No.

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS B. MCGILL - PETITIONER

VS

FLORIDA DEPARTMENT
OF CORRECTIONS - RESPONDENT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-3130

THOMAS MCGILL,

Petitioner,

v.

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

Petition for Writ of Certiorari—Original Jurisdiction.

December 30, 2020

PER CURIAM.

The petition for writ of certiorari is denied on the merits.

LEWIS, TANENBAUM, and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Appendix A

IN THE SECOND JUDICIAL CIRCUIT COURT OF FLORIDA
IN AND FOR LEON COUNTY, FLORIDA

THOMAS MCGILL, DOC #982800

Petitioner

Case No.: 2018-CA-002011

v.

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent

_____/

ORDER DENYING PETITION

THIS CAUSE comes before the Court on a petition for writ of mandamus filed by Thomas McGill (herein Petitioner), who argues that the Florida Department of Corrections (herein the Department) has improperly designated him ineligible to earn incentive and educational gain time. The Court, having considered the petition, the Department's response, any reply thereto, the court file, and being otherwise fully advised in the premises, finds as follows:

Petitioner was received by the Department on April 25, 1996, having been sentenced in the Circuit Court of Bay County on April 12, 1996, in pertinent part, to life in prison for the crime of first-degree murder, in violation of Section 782.04(1), Florida Statutes (1994). Petitioner committed his offense on December 26, 1994, when he was a juvenile.

On June 16, 2017, nunc pro tunc to April 12, 1996, Petitioner was resentenced from life to a prison term of fifty years, less 473 days jail credit as previously awarded, and credit for time already served in prison.

On March 27, 2018, the Department processed a court order dated March 13, 2018, amending McGill's judgment and sentence to reflect that he is entitled to a review of his sentence after twenty-five years. Accordingly, Petitioner's tentative release date is December 13, 2044.

Appendix B

On September 18, 2018, Petitioner filed a petition for mandamus relief before this Court, arguing that first-degree murderers who committed their crimes while the 1994 gain time statutes were in effect are entitled to earn gain time once their sentences have been reduced to a term of years.

Also currently pending before this Court is Petitioner's Request for Hearing/Oral Argument, filed June 6, 2019, and the Department's Motion for Disposition of the Instant Case Based on the Already Submitted Written Pleadings Without Hearing, filed June 17, 2019. The Court, having considered the motions and the written pleadings already filed with the Court, finds this case is well-suited for disposition based on the written pleadings. Accordingly, Petitioner's request for a hearing is **DENIED** and the Department's motion for disposition is **GRANTED**.

Under the gain time statute in effect between January 1, 1994, and October 1, 1995, during which period Petitioner committed his offense, inmate could earn either twenty- or twenty-five-days' incentive gain time per month, depending on the severity of the offense. Section 944.275(4)(c), Florida Statutes (1994), provided:

> For each month in which an inmate works diligently, participates in training, uses time constructively, or otherwise engages in positive activities, the department may grant incentive gain-time in accordance with this paragraph. For sentences imposed for offenses committed on or after January 1, 1994, for offenses which are, were, or would have been ranked on the offense severity chart in s. 921.0012 in:
> 1. Levels 1 through 7, up to 25 days of incentive gain-time, which shall be credited and applied monthly.
> 2. Levels 8, 9, and 10, up to 20 days of incentive gain-time, which shall be credited and applied monthly.

Capital felonies were not included in the Section 921.0012 offense severity ranking chart. Accordingly, capital felony sentences were not eligible for gain time credit.[1] In the instant case,

[1] "The 1994 sentencing guidelines, that were effective January 1, 1994, and any revisions thereto, apply to all felonies, *except capital felonies*, committed on or after January 1, 1994, and before October 1, 1995." § 775.082(8)(b), Fla. Stat. (emphasis added).

Petitioner has been convicted of committing felony first-degree murder under Section 782.04(1), Florida Statutes (1994), an offense which is not included in any of the stipulated Levels of Section 944.275(4)(c) (1994).

Petitioner devotes several pages to discussing what constitutes a "capital felony" under Florida law, but that discussion has no real bearing on the issue at hand. Regardless of whether Petitioner is a "capital" felon now that his sentence has been converted to a term of years, the fact remains that the Florida Legislature declined to include his offense in any of the statutorily-designated Levels in the 1994 gain time statutes. For this reason alone, he is ineligible to earn gain time. "Gain time is a matter of grace that an inmate does not have a vested right to receive without a legislative enactment." McGee v. State, Florida Dept. of Corr., 935 So. 2d 62, 63 (Fla. 1st DCA 2006) (citing Waldrup v. Dugger, 562 So.2d 687, 694-95 (Fla.1990). Further, it is well-established that "[a] prisoner's ability to earn gain time is based on the statutes in effect at the time of the offense." In re Commitment of Phillips, 69 So. 3d 951, 956 n.6 (Fla. 2d DCA 2010), approved sub nom. State v. Phillips, 74 So. 3d 1084 (Fla. 2011), and approved sub nom. State v. Phillips, 119 So. 3d 1233 (Fla. 2013). As the Florida Supreme Court explained in Waldrup, "inmates have no absolute right to avail themselves of a separate, intervening gain-time statute that is more lenient than both the statute in effect at the time of the offense and the one presently in effect." Id. at 695 (citing Connell v. Wade, 538 So. 2d 854, 855 (Fla. 1989)). Far less do inmates enjoy a right to have the judicial branch re-write gain time statutes perceived to be insufficiently clement.

Petitioner argues that because his sentence was reduced from life imprisonment to a term of twenty-five years, the underlying offense is effectively not "capital" for sentencing purposes, and that he is therefore eligible to earn gain time. As shown above, this argument is without merit, because Petitioner's ineligibility to earn gain time does not depend on whether his offense is or is

not a "capital felony." Rather, his ineligibility is rooted in the fact that the gain time statutes in effect at the time he committed his offense did not award gain time to first-degree murderers. Nevertheless, even if Petitioner's premise is correct – namely, that he is eligible to earn gain time so long as he is not a designated capital felon – his argument is still without merit. Under Florida law a felony which is not "capital" in the traditional sense of the word (i.e., punishable by death) is in fact "capital" for sentencing purposes when so designated by the Legislature. Petitioner has indisputably been convicted of committing first-degree murder under Section 782.04(1)(a)2.d., Florida Statutes (1943), which is expressly designated a "capital felony" by subsection (1)(a)3. of the same statute. Accordingly, Petitioner is a capital felon.

It is a longstanding principle of statutory construction "that words or phrases in a statute must be construed in accordance with their common and ordinary meaning." Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1154 (Fla. 2000). However, "[w]hen a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless a contrary intent clearly appears." Nicholson v. State, 600 So.2d 1101, 1103 (Fla. 1992). Section 775.081(1), Florida Statutes (1994), effectively defines a "capital felony" as any felony designated such by the Florida Legislature, regardless of whether it is, in fact, punishable by death:

> Felonies are classified, *for the purpose of sentence and for any other purpose specifically provided by statute*, into the following categories:
> (a) Capital felony;
> (b) Life felony;
> (c) Felony of the first degree;
> (d) Felony of the second degree; and
> (e) Felony of the third degree.
> *A capital felony and a life felony must be so designated by statute.*

(emphasis added).

In Rusaw v. State, the Florida Supreme Court held that, even though a defendant convicted of capital sexual battery could not be sentenced to death, his crime was still "capital" because it was so designated by statute. 451 So.2d 469, 470 (Fla. 1984). The Court rejected the defendant's argument that he should have been sentenced as though he had committed a life felony, because, the Court observed, his offense was still designated a capital felony under Florida law. Id.; see also Batie v. State, 534 So. 2d 694 (Fla. 1988) ("Notwithstanding our determination that the sexual battery proscribed by subsection 794.011(2) is no longer a capital crime, in Rusaw and [State v. Hogan, 451 So.2d 844 (Fla.1984)] we recognized the legislature's definition of it as 'capital' in determining legislative intent for other consequences of this crime.").

The most thorough judicial exposition of Florida's "capital felony" doctrine seems to be the recent opinion of the Second District in State v. Kwitowski, 250 So. 3d 210 (Fla. 2d DCA 2018). There, the court heard an appeal from an offender, one Kwitowski, who had been convicted of violating Section 837.02(2), Florida Statutes (2016), which made perjury in "an official proceeding related to the prosecution of a capital felony" a second-degree felony. Id. at 211. Kwitowski had committed perjury in a prosecution for capital sexual battery, an offense classified under Section 794.011(2)(a), Florida Statutes (2016), as a "capital felony." Id. The trial court dismissed the second-degree perjury charges on the grounds that capital sexual battery cannot be a capital felony because it is not punishable by death. Id. at 211-12. The Second District reversed the trial court's dismissal, explaining that "the statutory term 'capital felony' unambiguously refers to an offense that the legislature has by statute classified as a capital felony without regard to whether the death penalty may constitutionally be imposed for an offense so classified." Id. at 211. The court proceeded to deliver an extensive description and explanation of Florida's capital felony doctrine, some highlights of which include the following:

The trial court's interpretation of the term "capital felony" hinged on its sense that the ordinary meaning of that term refers to a felony constitutionally punishable by death. And it is doubtless true that when we determine the plain meaning of an undefined term in a statute, the ordinary, everyday meaning of that term is what usually controls. But where the legislature has defined the term, it is the defined meaning, not the ordinary meaning, that controls — at least absent a clear indication that a different meaning from the defined one was what the legislature meant. Here, section 775.081 — the statute classifying felonies into different categories — defines the term 'capital felony' as a felony that the legislature has classified by statute as a capital felony.

The classification statute is, to be sure, not a run-of-the-mill definitional statute of the type that begins 'as used in this chapter, the following terms have the following meanings.' But that is how the statute operates. It says both that a 'capital felony' is one that the legislature has by statute classified as such and that this classification operates 'for the purpose of sentence and for any other purpose specifically provided by statute.' In other words, where the legislature has classified an offense as a capital felony, that classification controls both for purposes of sentence and for any other purpose where a statute specifically provides that classification is relevant. Although it does not call itself a 'definitions' provision, that is very much what the classification statute is. Like a definitional provision, the text of the classification statute tells the reader that when the legislature uses the term 'capital felony' in a statute that specifically makes the classification of a felony relevant, it means any felony that it has by statute called a capital felony. . . .

When a statutory term has been used in a way that carries a specialized or technical meaning, that meaning prevails over the term's ordinary meaning. And similarly, when a statute 'uses an undefined term with a fixed legal meaning fitting the context, that meaning governs' instead of the ordinary meaning of that term. The context in which the word is used is an important factor in determining whether the term has been used in a technical or ordinary sense.

Here, the context in which the term 'capital felony' is used in the Florida Criminal Code is dispositive of the question. In the Florida Criminal Code, the term 'capital felony' is both a specialized reference and a legally significant reference to a felony that the legislature has classified as such. Section 775.081(1) lists every classification the legislature might give to any felony it creates and then says that each felony has the classification the legislature gives it in a statute. One of those classifications is '[c]apital felony.' Whatever the ordinary meaning of the term 'capital felony' might be in other contexts, section 775.081(1) quite clearly refers to a felony that the legislature has labeled a capital felony in a statute that classifies an offense. . . .

We recognize, of course, that the consequence of the classification of an offense as a capital felony is that the legislature deems it potentially eligible for imposition of the death penalty under section 775.082(1)(a). But that consequence does not make

> it reasonable to understand the term 'capital felony' in the second-degree perjury statute as meaning only a felony that may constitutionally be punished by death. Nothing in either section 775.081(1) or section 775.082 says that the constitutional availability of the death penalty determines or influences the classification of a crime as a capital felony — i.e., nothing in those statutes says that a capital felony for which the death penalty is no longer constitutionally available is no longer classified as a capital felony.

Id. at 214-17 (numerous citations omitted).

It is doubtless with this tradition of statutory construction in mind that the Florida Supreme Court recently and matter-of-factly observed that, under Florida law, "*a juvenile can now be sentenced to a term-of-years sentence for a capital offense.*" Purdy at 727 (emphasis added).

Petitioner's insistence that a felony can only be "capital" when it is punishable by death completely ignores the aforementioned considerations and precedents, and relies on a very selective misreading of what the courts have pronounced on various occasions. For example, he cites the Florida Supreme Court's observation in Mills v. Moore, 786 So.2d 532, 538 (Fla. 2001), that "a 'capital felony' is by definition a felony that may be punishable by death," but ignores all the other case law which qualifies this observation, including the Supreme Court's own abiding precedents. See Kwitowski, 250 So. 3d at 217-19 (finding "Mills is inapposite because it had nothing to do with . . . whether a felony classified as a capital felony retains that classification, and hence that meaning, when it is determined that it is unconstitutional to impose the death penalty for that particular felony. . . . [U]nless and until the legislature changes that classification, the offense remains a 'capital felony' as that term is used in the Criminal Code — just one for which a sentence of death cannot, consistent with the Constitution, be carried out.") (citing Batie v. State, 534 So.2d 694, 694–95 (Fla. 1988); Buford v. State, 403 So.2d 943 (Fla. 1981); Rusaw v. State, 451 So.2d 469 (Fla. 1984); State v. Hogan, 451 So.2d 844 (Fla. 1984)).

Likewise, the Supreme Court in Huffman v. State, 813 So. 2d 10 (Fla. 2000) had nothing to do with the definition of "capital felony" *under the Florida Statutes*, but with who qualifies as a capital felon for the purposes of Rule 3.850, Florida Rules of Criminal Procedure. As the high Court explained, "even though *certain types of sexual crimes qualify as capital felonies under either current or prior versions of the Florida Statutes*, . . . defendants convicted of capital crimes, but not sentenced to death, qualify as noncapital defendants *for the purposes of rule 3.850*." Id. at 11 (emphasis added). Article V, Section 2(a), of the Florida Constitution grants to the Supreme Court the exclusive authority to adopt rules of judicial practice and procedure, and to interpret the same, and this the Court did in Huffman.

Petitioner similarly misreads the First District's ruling in Ortiz v. State, 188 So. 3d 113, 115 (Fla. 1st DCA 2016), review granted, decision quashed on other grounds, 43 Fla. L. Weekly S556 (Fla. Oct. 19, 2018), which, in pertinent part, did not concern itself with the definition of "capital *felonies*" under the Florida Statutes, but with the definition of the distinct expression "capital *cases*" under Section 913.10, Florida Statutes. The court observed that "[w]hile it is true that first degree murder is a capital *felony* pursuant to section 782.04(1)(a), and that section 913.10 mandates a 12–person jury in 'all capital cases,' *a capital* case *for purposes of Chapter 913, Florida Statutes*, is a case where the death penalty is legally possible," and justified this construction by recourse to the statute's own plain language: "The Florida Legislature plainly understands *a capital case for purposes of chapter 913* is one where the death penalty is possible as evidenced by section 913.13, which excludes from jury service in a capital case any person who has an opposition to the death penalty." Id. (emphases added).

Petitioner's invocation of Sections 775.082(1) and 921.141, Florida Statutes (1994), has already been anticipated and answered by the Supreme Court in Rusaw, where the Court observed:

> [E]limination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing. In subsection 794.011(2) the legislature has denominated certain conduct to be a "capital" crime and has provided alternative penalties for that crime. [Our] striking of one of those penalties has not disturbed the other.

Id. at 470 (citations omitted). In other words, the judicial striking of the death penalty for a capital felony does not disturb the other consequences for that crime imposed by the Legislature, including ineligibility to earn gain time. See Batie at 694–95 (observing that "[n]otwithstanding our determination that the sexual battery proscribed by subsection 794.011(2) is no longer a capital crime, in Rusaw and Hogan we recognized the legislature's definition of it as 'capital' in determining legislative intent for the other consequences of this crime").

Section 775.15(1), Florida Statutes (1994), does not support Petitioner's position either. That statutory subsection clearly stipulates that "[i]f the death penalty is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, all crimes designated as capital felonies shall be considered life felonies *for the purposes of this section*," i.e., for the purposes of Section 775.15, which governs time limitations on prosecutions. This section of the Florida Statutes is not at issue in the instant case.

Finally, Section 944.275(4)(e), Florida Statutes (1994), does not presently allow Petitioner to earn the stipulated "one-time award of 60 additional days of incentive gain-time" because this statute provides that such credit may only be awarded to an inmate "who is otherwise eligible" for incentive gain time. As has been demonstrated, under Section 944.275(4)(c) (1994), Petitioner is ineligible to earn incentive gain time.

Petitioner further argues that, even if he is a capital felon, he is entitled to earn incentive gain time solely because none of the gain time statutes explicitly state that first-degree murderers are ineligible to earn gain time. This argument is also without merit. Section 944.275(4)(c),

Florida Statutes (1994), expressly delineates who is eligible to earn incentive gain time and in what amount it is to be credited, and under this statute first-degree murderers are ineligible to earn it, even though the Legislature could quite easily have provided that such felons would become eligible in the event their sentences were reduced to a term of years.

Sections 944.275(2)(a) and (3)a, Florida Statutes (1994), do not support Petitioner's argument either. Subsection (2)(a) does not provide that all inmates sentenced to a term of years are eligible to earn incentive gain time. Instead, it provides that, when establishing the date of release from custody, the Department "shall reduce the total time to be served by any time *lawfully* credited." (emphasis added). As demonstrated *supra*, Petitioner is not *lawfully* entitled to any such credit. Similarly, subsection (3)(a) stipulates that the Department shall establish for all inmates a tentative release date "which shall be the date projected for the prisoner's release from custody by virtue of gain-time granted or forfeited *as described in this section.*" (emphasis added). As has been shown, Section 944.275 ("this section") does not authorize the award of gain time to convicted first-degree murderers.

Petitioner is further mistaken when he asserts that the Department has, or had ever, awarded him incentive gain time his first-degree murder sentence. As the Department has repeatedly explained to him, the Department keeps administrative track of monthly incentive gain time *potentially* (but not *actually*) earned by ineligible offender inmates, doing so in case the Legislature elects to amend the Florida Statutes to render such inmates eligible, or in the event an inmate's conviction or sentence is modified in such a way that he becomes newly eligible to be awarded it. By Petitioner's own admission, this so-called "award" of gain-time was being made on a monthly basis (and "revoked" for disciplinary infractions) for some twenty or so years before his life sentence was modified to a term of years, two decades during which neither he nor the Department

expected he would ever be released from custody barring legislative amendment of the gain time statutes or judicial modification of his sentence, so such recording of accumulated gain time was obviously not an *actual* award of the same.

The Florida Legislature has thus far declined to award inmates in Petitioner's situation – first-degree murderers who offended in 1994 – eligibility to earn gain time on their first-degree murder sentences, and Petitioner remains a convicted first-degree murderer. Accordingly, while the Department *continues* to keep track of *potential* monthly incentive gain time award, this award will not become activated until the Legislature amends the gain time statutes or the sentencing court amends Petitioner's conviction.

No such modification has occurred in the instant case: Petitioner remains convicted of a capital felony, and consequently has earned no gain time on his sentence.

Petitioner also invokes of Rule 33-11.0065(5)(c), Florida Administrative Code (1994), which provides:

> Death or Life sentences cannot be reduced by gain time. However, any inmate serving a death or life sentence will be considered for incentive gain time and the gain time will be posted so that in the event the death or life sentence is commuted to a number of years, the accumulated incentive gain time will be applied to the inmate's sentence.

First, it is notable that Petitioner invokes this rule, as by doing so he implicitly *concedes* that he has never been *awarded* incentive gain time. Instead, for the last twenty-two years or so, he has only been "considered" for gain time, and that gain time has only been "posted," not awarded, in the event he becomes eligible to receive it.

The above rule by itself is an inadequate expression of the requirements of Florida law, at least as it applies to first-degree murderers who committed their offenses between January 1, 1994, and October 1, 1995. Nevertheless, the rule has to be interpreted and applied in a manner

consistent with Florida Statutes, and disregarded to the extent it can be read to contradict with the statutes. "Rulemaking is not a matter of agency discretion," and "[n]o agency has inherent rulemaking authority." §§ 120.535(1); 120.54(15), Fla. Stat. (1994). Since "[g]ain time is a matter of grace that an inmate does not have a vested right to receive without a legislative enactment," McGee at 63, and "[a] prisoner's ability to earn gain time is based on the statutes in effect at the time of the offense," In re Commitment of Phillips at 956 n.6, the Department has no authority to award gain time without specific authorization by the Legislature. Accordingly, to the extent Rule 33-11.0065(5)(c) is interpreted to apply to inmates in Petitioner's situation, to that extent it is simply invalid.

The cases cited by Petitioner in support of his contention that the aforementioned rule entitles him to incentive gain time credit are inapposite to the case at bar. In Pettway v. Wainwright, 450 So. 2d 1279 (Fla. 1st DCA 1984), the Department had declined to award discretionary incentive gain time to an inmate during his last forty-five days of imprisonment. The inmate indisputably qualified for that gain time under the Florida Statutes and the Department's own rules, but the Department argued that it needed "a cut-off date for granting incentive gain-time in order to determine a definite release date sufficiently in advance of a prisoner's release and in order to properly prepare for the prisoner's release." Id. at 1280. The court observed that the Department's concern was valid, but that the award or non-award of gain time had to be determined uniformly according to duly promulgated rules, and the court granted the inmate's petition. Id. at 1280-81.[2] The facts of this case could not be farther removed from Petitioner's: In the instant case, Petitioner's non-award of gain time is not within the Department's discretion, but follows from the Department's non-discretionary enforcement of Section 944.275(4)(c), Florida Statutes (1994).

[2] An inmate similarly situated later brought suit in DeAngelis v. Wainwright, 455 So. 2d 639 (Fla. 1st DCA 1984), by which time the Department had duly adopted the new rules authorizing the withholding. Id. at 639-40.

The *ex post facto* doctrine is likewise inapplicable to this case. First, and most crucially, Petitioner has not actually been awarded any gain time, for the reasons discussed *supra* and by his own implicit admission (according to his invocation of 33-11.0065(5)(c)). Since he has never been awarded gain time, Petitioner has not suffered any *ex post facto* by the Department's rules or by the Department's interpretation of the Florida Statutes. Second, the Department is enforcing the very gain time statutes in effect at the time Petitioner committed his offenses, not some later statutes or regulations which have put him in a detrimental position.

It is therefore clear why Lynce v. Mathis, 519 U.S. 433 (1997) and Cridland v. Singletery, 695 So. 2d 794 (Fla. 1st DCA 1997) are inapposite to the instant case. As Petitioner himself observes in his petition, in both of these cases the inmates in question had *actually been awarded* gain time credits, were *actually released from prison*, and were subsequently re-arrested and returned to prison after the Department *subsequently forfeited* by the Department pursuant newly adopted interpretations by the Department of statutes enacted after the credit had already been awarded. Lynce at 435-36; Cridland at 794-95. Petitioner is simply incorrect when he affirms that the First District in Cridland "addressed the precise situation arising in" Petitioner's case.

Petitioner's claims to the contrary notwithstanding, the Department has not, in fact, changed its method of calculating Petitioner's gain time (Petition at 27), nor has it "applie[d] a new interpretation of a statute after a long period of applying a different interpretation" (Petition at 28), let alone "adopt[ed] retroactive rules." (Petition at 31). Likewise, no gain time has been awarded in the instant case, and none has been forfeited.

Finally, Petitioner avers that the very fact that gain time award eligibility is determined by the statutes in effect at the time an inmate committed his offenses is, *ipso facto*, a violation of the equal protection clauses of the United States and Florida Constitutions. Of course, neither the texts

of the U.S. and Florida constitutions, nor the construction of the same by the judiciary of these jurisdictions, has ever held that all prisoners convicted of the same offenses, but at different dates and under different statutory schemes, are entitled to suffer the same consequences for their crimes, and no such authority is cited by Petitioner.

As the Florida Supreme Court has observed:

> Equal protection is not violated merely because some persons are treated differently than other persons. It only requires that persons similarly situated be treated similarly. In the absence of a fundamental right or a protected class, equal protection demands only that a distinction which results in unequal treatment bear some rational relationship to a legitimate state purpose. This is known as the rational basis test. Since there is no fundamental right or suspect class at issue here, the State need only meet that test.

Duncan v. Moore, 754 So. 2d 708, 712 (Fla. 2000) (citations omitted). Inmates do not enjoy a fundamental or constitutional right to gain time of any sort, and first-degree murderers are not a "protected class" according to any traditional sense of that term. Accordingly, the State of Florida only needs to meet the rational basis test to prevail against an equal protection claim. That test is met here, where the State's gain time statutes are applied equally to all inmates similarly situated, i.e., to all inmates whose offenses were committed during the period the gain time statutes were in effect, and where the state has the eminently legitimate interest in subjecting all convicted offenders to consequences which they had constructive notice of at the time they committed their offenses.

Petitioner is being treated, under Florida law, similarly to all persons similarly situated as he is, i.e., similarly to all juvenile first-degree murderers who committed their offenses between January 1, 1994, and October 1, 1995, and who have had their life sentences converted to a term of years.

In conclusion, the Court finds that Petitioner is a first-degree murderer and capital felon, and that, having committed his offense in 1994, he is accordingly not eligible to earn gain time on his sentence.

Therefore, it is

ORDERED and ADJUDGED that the petition for writ of mandamus is hereby **DENIED.** The Clerk is directed to close this file.

DONE and ORDERED in Chambers, Tallahassee, Leon County, Florida, on this 26th day of July, 2019.

JOHN C. COOPER
Circuit Judge

Copies furnished to:

Beverly Brewster, Esq.
Assistant General Counsel
Florida Department of Corrections
501 S. Calhoun St.
Tallahassee, FL 32399

Michael Ufferman, Esq.
Counsel for Petitioner
2022-1 Raymond Diehl Rd.
Tallahassee, FL 32308

Copies Mailed and/or E-Served
by SB on JUL 26 2019

Subject: FW: release date calculation Thomas McGill, DC#982800,

From: haynes.stacey@mail.dc.state.fl.us
To: srudenstine@yahoo.com
Cc: haynes.stacey@mail.dc.state.fl.us
Date: Friday, February 26, 2016, 2:51:04 PM EST

Good afternoon. Per our phone conversation earlier this month, below is the information pertaining to the application of gain-time on capital felonies with offense dates between 1/1/94 and until 9/30/95:

> Capital felonies are not included within the sentencing guidelines (s.921.001(4)(b)2: "The 1994 guidelines apply to sentencing for all felonies, except capital felonies, committed on or after January 1, 1994. Any revision to the 1994 guidelines applies to sentencing for all felonies, except capital felonies, committed on or after the effective date of the revision.") Beginning 1/1/94 and until 9/30/95, the authorization to award incentive gain time was based on the guideline severity level of the underlying offense (s.944.275(4)(b)2: "For offenses ranked in offense severity levels 1 through 7, under s. 921.0012 or s. 921.0013, up to 25 days of incentive gain-time may be granted...For offenses ranked in offense severity levels 8, 9, and 10, under s. 921.0012 or s. 921.0013, up to 20 days of incentive gain-time may be granted). Since capital crimes are not included within the guidelines sentencing scheme, they are not assigned a severity level. For term-of-year sentences imposed for capital crimes committed 1/1/94 to 9/30/95, no gain time is authorized.

As of February 11, 2016, the Department has posted 4148 days of net gain-time solely for record keeping purposes. The gain-time cannot be applied to the sentence for a capital felony. He would be eligible for gain-time on the consecutive sentence in count 2.

Please let me know if you have any more questions pertaining this information. thank you, and have a nice weekend!

Stacey Haynes

Correctional Services Consultant

Bureau of Admission and Release

850-717-3078

From: Haynes, Stacey
Sent: Wednesday, February 10, 2016 7:47 AM
To: 'Sonya Rudenstine'
Cc: Haynes, Stacey
Subject: RE: release date calculation Thomas McGill, DC#982800,

Appendix C

Morning. it may be best to discuss over the phone rather than go back and for the over email. Please give me a call at your convenience. Thank you.

From: Sonya Rudenstine [mailto:srudenstine@yahoo.com]
Sent: Friday, February 05, 2016 12:31 PM
To: Haynes, Stacey
Subject: Re: release date calculation Thomas McGill, DC#982800,

Okay, thanks.

Sonya Rudenstine

2531 NW 41st St., Ste. E

Gainesville, FL 32606

(352) 374-0604

On Feb 5, 2016, at 10:58 AM, Haynes, Stacey <haynes.stacey@mail.dc.state.fl.us> wrote:

Good morning. I am waiting to hear back from my supervisor as to whether or not this inmate would be eligible to receive gain-time or not. Once I get that answer, I can respond to your inquiry. Thank you.

Stacey Haynes

Correctional Services Consultant

Bureau of Admission and Release

850-717-3078

From: Sonya Rudenstine [mailto:srudenstine@yahoo.com]
Sent: Monday, February 01, 2016 7:04 AM
To: Haynes, Stacey
Subject: release date calculation

Hi, Stacey,

Could you do me a favor and give me an estimated release date (and gain time details, like you did for Kleppinger) for Thomas McGill, DC#982800, if he is resentenced to 40 years in prison for his 1st degree murder, concurrent to his robbery? He is a juvenile pending resentencing on the murder conviction.

There is no rush on this. Many thanks, Sonya

Sonya Rudenstine

Attorney at Law

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Gainesville, FL 32606

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STATE OF FLORIDA)
)
COUNTY OF ALACHUA)

AFFIDAVIT

I, Sonya Rudenstine, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Sonya Rudenstine and I reside in Gainesville, Florida, Alachua County.

2. I own a solo law practice at 224 NW 2nd Avenue, Gainesville, Florida, 32601. I opened my practice in 2006 and represent individuals convicted of serious felonies on appeal and in postconviction proceedings, as well as individuals convicted as adults for offenses they committed when they were minors who were sentenced to life in prison without the possibility of parole.

3. I began representing Thomas McGill, along with co-counsel Michael Ufferman, in August 2012. Having been sentenced to life without parole for a first-degree murder conviction and a concurrent sentence of 153.7 months for an armed robbery conviction, both of which he committed as a juvenile in 1994, Mr. McGill believed he was eligible for a resentencing hearing pursuant to *Miller v. Jackson*, 567 U.S. 460 (2012).

4. After granting Mr. McGill's Rule 3.800(a) motion to correct an illegal sentence, the trial court scheduled his resentencing hearing for January 12-13, 2017.

5. On February 1, 2016, in preparation for the resentencing hearing, I emailed Stacey Haynes, a Correctional Services Consultant for the Florida Department of Corrections (hereinafter "the Department"), to request an estimated release date for Mr. McGill, including any gain-time that had been applied over the approximately twenty years he had been incarcerated in the Department's custody. I asked Ms. Haynes to calculate the estimated release date based on a new, hypothetical new sentence of forty years in prison for the first-degree murder conviction, and the same, concurrent 153.7-month sentence for the robbery conviction that Mr. McGill had originally received.

6. Ms. Haynes initially responded by email on February 5, 2016, informing me that she would have to check with her supervisor to find out whether Mr. McGill was eligible for gain-time before she could provide an estimated release date.

7. On February 10, 2016, Ms. Haynes sent me an email indicating that it would be best to discuss the issue of Mr. McGill's release date over the phone rather

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than by email. I telephoned her and she informed me that Mr. McGill had accrued 4,148 days in gain-time, but that the Department was currently in the process of removing gain-time from the classification records of various juveniles, including Mr. McGill, because the Department had recently changed its interpretation of section 921.001(4)(b)(2) of the Florida Statutes. She told me that the agency had recently determined that, contrary to its previous interpretation, individuals convicted of first-degree murder between January 1, 1994 and September 30, 1995, including Mr. McGill, were not entitled to gain-time under the statute.

8. Ms. Haynes indicated that a record of Mr. McGill's gain-time would be backed up on the Department's computer system, but would no longer be reflected in his prison classification file.

9. I asked Ms. Haynes for written documentation of the Department's new policy, as well as documentation of Mr. McGill's gain time. In an email dated February 26, 2016, Ms. Haynes relayed to me the following information:

> Capital felonies are not included within the sentencing guidelines (s.921.001(4)(b)2: "The 1994 guidelines apply to sentencing for all felonies, except capital felonies, committed on or after January 1, 1994. Any revision to the 1994 guidelines applies to sentencing for all felonies, except capital felonies, committed on or after the effective date of the revision.") Beginning 1/1/94 and until 9/30/95, the authorization to award incentive gain time was based on the guideline severity level of the underlying offense (s.944.275(4)(b)2: "For offenses ranked in offense severity levels 1 through 7, under s. 921.0012 or s. 921.0013, up to 25 days of incentive gain-time may be granted...For offenses ranked in offense severity levels 8, 9, and 10, under s. 921.0012 or s. 921.0013, up to 20 days of incentive gain-time may be granted). Since capital crimes are not included within the guidelines sentencing scheme, they are not assigned a severity level. For term-of-year sentences imposed for capital crimes committed 1/1/94 to 9/30/95, no gain time is authorized.
>
> As of February 11, 2016, the Department has posted 4148 days of net gain-time solely for record keeping purposes. The gain-time cannot be applied to the sentence for a capital felony. He would be eligible for gain-time on the consecutive sentence in count 2.

10. While Mr. McGill has consistently received monthly reports from the Department indicating his accrual and or revocation of gain-time. Yet, it did not inform him when his 4,148 days of gain-time were revoked based on the Department's new interpretation of the Florida statutes, nor was he given notice of the impending revocation, or an opportunity to contest the basis for the revocation.

Further affiant sayeth naught,

Sonya Rudenstine
Attorney at Law
224 NW 2nd Avenue
Gainesville, FL 32601
(352) 359-3972
Fla. Bar No. 0711950

Sworn and subscribed before me this 11th day of September, 2018, by Sonya Rudenstine, who has produced the following identification:

FLDL835274 3705990

Notary Public, State of Florida

KATELYN SULLIVAN
Notary Public - State of Florida
Commission # GG 227627
My Comm. Expires Jun 12, 2022
Bonded through National Notary Assn.

My Commission expires on: June 12 2022

INMATE REQUEST

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

Mail Number: _____
Team Number: _____
Institution: _____

TO: (Check One)
☐ Warden ☐ Asst. Warden ☒ Classification (Ms Pennington) ☐ Security ☐ Medical ☐ Mental Health ☐ Dental ☐ Other _____

FROM:	Inmate Name	DC Number	Quarters	Job Assignment	Date
	Thomas McGill	982800	C2-453	PRIDE	6/20/18

REQUEST

Check here if this is an informal grievance ☐

I was arrested in mid-end Monroe County of armed robbery and murder. I received a three year minimum mandatory for the armed robbery but not for the murder. For two pieces I'll one if I was having to serve time for the murder charge pursuant to 775.087(2)(a)3. does the three year mandatory portion of the armed robbery?

Thank You!

All requests will be handled in one of the following ways: 1) Written information or 2) Personal interview. All informal grievances will be responded to in writing.

RECEIVED
JUN 22 REC'D

Inmate (Signature): Thomas C. McGill | DC#: 982800

DO NOT WRITE BELOW THIS LINE

RESPONSE

DATE RECEIVED: CLASSIFICATION

All your time has been removed

[The following pertains to informal grievances only:]

Based on the above information, your grievance is _____ (Returned, Denied, or Approved). If your informal grievance is denied, you have the right to submit a formal grievance in accordance with Chapter 33-103.006, F.A.C.]

Official (Print Name): [illegible] | Official (Signature): | Date: 6/26/18

Original: Inmate (plus one copy)
CC: Retained by official responding or if the response is to an informal grievance then forward to be placed in inmate's file
This form is also used to file informal grievances in accordance with Rule 33-103.005, Florida Administrative Code.

Informal Grievances and Inmate Requests will be responded to within 10 days, following receipt by staff.
You may obtain further administrative review of your complaint by obtaining form DC1-303, Request for Administrative Remedy or Appeal, completing the form as required by Rule 33-103.006, F.A.C., attaching a copy of your informal grievance and response, and forwarding your complaint to the warden or assistant warden no later than 15 days after the grievance is responded to. If the 15th day falls on a weekend or holiday, the due date shall be the next regular work day.

DC6-236 (Effective 12/14)

Incorporated by Reference in Rule 33-103.005, F.A.C.

Appendix E

INMATE DISCIPLINARY ACTIONS AS OF 03/22/18 TIME: 11:52

THE FOLLOWING ENTRIES REFLECT DISCIPLINARY ACTIONS AGAINST THE INMATE FOR VIOLATION OF THE RULE CITED AND INDICATE THE GAIN TIME DAYS LOST

--- CURRENT INCARCERATION ---

DATE	DAYS	VIOLATION	LOCATION
04/21/97	0	DISRESP.TO OFFICIALS	APALACHEE WEST UNIT
07/09/97	0	FIGHTING	APALACHEE WEST UNIT
09/27/98	90	SPOKEN THREATS	CALHOUN C.I.
11/14/06	0	SEX ACTS	CALHOUN C.I.
05/15/08	0	DISOBEY REGULATIONS	CALHOUN C.I.
03/16/09	0	FIGHTING	CALHOUN C.I.
12/16/11	0	POSS OF CONTRABAND	CALHOUN C.I.

INMATE CLASSIFICATION ACTIONS AS OF 03/22/18 TIME: 11:52

THE FOLLOWING ENTRIES REFLECT CLASSIFICATION ACTIONS TAKEN REGARDING THE INMATE.

--- CURRENT INCARCERATION ---

DATE	TYPE	CUSTODY	LOCATION
05/20/96	INITIAL	CLOSE	R.M.C.- WEST UNI
11/25/96	SCHEDULE	CLOSE	APALACHEE WEST U
11/17/98	SCHEDULE	CLOSE	CALHOUN C.I.
02/20/01	SCHEDULE	CLOSE	CALHOUN C.I.
06/30/17	INITIAL	CLOSE	LIBERTY C.I.

CONTROL RELEASE ACTIONS AS OF 03/22/18 TIME: 11:52

THE FOLLOWING ENTRIES REFLECT CONTROL RELEASE ACTIONS TAKEN BY THE FLORIDA COMMISSION ON OFFENDER REVIEW FOR THIS INMATE INCLUDING ANY ADVANCEMENTS OF THE INMATE'S CONTROL RELEASE DATE.

--- CURRENT INCARCERATION ---

DATE	TYPE	DAYS	REASON
05/09/96	INMATE DETERM STAT INELIG-CRIS	000	CR/9 MURDERER

Appendix F