

IN THE SUPREME COURT OF FLORIDA

MARK WINKLER,
CHRISTOPHER HALL,
and
KELLY TORMEY,

Petitioners,

vs.

Case No. SC93294
Consol. Nos. SC94507, SC97143

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,
and
FLORIDA PAROLE COMMISSION,

Respondents.

**TORMEY’S REPLY AND AMENDED PETITION
FOR EXTRAORDINARY RELIEF**

Petitioner Kelly Tormey, by and through the undersigned appointed counsel, replies to Respondent Moore’s response and amends her petition for a writ of habeas corpus or alternative relief pursuant to article I, section 13, of the Florida Constitution and in support of her petition states:

I. JURISDICTION

1. Jurisdiction is conferred on this Court by article V, section 3(b)(9), of the Florida Constitution. Petitioner invokes the Court’s jurisdiction pursuant to chapter 79, Florida Statutes (1999), and Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100.

2. This reply and amended petition present important, time-sensitive constitutional questions of statewide applicability under *Lynce v. Mathis*, 519 U.S. 433 (1997), and *Gomez v. Singletary*, 733 So.2d 499 (Fla. 1998). It is necessary and appropriate for the Court to continue to exercise its original jurisdiction both to ensure a just and timely resolution of the issues and to promote uniformity and the efficient use of judicial resources in this State.

II. FACTS

3. The circuit court in Miami imposed on petitioner Tormey concurrent sentences of twenty (20) years imprisonment for the offenses of second-degree murder and armed robbery. The court also imposed a three-year mandatory term. The offenses were committed on May 18, 1990. The offenses did not involve the murder or attempted murder of an officer or other person referred to in section 944.277(1)(h), Florida Statutes (1989-Supp. 1992). The combined twenty-year sentence controls the duration of Ms. Tormey's incarcerative term. See Exhibit C to Respondent Moore's Response to Tormey Petition.

4. The Miami court also imposed a five-year term of imprisonment on Ms. Tormey, to be served concurrently with the twenty-year term. For this sentence the offense was possession of cocaine, committed on September 8, 1990. The five-year term does not determine the duration of Ms. Tormey's incarceration. Id.

5. Ms. Tormey has been in the custody of the Florida Department of Corrections since December 26, 1990. She has no other active sentence.

6. As of April 2, 2000, Ms. Tormey's tentative release date was May 3, 2002. This release date includes a reduction of thirty (30) days of emergency gain-time, granted pursuant to *Gomez v. Singletary*, 733 So.2d 499 (Fla. 1998).

7. From January 18, 1991, through the present the Secretary has granted 1860 days (5.1 years) of provisional credits pursuant to section 944.277, Florida Statutes (1989-Supp. 1992). From September 30, 1993, through the present he has granted 782 days (2.1 years) of provisional credits.

8. By dates of offense alone, Ms. Tormey is in Groups 3 (emergency gain-time at 99% of lawful capacity) and 5 (provisional credits at 97.5% of lawful capacity), as set forth in Gomez. Ms. Tormey admits that the Secretary has placed her in Group 3 and granted her only 30 days of emergency gain-time, but she contests her placement in Group and the remedy therefor.

9. The respondent, Secretary of the Florida Department of Corrections, has refused to grant any provisional credits to Ms. Tormey after Gomez on the grounds that, as a person convicted of second-degree murder, she was excluded from eligibility by section 944.277(1)(i), Florida Statutes (1989). See Respondent Moore's Response to Tormey Petition at 5 and Exhibit C thereto.

10. But for the application of the murder exclusion in section 944.277(1)(i), Ms. Tormey would be entitled to grants of provisional credits in an amount that would require her immediate or imminent release from prison.

11. Chapter 89-100, Laws of Florida, which purportedly enacted the murder exclusion effective January 1, 1990, violates article III, section 6, of the Florida Constitution. Because of defects in the enactment process of chapter 89-100, section 944.277(1)(i) was not in effect until after Ms. Tormey's relevant offenses. Section 944.277(1)(i) did not constitutionally take effect until October 1, 1990, at the earliest, and is *ex post facto* as applied to Ms. Tormey.

III. RELIEF

Petitioner Tormey is entitled to provisional credits for each month in which they were granted after her mandatory term, provided she was earning incentive gain-time. Lawful grants of provisional credits would cause the immediate or imminent expiration of Ms. Tormey's combined sentence. The Court should order the Secretary forthwith: (1) to show cause why chapter 89-100 is not violative of article III, section 6, and why he should not grant Ms. Tormey provisional credits; and (2) to file a proposed remedy for Ms. Tormey, in the event the Court holds that chapter 89-100 is unconstitutional, consisting of the amount and month of each grant of provisional credits and his asserted grounds for each month of disqualification.

In the alternative, Ms. Tormey is entitled to the amount of emergency gain-time she would have received if control release had not been enacted. Although this alternative argument was apparently rejected in *Gomez*, for reasons set forth below and in Mr. Hall's

Supplemental Reply the Court should reconsider the *ex post facto* effects of control release if it rejects Ms. Tormey's principal claim for provisional credits.

IV. ARGUMENT

A. CHAPTER 89-100 VIOLATED ARTICLE III, SECTION 6, OF THE FLORIDA CONSTITUTION, AND THE MURDER EXCLUSION IN SECTION 944.277(1)(i) COULD NOT HAVE TAKEN EFFECT BEFORE OCTOBER 1, 1990

Section 944.277(1)(i), Florida Statutes (1989-Supp.1992), excludes all persons convicted of having committed murder or attempted murder of any degree from eligibility for provisional credits. But for the Secretary's application of the murder exclusion to Ms. Tormey, she would be entitled to provisional credits pursuant to *Gomez v. Singletary*, 733 So.2d 499 (Fla. 1998). The Secretary asserts that the pertinent amendment to section 944.277(1) took effect on January 1, 1990, before Ms. Tormey's offenses. *See* Respondent Moore's Response to Tormey Petition at 5 and Exhibit C thereto. Ms. Tormey, however, claims that the amendment could not have taken effect under article III, section 6 of the Florida Constitution before October 1, 1990, which was after her dates of offense.

The Secretary has erroneously applied the murder exclusion of section 944.277(1)(i) to Ms. Tormey and deprived her of provisional credits. The law in which the Legislature first attempted to enact the murder exclusion, Chapter 89-100, violated article III, section 6, of the Florida Constitution in several material respects. For this reason the murder exclusion did not take effect on January 1, 1990, the date specified by the 1989 Legislature in the first law. It did not take effect until October 1, 1990, at the earliest. Because all of Ms. Tormey's

offenses precede any constitutionally permissible effective date for the murder exclusion, it is *ex post facto* as applied to her. Therefore, Ms. Tormey was eligible for credits under section 944.277 on the dates of offense and is entitled to provisional credits under *Lynce* and *Gomez*.

1. The history and enactment of Chapter 89-100

The Legislature first enacted the murder exclusion in 1989. *See* ch. 89-100, § 4, at 256, Laws of Fla. (codified at § 944.277(1)(i), Fla. Stat. (1989-Supp. 1992)) (Appendix A hereto). The 1989 act expressly provided an effective date of January 1, 1990, and was to apply to offenses committed on and after that date. *See id.* § 6, at 256.¹ In a case in which the requirements of article III, section 6 of the Florida Constitution were not at issue, the court employed the effective date expressed in the act, January 1, 1990. *See Dominguez v. State*, 606 So. 2d 757 (Fla. 1st DCA 1992). Soon thereafter, however, the Attorney General questioned the accuracy and precedential force of *Dominguez*. *See* Op. Att’y Gen. Fla. 92-96, at 287-88 (1992)(Question 3).

The title of the chapter 89-100 states that the act relates to criminal penalties and creates the “Law Enforcement Protection Act.” It then briefly describes various provisions

¹The Legislature amended section 944.277 two more times in 1989, after the conclusion of the regular 1989 session. *See* ch. 89-526, § 5, at 2662-63, and ch. 89-531, § 5, at 2717, Laws of Fla. (Spec. Sess. B). Neither of these acts affected the exclusions from eligibility in subsection (1). *Id.* These acts took effect on September 1, 1990, and October 1, 1989, respectively. *See* ch. 89-526, § 52, at 2690, and ch. 89-531, §§ 19-20, at 2721, Laws of Fla.

in the act. It refers generally, in pertinent part, to provisional credits and section 944.277, but, consistent with the popular name and findings and intent, it specifically identifies only those amendments to section 944.277(1) that relate to law enforcement officers.

Chapter 89-100 has six sections. Section 1 states that the act as a whole may be cited as the “Law Enforcement Protection Act.” Section 2 sets forth findings and intent in four subsections, all of which pertain to the protection of law enforcement officers. Section 3 creates section 775.0823, Florida Statutes, which imposes mandatory sentences and otherwise enhances criminal penalties for those convicted of enumerated violent offenses against law enforcement officers. It also prohibits granting provisional release credits to “any person convicted of an offense under this section.” Section 4 amends section 944.277(1) by adding two new paragraphs to the list of exclusions from eligibility. Paragraph (h) excludes those convicted of enumerated violent offenses against law enforcement officers, including murder and attempted murder. In contrast to the narrowly focused purpose of the rest of the act, however, paragraph (i) excludes all murderers and attempted murders, regardless of the identity or vocation of the victim. Section 5 advises this Court of the need to revise the standard jury instructions, and section 6 indicates the effective and applicability date.

The bill that eventually became chapter 89-100 was the Committee Substitute for House Bill 25 (CS/HB 25) (Appendix B hereto). The bill proceeded to the floor of the House on May 25, 1989. *See Fla. H.R. Jour. May 25, 1989. (Reg. Sess. 1989) (Appendix C hereto).*

At the time it reached the floor the bill was in substantially the form described above, with one relevant exception. Section 4 of CS/HB 25, amending section 944.277(1), contained only paragraph (h), which excluded only those serving sentences for offenses against law enforcement officers. The general murder exclusion of paragraph (i) was not part of the bill that went to the floor. *See Fla. H.R. CS/HB 25 (Reg. Sess. 1989)(unamended floor version) (Appendix B hereto).*² Thus, the bill that went to the floor of the House was a bill focused exclusively on the protection of law enforcement officers.

On the floor of the House, seven amendments were made to CS/HB 25. Two of them, and the lack of a third, are relevant to Ms. Tormey's present petition. First, Amendment 5 added the entirety of paragraph (i) to section 4 of the act, thereby adding the general murder exclusion to section 944.277(1). Second, Amendment 6 made a conforming amendment to the directory clause of section 4 of the act, to state that paragraph (i), as well as (h), was being added. Finally, there was no amendment to the title of the bill. *See Fla. H.R. Jour. May 25, 1989. (Reg. Sess. 1989) (Appendix C hereto).* The title was the same before and after the floor amendments.

The Law Enforcement Protection Act, as amended on the floor, passed the House and went to the Senate. There it was read by title. The Senate then substituted CS/HB 25 for the

²House bills addressing only provisional release credits and including a general murder exclusion did not reach the floor. *See HB 586, CS/HB 586, and HB 1050.*

companion measure, CS/CS/CS/SB 45,³ and read it by title a second and third time. The Senate then passed the bill and certified it to the House. *See* Fla. S. Jour. May 25, 1989 (Reg. Sess. 1989) (Appendix F hereto).

The Final Staff Analysis of CS/HB 25 describes section 4 of the act *in toto* as follows: “Section 4 provides that in the event of inmate population overcrowding provisional credits shall not be granted to an inmate convicted under this section.” *See* Fla. H.R. Comm. on Crim. Just., CS/HB 25 (1989) Staff Analysis 2 (final June 30, 1989) (Appendix D hereto). The Governor signed the bill into law on June 21, 1989.

2. Chapter 89-100 contained a defective and misleading title in violation of Article III, Section 6

The title of chapter 89-100 violates article III, section 6 of the Florida Constitution, which requires, in pertinent part, that the subject of every law “shall be briefly expressed in the title.” In addition, the title of chapter 89-100 violates the implicit prohibition against misleading titles. For each of these reasons section 4 of chapter 89-100 is unconstitutional as applied to Ms. Tormey.

The purpose of the title requirement of article III, section 6, is to put people who may be subject to the law, other lawmakers, and other interested citizens on notice of the nature and substance of the law and, at a minimum, of the need to inquire further into the particular

³The Senate’s companion bill did not contain a general murder exclusion. *See* Fla. S. CS/CS/CS/SB 45 (Reg. Sess. 1989) (Appendix E hereto). Senate bills addressing only provisional release credits and including a general murder exclusion did not reach the floor. *See* SB 210, and SB 307.

provisions of the legislation. *See State v. Physical Therapy Rehabilitation Center of Coral Springs, Inc.*, 665 So.2d 1227, 1130 (Fla. 1st DCA 1996). The title may identify a broad or restricted subject, but it must be accurate and not misleading. *Id.* The effect of a defective or misleading title is to render the unnoticed provisions inoperative. *See County of Hillsborough v. Price*, 149 So.2d 912, 915 (Fla. 1963); *see also Heggis v. State*, 25 Fla. L. Weekly S137, 140 (Fla. Feb. 17, 2000)(dictum)(for title defect, as distinguished from single-subject violation, court may sever the offending provisions).

In this case, CS/HB 25 went to the floor as a pure law enforcement protection bill, and the title so indicated. In that unamended form, the bill already excluded murderers and attempted murderers of law enforcement personnel from eligibility for provisional credits, as expressed in the title of CS/HB 25. On the floor, however, the bill was amended in a manner wholly unrelated to law enforcement protection: the exclusion of *all* murderers and attempted murderers from eligibility for provisional credits. Despite this radical departure from the unified subject of the bill that went to the floor, the title was not modified. Instead of referring to the general murder exclusion, the title referred with great specificity to the other provisions of the act: findings and intent limited narrowly to law enforcement protection, enumerated offenses against law enforcement officers, the definition of law enforcement officers, the enhanced criminal penalties and other consequences for offenses against law enforcement officers. Despite the consistent references to each of the provisions related to law enforcement protection, the title is completely silent on the exclusion of *all*

people convicted of any murder or attempted murder. This is a classic violation of the title requirement of article III, section 6.

It cannot be disputed that the bill that went to the floor, CS/HB 25, related entirely to the protection of law enforcement officers. At that point, before the murder exclusion was added, the title was exactly the same as the final title of the amended bill, after the broad exclusion was added. Just as that initial title failed to give notice of a general murder exclusion before the floor amendments – there was no general murder exclusion in the bill at that time – the final title failed to give the requisite notice after the exclusion was added on the floor. Because the general murder exclusion added on the floor has nothing to do with the protection of law enforcement, that title is clearly deficient under article III, section 6.

Any honest reading of the unamended title, both before and after the relevant floor amendments to the bill, compels the conclusion that the law has to do with criminal penalties for crimes against law enforcement officers. Containing nine (9) clauses in relation to the six (6) sections of the bill, the title follows a clear and restrictive pattern in describing the substantive sections. First it states the general, then it states the particular. It follows this pattern three times.

The first three clauses of the title set the limiting pattern of the title and the restrictive context of the law. While the first clause refers generally to criminal penalties, the second and third clauses immediately restrict the scope to the protection of law enforcement personnel. The second clause in the title relates specifically to section 1 of the bill, which

sets forth the popular name of the law as a whole: “The Law Enforcement Protection Act.” The third clause in the title relates specifically to section 2 of the bill, which recites findings and intent restricted to protection of law enforcement officers. The first three clauses, proceeding from the general to the particular, establish that this is a bill that contains criminal penalties for crimes against law enforcement.

The substantive clauses continue this pattern and confirm the restricted scope of the bill. The fourth, fifth, and sixth clauses of the title relate to section 3, which created section 775.0823. The fourth clause states generally that section 775.0823 is created. The fifth clause states with specificity that the new section establishes mandatory sentences for those people convicted of specifically enumerated offenses against law enforcement officers, who in turn are also identified with particularity. The sixth clause relates directly to the final paragraph of new section 775.0823, providing that these same offenders are prohibited from receiving provisional credits. Thus, there are three clauses relating to section 3: a general clause followed by two specific clauses.

The seventh clause of the title generally indicates that the bill amends section 944.277. Immediately thereafter the eighth clause states the specific manner in which the bill amends section 944.277: to prohibit the granting of provisional credits to those convicted of “certain offenses against law enforcement officers. . . .” Again, the specific qualifies the general.⁴

⁴The ninth and final clause of the title refers to the effective date in section 6. The title makes no reference whatsoever to section 5, which “directs” this Court to revise the standard jury instructions and appears to be largely, if not entirely, a nullity.

Both before and after the floor amendment, the title states clearly that this is a “law enforcement protection” act. Every clause in the title is effectively limited to that theme. It bears repeating that the bill was read only by title in the Senate.⁵ Under applicable precedent, therefore, the title fails to give notice of the general murder exclusion added on the floor of the House.

In *State v. Physical Therapy Rehabilitation Center of Coral Springs, Inc.*, 665 So.2d 1227, 1130 (Fla. 1st DCA 1996), the court held a title analogous to that of chapter 89-100 unconstitutional under article III, section 6. Like the title of chapter 89-100, the title in *Physical Therapy* enumerated most provisions of the act in one way or another. The title specifically identified provisions that placed caps on fees for radiation therapy, just as the title of chapter 89-100 specifically identified provisions affecting the sentences of those who commit offenses against law enforcement officers. However, in each case the title makes no reference to its broadest provision: in *Physical Therapy*, the provision that placed caps on the fees charged by *all* providers of designated health services; in this case, the provision excluding *all* murderers and attempted murderers from eligibility for early release. In a challenge to the fee cap by providers of health services other than radiation therapy, the court in *Physical Therapy* that the title was defective and also affirmatively misleading. *Id.* at 1130-31. The court struck the offending provision under article III, section 6, and prohibited

⁵And, as set forth above, the Senate promptly substituted the amended House bill for CS/CS/CS/SB 45, which contained no general murder exclusion.

the application of the general fee-cap provision to providers of services other than radiation therapy.

The titles in *Physical Therapy* and in this case both begin with clauses too broad to satisfy the title requirement of article III, section 6. In *Physical Therapy* the title began generally: “An act relating to medical practice; . . .” The court essentially ignored this vague, generalized beginning, for the title went on to make specific reference to almost every provision in the act. The court reiterated the well-established principle that, while a broad, inclusive title standing alone might satisfy the title requirement, broad clauses followed by restrictive enumerations effectively restrict the scope of the notice to the matters expressly mentioned. *Id.* at 1130 (citing *Town of Monticello v. Finlayson*, 156 Fla. 568, 23 So.2d 843 (Fla. 1945)). For the same reason that *Physical Therapy* discounted the broad introductory clause about “medical practice,” this Court should conclude that the introductory reference to “criminal penalties” is without constitutional significance. In each case the title enumerates with particularity virtually all of the provisions of the act, except the one at issue.

Clauses encompassing broad subjects are read in the context of limiting clauses that precede or follow them. *See, e.g., Christensen v. Commercial Fishermen’s Assoc.*, 187 So. 699, 700-01 (Fla. 1939); *State ex rel. Crump v. Sullivan*, 128 So. 478, 480 (Fla. 1930). Thus, those portions of the title in *Physical Therapy* that referred to all providers of health care services were effectively limited, in the context of the title, by references to specific providers and other limiting provisions. *See Physical Therapy*, 665 So.2d at 1131. The

broad references to provisional credits in the title of chapter 89-100 are similarly limited by context. Both before and after the relevant floor amendment to the substantive provisions of the bill in section 4, the title mentioned section 944.277 and provisional credits only in the context of excluding those people who commit enumerated offenses against law enforcement officers. It was ineffective to notify legislators and other citizens that a much broader group was to be excluded.

In the last analysis the title of chapter 89-100 is affirmatively misleading and embodies the evils that the title requirement prohibits. The bill that went to the floor of the House was a law enforcement protection bill. The unified theme of the title – from the popular name and the findings and intent through all of the substantive clauses – misleads the reader into thinking the bill relates solely to law enforcement protection. On the floor it suffered a logrolling amendment that resulted in a hidden provision not expressed in the otherwise detailed title. Logrolling and the addition of unrelated provisions not noticed in the title are the very evils that article III, section 6, seeks to prevent. *See Rouleau v. Avrach*, 233 So.2d 1, 3 (Fla. 1970). Even after the floor amendment, the title failed to apprise the reader that the restricted subject, penalties for crimes against law enforcement officers, had been materially breached.

Therefore, the title of chapter 89-100 fails to provide constitutionally required notice of the actual scope of the subject of the law and is affirmatively misleading. It gives no notice that a general exclusion of all murderers and attempted murderers of any degree is part

of the bill. On the contrary, it specifically and repeatedly gives notice that the subject of the bill is the protection of law enforcement officers. Particularly because people who committed or attempted to commit murder against law enforcement officers were already excluded by other portions of the bill, the general murder exclusion is wholly unrelated to law enforcement protection.

At the same time that the title withholds notice of the general murder exclusion, it affirmatively and specifically leads interested persons to understand that the bill is entirely about the protection of law enforcement officers. For these reasons the Court should hold that chapter 89-100, insofar as it seeks to exclude all murderers and attempted murderers from eligibility for provisional credits, violates the title requirement of Article III, Section 6, of the Florida Constitution.

3. Chapter 89-100 violates the single-subject requirement of article III, section 6

Both by title and by substance, the subject of chapter 89-100 is criminal penalties for certain offenses against law enforcement officers. The popular name of the *entire* law is the “Law Enforcement Protection Act.” *See* ch. 89-100, § 1, at 254, Laws of Fla. In the section containing legislative findings and intent, *each* provision pertains directly to violent offenses against law enforcement officers. *See id.* § 2, at 254-55. Each substantive provision relates directly to sentences for violent offenses against law enforcement officers. *See id.* §§ 3, 4, at 255-56.

Out of all these sections of the law, there is only one provision that bears no relationship to the subject of sentences for violent offenses against law enforcement officers: that part of section 4 that adds paragraph (i) to section 944.277(1). *See id.* § 4, at 256. The subject of this latter provision, the early-release eligibility of those who commit or attempt to commit murder against persons *other than* law enforcement officers, is distinct from the subject of the rest of the law. The presence of these two subjects in the same law violates the single-subject requirement of article III, section 6.⁶ *See State v. Thompson*, 750 So.2d 643 (Fla. 1999); *see also Heggs v. State*, 25 Fla. L. Weekly S137 (Fla. Feb. 17, 2000) (rehearing pending, No. SC93851).

In chapter 89-100 the Legislature did not address a broad crisis in crime control or criminal punishment in general. On the contrary, it expressly identified a narrow or restricted problem: “violent offenses against law enforcement and [similar] officers, including . . . homicides.” *See id.* § 2(2), at 255. The Legislature addressed the problem by enhancing sentences imposed by courts and prohibiting grants of sentence-reduction credits by the Secretary of Corrections. Among other measures, the Legislature specifically excluded those who commit murder or attempted murder against enumerated officials from eligibility for provisional credits. *See id.* § 4, at 256 (codified at § 944.277(1)(h), Fla. Stat. 1989)). The

⁶“Every law shall embrace but one subject and matter properly connected therewith. . . .” Art. III, § 6, Fla. Const.

subject was the unique incidence of violent crime against law enforcement officials, and the Legislature addressed it.

The exclusion codified at section 944.277(1)(i) has no cognizable relationship to the subject of chapter 89-100, protection of law enforcement officers. This extraneous provision excluded every person who committed murder or attempted murder, regardless of the vocation of the victim. Furthermore, in the context of chapter 89-100, the effect of the general murder exclusion was to exclude *only* those committing these offenses against victims who, by definition, are *not* law enforcement officers and who are clearly *not* embraced within the popular name of the first section and the findings and intent of the second section of the law. The effect of paragraph (i) was limited to victims other than law enforcement officers because paragraph (h) had already excluded those committing the specified offenses against law enforcement and similar officials. Therefore, paragraph (i) is unrelated to the subject of the law, which was enhanced penalties and longer prison terms for violent crimes against law enforcement officers.

The legislative history of chapter 89-100, reviewed above, fully supports the conclusion that the law addresses two subjects. Paragraph (i), the extraneous murder exclusion, was added at the last minute on the house floor. Until that time, the law had addressed only the protection of law enforcement officers. Anyone following the bill to the floor would have known it was a bill about protecting law enforcement officers. On the

floor, however, it was essentially a case of logrolling an extraneous measure into a bill that, during the entire course of its passage, dealt with another subject.

The Court should hold under *State v. Thompson*, 750 So.2d 643 (Fla. 1999), that chapter 89-100 violates the single-subject requirement of article III, section 6.

4. The murder exclusion of section 944.277(1)(i) did not take effect until October 1, 1990, at the earliest, was after the dates of Ms. Tormey's offenses, and is inapplicable to her

Chapter 89-100 provided an effective date of January 1, 1990. *See* ch. 89-100, § 6, at 256. However, because chapter 89-100 violated the title requirement, single-subject rule, or both, the general murder exclusion contained in section 4 of the act (and codified at section 944.277(1)(i)) did not take effect on January 1, 1990. *See State v. Thompson*, 750 So.2d 643 (Fla. 1999). The violation of article III, section 6, rendered at least the general murder exclusion unconstitutional until a later act validly enacted it. *Id.* at 645-46. The earliest possible date for the closing of the window of unconstitutionality is October 1, 1990. The date of Ms. Tormey's relevant offense was May 18, 1990, and the Secretary has applied the murder exclusion to her. Therefore, she has standing to assert the constitutional violations. *Id.*; *State v. Johnson*, 616 So.2d 1, 2-3 (Fla. 1993).

Although the Legislature addressed section 944.277 again in 1989, it did not set forth paragraph (i) on either occasion. *See* Op. Att'y Gen. Fla. 92-96, at 287-88 (1992)(Question 3). First the Legislature amended subsection (1) by increasing the triggering percentage from 97.5 to 98% of lawful capacity. In doing so, the Legislature failed to set forth paragraphs (h)

and (i) of subsection (1). *See* ch. 89-526, § 5, at 2662-63, Laws of Fla. (eff. Sept. 1, 1990).⁷ On the second occasion, the Legislature amended only subsection (5) and set forth only that subsection. *See* ch. 89-531, § 5, at 2717, Laws of Fla. (eff. Oct. 1, 1989).

The first occasion on which the Legislature enacted subsection (i) of section 944.277(1) was in the 1990 session. *See* Op. Att’y Gen. Fla. 92-96, at 287-88 (1992)(Question 3). The Legislature appears to have set forth the entirety of subsection (1) in two laws. *See* ch. 90-77, § 2, at 201-02, and ch. 90-186, § 1, Laws of Fla. (ch. 99-77 is Appendix G hereto). Each of these laws expressed an effective date of October 1, 1990, and the latter (ch. 90-186) stated that it was to apply only to offenses committed on or after that date. *See* ch. 90-77, § 4, at 203, and ch. 90-186, § 4, Laws of Fla.

Therefore, assuming the validity of either or both of these 1990 acts, October 1, 1990, is the earliest date on which paragraph (i) of section 944.277(1) could have taken effect. Because Ms. Tormey’s relevant date of offense is in May 1990, it is unnecessary to determine the validity of these acts or other possible closing dates under later acts and the biennial adoption in 1991. *See State v. Thompson*, 750 So.2d 643, 646 (Fla. 1999).

For the foregoing reasons, section 944.277(1)(i), Florida Statutes (1989), did not become law before petitioner Tormey’s offense date. It cannot be applied to exclude her

⁷This law also enacted, *inter alia*, control release, which contained a general murder exclusion effective September 1, 1990.

from eligibility for provisional release credits. *See Lynce v. Mathis*, 519 U.S. 433 (1997); *Gomez v. Singletary*, 733 So.2d 499 (Fla. 1998).

B. SECTION 947.146, FLORIDA STATUTES (1989), RETROACTIVELY DEPRIVES PRISONERS SERVING SENTENCES FOR OFFENSES COMMITTED BEFORE ITS EFFECTIVE DATE OF EARLY RELEASE CREDITS UNDER THE LAWS IN EFFECT ON THEIR DATES OF OFFENSE AND IS *EX POST FACTO* AS APPLIED THEM

Even if the Court rejects Ms. Tormey's constitutional challenge to the general murder exclusion of section 944.277(1)(i), she is entitled to more substantial relief than the 30 days of emergency gain-time proposed by the Secretary. It is true, as the Secretary asserts, that she would "default" to what he calls Group 3. *See Moore's Response* at 3, 4-5, 15-16. However, for the reasons stated by petitioner Hall, which she incorporates by reference, she is entitled to a far greater remedy than the Secretary proposes. *See Hall's Supplemental Reply to Moore's Supplemental Response passim*.

Ms. Tormey's relevant offense was committed in May 1990. The control release statute did not take effect until September 1, 1990. *See Gomez v. Singletary*, 733 So.2d 499, 501 (Fla. 1998). Therefore, the control release statute, section 947.146, is *ex post facto* as applied to her. *Id.* at 500, 508.

Gomez does not remedy the *ex post facto* violation created by section 947.146. That case requires only that the Secretary continue to apply the law in effect on the date of offense, using population figures that are themselves the result of the retroactive exclusions enacted

in the control release statute. While *Gomez* correctly held that the control release statute was *ex post facto*, in that it in substance and effect repealed or amended the earlier statutes, the remedy provided by *Gomez* preserves and extends that *ex post facto* violation. It fully allows the retroactive selectivity (exclusions and inclusions) of control release to reduce the population in a way that would not have occurred under provisional release or the earlier mechanisms. The remedy in *Gomez* proceeds as if *Gomez* held that the State in fact *could* constitutionally supplant provisional release credits with control release, but that the State simply could not cease to operate the earlier mechanisms *after* control release had its retroactive, disadvantageous effects on Ms. Tormey. *Gomez* did not so hold, but the effect of the inadequate remedy that *Gomez* approved is to belie and substantially diminish the express, correct *ex post facto* holding in that case.

For reasons more fully set forth in Mr. Hall's Supplemental Reply, the Court should reconsider the adequacy of the *Gomez* methodology and remedies. First, there has been intervening caselaw that changed preexisting law. *See Lewis v. Moore*, 25 Fla. L. Weekly S152 (Fla. 2000). Before *Lewis* the Court had entertained for some years a distinction between the gain-time-based mechanisms and control release advancements. *See, e.g., Gomez*, 733 So.2d at 501. *Lewis* holds that control release advancements are gain-time for *ex post facto* as well as state-law purposes like forfeiture. With that holding, *Lewis* vitiates that part of *Gomez* that allows control release to diminish the population at the expense of earlier offenders who were retroactively excluded, in whole or part, from early release by

control release. Because it would have been *ex post facto* for the Legislature to have accomplished these retroactive effects on Ms. Tormey by directly amending or repealing her provisional release or emergency gain-time statute, it is equally *ex post facto* for the Legislature to accomplish the same retroactive effects by indirectly amending or repealing her statute by means of a new, exclusive gain-time mechanism.

Second, members of Ms. Tormey's original statutory group, whether it is emergency gain-time or provisional release credits, actually received the benefits of control release and were released. Control release was clearly *ex post facto* as to Ms. Tormey, and its unconstitutional effects are present in the proposed remedy of only 30 days. It is an inadequate remedy for an *ex post facto* law that gave thousands of credits to prisoners whose offenses were much earlier and much more recent than Ms. Tormey's. The releases, both of members of Ms. Tormey's group and of much earlier and later groups, prevented her trigger from being reached with greater regularity and created gross disparities. She is serving a disproportionately greater percentage of her sentence than people who are not less dangerous than she and who committed their offenses earlier, at the same time, and later than hers. The grossly disparate treatment of Ms. Tormey, relative to members of her and earlier statutory groups, violates *Waldrup's* dictum and the *Ex Post Facto* and Equal Protection Clauses. See *Waldrup v. Dugger*, 562 So.2d 687, 694 (Fla. 1990).

Third, the Court in *Gomez* erred in rejecting *Lynce's* interpretation of section 944.598. When *Lynce* expressly rejected the Attorney General's argument, it expressly rejected the

statutory interpretation that this Court adopted in *Gomez*, and *Lynce*'s interpretation was necessary to its *ex post facto* holding. *See Lynce*, 519 U.S. at 448 n.18. As part of the holding on the federal question, *Lynce*'s interpretation of section 944.598 is binding under the Supremacy Clause.

For these reasons Ms. Tormey is entitled to 30 days each month in which her threshold was triggered after January 1991. In the alternative, she is entitled to the benefits extended to prisoners who were retroactively favored, at her expense, by the Legislature in the control release law enacted after the date of her offense.

CONCLUSION

For the foregoing reasons, Kelly Tormey is entitled to provisional credits under section 944.277(1), without reference to the general murder exclusion. In the alternative, she is entitled emergency gain-time in the amount of 30 days each month or in the amounts of credits granted to members of her original statutory group under control release.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petitioner Tormey's Reply and Amended Petition has been furnished by U.S. Mail to **Judy Bone**, Assistant General Counsel, Florida Department of Corrections, 2601 Blair Stone Road, Tallahassee, FL 32399-2500, **Susan Maher**, Assistant General Counsel, Florida Department of Corrections, 2601 Blair Stone Road, Tallahassee, FL 32399, **Bradley R. Bischoff**, Assistant General Counsel, Florida Parole Commission , 2601 Blair Stone Road, Building C, Tallahassee, FL 32399, **Robert A. Butterworth, Attorney General**, Department of Legal Affairs, Suite PL-01, The Capitol, Tallahassee FL 32399-1050 and **Baya Harrison, III**, Esq. P.O. Box 1219, Monticello, FL 32345 on this _____ day of April, 2000.

John C. Schaible