application of the law.

Under *Lynce*, a criminal statute constitutes an impermissible *ex post facto* law if (1) the law is retrospective, that is, the law applies to events occurring before the law's enactment and (2) the law disadvantages the offender.[70] The pertinent "event" for an *ex post facto* analysis "is the commission of the *offense* and the rights the offender had on the date he or she committed the offense."[71] This Court's decision in *Winkler* provides a helpful illustration of this principle:

> [F]or example, . . . 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 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.[72]

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[70] *Winkler*, 831 So. 2d at 67-68 (quoting *Lynce*).

[71] *Id.* at 68 (emphasis in original).

[72] *Id.* (emphasis in original).

A statute retroactively reducing gain time credits for, or applying a stronger punishment to, a crime committed before the statute's enactment violates the *Ex Post Facto* Clause.[73]

Here the DOC's interpretation of the 1992 Amendment constitutes an impermissible *ex post facto* application of the law. For Leftwich and similarly situated inmates, Section 944.277(1)(g) (Supp. 1988) permitted the award of provisional credits at the time of Leftwich's crime and incarceration. Similarly, after Leftwich received a habitual offender sentence in 1990, Section 944.277(1)(g) allowed Leftwich to earn provisional credits. The 1992 Amendment changed a habitual offender's ability to earn provisional credits. Thus, the DOC's application of the 1992 Amendment is retrospective because the DOC applies the new law to a habitual offender sentence occurring before the amendment's enactment. That application unquestionably disadvantages Leftwich and similarly situated inmates by revoking credits earned under the former statute and effectively lengthening an otherwise truncated prison term.

VI. CONCLUSION

"The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption 'is deeply rooted in our jurisprudence, and embodies a

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[73] *See Weaver v. Graham*, 450 U.S. 24 (1981); *Miller v. Florida*, 482 U.S. 423 (1987).

legal doctrine centuries older than our Republic.'"[74] Both the United States Supreme Court and this Court recognize that both the presumption against retroactivity and the *ex post facto* analysis apply to laws affecting provisional credits and gain-time for DOC inmates. Despite this recognition, the First and Fifth DCAs continue to apply an obsolete legal analysis—that is, an analysis that ignores *ex post facto* principles—to changes in Florida's provisional credits scheme. *McBride* and *Mamone* perpetuate a legal fallacy and should be rejected. In contrast, *Crosby* provides a cogent, correct, and current statement of Florida law. This Court should approve *Crosby* and hold that an inmate like Leftwich, who earned provisional credits under Section 944.277(1)(g) (Supp. 1988), may use those provisional credits against his pre-habitual offender sentences despite the 1992 Amendment.

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[74] *Lynce*, 519 U.S. at 439-40 (citations omitted).

WHEREFORE, the petitioner Robert Leftwich respectfully requests that this Court resolve the conflict in favor of the Second DCA's decision in *Crosby*, reverse the decision of the court below, and issue a writ of mandamus to the DOC.

DATED this 28th day of August, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a copy of a true and correct copy of the foregoing by electronic mail to:

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