NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0489

ROYAL STEVENS

VERSUS

LOUISIANA DEPARTMENT OF CORRECTIONS

Judgment Rendered: October 29, 2010

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Appealed from the
Nineteenth District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 576,669

Honorable Todd Hernandez, Judge

* * * * * * *

Royal Stevens
Angola, LA

In Proper Person
Plaintiff – Appellant

Debra A. Rutledge
Baton Rouge, LA

Attorney for
Defendant -- Appellee
Louisiana Department of
Public Safety & Corrections

* * * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

Royal Stevens, an inmate in the custody of the Louisiana Department of Public Safety and Corrections (the "Department") appeals a judgment of the district court dismissing his petition for judicial review of Administrative Remedy Procedure No. RCC-2008-62 and affirming the Department's final decision in the matter.

In 1994, Stevens was sentenced to 35 years in prison for four counts of armed robbery. In Stevens' request for administrative remedy, he sought to have the Department restore all of the good time that the Department determined he forfeited for prison rule violations pursuant to La. R.S. 15:571.4. At the time Stevens was remanded to the custody of the Department, the maximum good time penalty that could be imposed for prison rule violations was a prospective inability to earn thirty days of good time. In 1995, La. R.S. 15:571.4(B)(4) was amended to authorize the Department to impose the forfeiture of a maximum of one hundred-eighty days of earned good time for certain prison rule violations. Essentially, Stevens contends that the amended provisions of La. R.S. 15:571.4(B)(4) should not be applied to him because it violates the *ex post facto* clauses of the constitutions of Louisiana and the United States.[1] The Department denied the relief sought, maintaining that Stevens was subject to the forfeiture of good time provisions that were in effect at the time each prison rule violation occurred and that the forfeiture of good time did not violate *ex post facto* because good time did not alter the definition of criminal conduct or increase the penalty for a crime, but rather, only affected an inmate's opportunity to take advantage of early release provisions. Stevens then instituted this proceeding, seeking judicial review of the Department's decision.

On September 4, 2009, the commissioner assigned to the matter issued a

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[1] See La. Const. art. I, § 23 and U.S. Const. art. I, § 10.

report recommending to the district court that the Department's decision be affirmed and that Stevens' petition be dismissed. The commissioner noted in her report that the 1995 amendment to La. R.S. 15:571.4 did not increase the penalty or the prison sentence for the crimes for which Stevens was sentenced in 1994. Stevens was sentenced to 35 years in the custody of the Department for four counts of armed robbery, and this sentence has remained the same. The commissioner further noted that the amendment to La. R.S. 15:571.4 only affected a prisoner's early release date based on good behavior in prison, with early release being a supervised release with conditions for the duration of the sentence. Accordingly, the commissioner determined that the application of the amended provisions of La. R.S. 15:571.4(B)(4) did not violate the *ex post facto* clauses of the constitutions of Louisiana and the United States.[2]

After considering the entire record of the proceedings, on October 19, 2009, the district court adopted the commissioner's recommendation and rendered judgment dismissing Stevens' petition and affirming the Department's decision. After a thorough review of the record of these proceedings, we find no error in the judgment of the district court and affirm the district court's judgment in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.2(A)(5), (6), (7), and (8). Moreover, we find the September 4, 2009 commissioner's recommendation adopted by the district court in its October 19, 2009 judgment

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[2] Article I, § 10 of the United States Constitution and Article I, § 23 of the Louisiana Constitution prohibit applying criminal laws *ex post facto*. Traditionally, Louisiana courts have held that in order for a criminal or penal law to fall within this prohibition, the law had to be passed after the date of the offense, relate to that offense or its punishment, and alter the situation of the accused to his disadvantage. **State ex rel. Olivieri v. State**, 2000-0172, 2000-1767, p. 14 (La. 2/21/01), 779 So.2d 735, 743-744, cert. denied, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001). However, in **Olivieri**, the supreme court narrowed the focus of *ex post facto* analyses in Louisiana. While the court recognized that, in previous *ex post facto* analysis, Louisiana jurisprudence had broadly focused on whether the change in a law operated to the disadvantage of an accused, the court adopted the current federal approach to *ex post facto* analysis, which focuses on whether any change in the law altered the definition of criminal conduct or increased the penalty by which the crime was punishable. **Olivieri**, 2000-0172 at pp.14-16, 779 So.2d at 744.

adequately explains, discusses, and resolves the issues raised by Stevens, and therefore, we adopt those written reasons and incorporate them into this opinion as "Appendix A."

All costs of this appeal are assessed to the plaintiff/appellant, Royal Stevens.

AFFIRMED.

ROYAL STEVENS

VERSUS

STATE OF LOUISIANA, ET AL

NUMBER: 576,669 SECTION 27

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

COMMISSIONER'S REPORT

The Petitioner, an inmate in the Department of Public Safety and Corrections, filed this appeal of administrative procedure # RCC-08-62, seeking review in accordance with R.S. 15:1171 et seq. By it, he seeks reversal of the Department's authority to forfeit good time for disciplinary violations if the prisoner was committed to the Department before the 1995 amendment to R.S. 15:571.4(B), on the basis that the increase in the good time penalty violates the guarantee against ex post facto law.

The State filed the entire administrative record of the ARP, which has been accepted as Exh. A in globo attached to the Defendant's Answer. Both parties filed argument by briefs, which are in the record for the Court's review and convenience.

This report is issued on the administrative record alone for the Court's de novo review and final adjudication.

ANALYSIS OF THE FACTS AND THE LAW

Article I, § 10, of the Constitution prohibits the States from passing any "ex post facto Law." Prior to 1990, the Court's analysis of what constituted "ex post facto" laws had expanded to include any law that "disadvantaged" a person. However, in 1990, the Supreme Court decided *Collins v. Youngblood*[1], wherein the Court reaffirmed that the *Ex Post Facto* Clause incorporated "a term of art with an established meaning at the time of the framing of the Constitution." In accordance with that original understanding, the Court once again narrowed the definition, holding that the Clause is aimed at laws that either "retroactively *alter the definition of crimes or* <u>*increase the punishment for criminal acts*</u>."[2]

The amendment that is at issue herein is R.S. 15:571.4(B) (4), that authorizes the Department to forfeit up to 180 days of good time for certain prison rule violations. The Petitioner argues that the application of the 1995 amendment to R.S. 15:571.4 increases the punishment for the crimes he originally committed (4 armed robberies) and for which he was sentenced to prison for 35 years in 1994. Prior to the 1995 amendment, the maximum good time penalty that could be imposed for rule violations was a *prospective*

[1] 497 U.S. 37, 41, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30 (1990).
[2] See *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718-2719, 111 L.Ed.2d 30 (1990); See also *California Dept. of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597, 1601 (U.S., 1995).

"failure to earn" 30 days of good time only. IN other words, earned good time could not be "forfeited" at all prior to 1995 for rule violations. Only the prospective *inability to earn* it for up to 30 days was the maximum sanction for rule violations. The change in the law in 1995 allowed the Department, for the first time, to forfeit earned good time—not deny prospective good time. The First Circuit has since held that the Department has no authority to impose the loss of good time that is not yet earned.[3]

> "The issue raised in this appeal is ... whether DPSC can impose a forfeiture of unearned or prospective "good time" as a sentence in a disciplinary matter. Concluding there is no statutory authority for such a forfeiture, we reverse the judgment and remand this matter to the DPSC with instructions.[4]

Considering the holding in *Cao, (above)* that prohibits prospective losses of good time, the Petitioner's contention that R.S. 15:571.4(B)(4) is an ex post facto imposition would, if adopted, apparently prohibit the Department from imposing *any* loss of good time sanctions for prison rule violations if the prisoner involved also committed his criminal offense prior to 1995. But more importantly, the 1995 amendment does not increase the penalty for the crimes for which the Petitioner was sentenced in 1994, and therefore, is simply not encompassed in the definition of "ex post facto" laws.

The prospective loss or a retrospective loss of good time does not increase the penalty for the crime committed by the offender. In fact, the *earning of (*distinguished from *eligibility to earn)* good time is, at best, speculative, but the loss of good time never increases one's sentence. The penalty—in this case, 35 years in the Department's custody—remains the same even though one's custody status within the Department may change (from physical to constructive), the latter including supervised release with conditions for the duration of the sentence, based on good behavior. Thus, good time, whether earned or lost, does not increase the penalty for the crime.

To say it another way, the sentence imposed in 1994 did not guarantee that the prisoner would actually earn any or all of the good time that he may become "eligible" for—but only that he would be good time eligible. He was on notice from the law and the Department's promulgated rules that he *could* lose good time for misbehavior. While good time eligibility may be a significant consideration to the offender at his plea and in sentencing, whether one will actually earn it or lose it once incarcerated does not "change" the actual sentence that was imposed for the crime.

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[3] *Cao v. Stalder*, 915 So.2d 851, 853 (La. App. 1 Cir. 2005).
[4] *Cao v. Stalder*, 915 So.2d 851, 853 (La. App. 1 Cir. 2005).

Under the post-1990 interpretation of "ex post facto" law discussed at length by the Supreme Court in *Collins v. Youngblood* and *California Dept. of Corrections v. Morales*, the challenged legislation must either change the definition of the crime (which it clearly does not in this case) or it must *increase the penalty attached to crime*, to violate to the constitution.[5]

The Petitioner's conclusion that the change in R.S. 15:571.4 increases his sentence is faulty and is not line with the cases that he cites in support. The Petitioner relies primarily on the holding in *Weaver v. Graham*[6], *a notably pre-Collins* and/or *Morales* decision, and one that included a broader definition of ex post facto, including any law that "disadvantaged" the Defendant. The Petitioner herein argues that R.S. 15:571.4, as amended, changed the "standard of punishment" that was effective when he committed his crime in 1994. Even if *Weaver* has survived the narrower ex post facto definition in *Collins and Morales*, which is not entirely certain, *it* is distinguishable in that it did not involve a good time statute at all. On the contrary, the Court found that the new law effected a "substantive" change in the sentencing formula the court was forced to use to determine the minimum sentencing range for the Defendant's crime. Thus, it effectively increased the minimum punishment for the crime, and violated the constitution.

The circumstances in the *Weaver* case differ significantly from the factual or legal situation in this case. In this matter, the Petitioner's sentences of 35 years remain the same before and after commission of the crime and before and after the law being assailed. The speculative loss of good time—based on a prisoner's behavior after sentencing-- does not, in any way, increase the original 35 year penalty imposed by the Court.[7] The Petitioner does not even allege that he will have to serve more than 35 years.

In 2001, the Louisiana Supreme Court, in *State ex rel. Olivieri v. State* [8], adopted the *Collins* analysis of ex post facto, and found that it and the *Morales* line of jurisprudence made Louisiana's jurisprudential interpretation of *ex post facto* laws no longer viable.[9]

> "After *Collins*, the focus of the *ex post facto* inquiry is not whether a legislative change produces some ambiguous sort of "disadvantage," nor... on whether an amendment affects a prisoner's "opportunity to take advantage of provisions for early release," ... but on whether any such change *alters the definition of criminal conduct or increases the penalty by which the crime is punishable*. ...

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[5] See *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718-2719, 111 L.Ed.2d 30 (1990); See also *California Dept. of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597, 1601 (U.S., 1995).
[6] 101 S.Ct. 960 (1981).
[7] See *Williams v. Creed*, 978 So.2d 419 (La. App. 1 Cir. 12/21/2007), and *State ex rel. Olivieri v. State*, 779 So.2d 735, 2000-0172 (La. 2/21/01).
[8] *State ex rel. Olivieri v. State*, 779 So.2d 735, 744 (La. 2001).
[9] *Id.*

> Therefore, we adopt the *Collins* and *Morales* line of jurisprudence which significantly narrows the definition of an *ex post facto* law from the "disadvantage" line of jurisprudence to whether the change alters the definition of criminal conduct or increases the penalty."[10] (Emp. mine)

Additionally, the case of *Williams v. Creed*[11] involves an ex post facto analysis wherein a prisoner contended that a change in the law that denied him good time eligibility was ex post facto. In denying relief, the First Circuit found that, since *Olivieri*, good time changes no longer fit the definition of ex post facto because they do not increase the penalty for the crime charged:

> "Traditionally, Louisiana courts have held that in order for a criminal or penal law to fall within this ***[ex post facto]*** prohibition, the law had to be passed after the date of the offense, relate to that offense or its punishment, and *alter the situation of the accused to his disadvantage.*[12] State ex rel. Olivieri v. State, 00-0172 (La.2/21/01), 779 So.2d 735, 743-44, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001). However, the Louisiana Supreme Court narrowed the focus of *ex post facto* analysis in Louisiana in the Olivieri case. While the court recognized that, in previous *ex post facto* analysis, Louisiana jurisprudence had broadly focused on whether the change in a law operated to the disadvantage of an accused, the Olivieri court adopted the current federal approach to *ex post facto* analysis, which focuses on whether any change in the law altered the definition of criminal conduct or increased the penalty by which the crime was punishable. Olivieri, 779 So.2d at 743-44; State v. Smith, 794 So.2d 41, 45 (La.App. 5th Cir.5/30/01), *writ denied*, 01-1921 (La.6/7/02), 817 So.2d 1145.[13]...
>
> Williams points out that ... the court did not order that he was to be denied good time on the multiple offender conviction. Therefore, he contends that ... his sentence ... should be computed with time off for good behavior. The statute was amended in 1977 to provide that multiple offenders convicted and sentenced after September 9, 1977, shall in no case be entitled to diminution of sentence for good behavior. Williams contends that although he was sentenced after September 9, 1977, the application of this amendment to him violates the *ex post facto* clauses .... Williams also claims ... the version of the good time statute in effect when the crimes were committed must be applied....[14]

Noting that the Petitioner's argument correctly stated the jurisprudence *before Olivieri*, the First Circuit stated the following:

> After Olivieri, the only relevant issues regarding a legislative change are "whether any such change alters the definition of criminal conduct or increases the penalty by which the crime is punishable." Olivieri, 779 So.2d at 744. *In other words, in a post-sentence context, once a sentence has been imposed on a defendant, any change in the law*

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[10] *State ex rel. Olivieri v. State*, 779 So.2d 735, 744 (La. 2001).
[11] 798 So.2d 419 (1st Cir. 2007).
[12] Emp. mine.
[13] *Id.* at p. 423.
[14] *Id.* at pp. 423-424.

> *that later occurs cannot be applied to that defendant to increase that sentence or penalty. Anything other than or less than this is not protected by the ex post facto clauses in the United States and Louisiana Constitutions.*[15]
>
> In the matter before us, the definition of the criminal conduct committed by Williams was not changed by the amendment to the good time statute that occurred after he committed that crime. The only question, therefore, is whether that change could be applied to Williams in such a way that it increased the penalty by which his crime ... was punishable. The district court imposed on him a sentence or penalty of twenty-five years for the second count of attempted aggravated rape. The court advised that, ... the sentence would not be increased.... After Williams was charged as a multiple offender, the original sentence ... was vacated, and a new sentence was imposed... That sentence was also twenty-five years. There was no increase in the penalty imposed on him. Rather, the change in the good-time statute simply removed the opportunity to take advantage of provisions for early release."[16FN8]
>
> Having reviewed the cited jurisprudence, we note that all the cases cited by Williams-as well as many other cases-unequivocally support his argument. However, none of these cases were decided after the Olivieri court narrowed the principles to be used in an *ex post facto* analysis."[17]

In conclusion, the First Circuit specifically noted, in a footnote, that changes in the laws governing "possible early release" would no longer fit the definition of ex post facto laws:

> "FN8. In *Olivieri*, the Louisiana Supreme Court cited *California Dept. of Corrections v. Morales*, 514 U.S. 499, 506 n. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), in which the United States Supreme Court had stated that "the focus of the *ex post facto* inquiry is not whether a legislative change produces some ambiguous sort of 'disadvantage,' nor, as the dissent seems to suggest, on whether an amendment affects a prisoner's ***opportunity* to take advantage of provisions for early release'** ... but on whether any such change alters the definition of criminal conduct or increases the penalty by which the crime is punishable." *Olivieri*, 779 So.2d at 743 (emphasis added)."[18]

Thus, to the question before the Court—whether the statute giving authority to forfeit good time, instead of denying prospective good time— is an ex post facto law, the answer must be "no", because it does not increase the sentence at all. Only the early release date may be affected, based on the Petitioner's behavior record while in prison. Therefore, based on the jurisprudence interpreting the constitutional parameters for ex post facto laws, a change in prison sanctions involving discipline and behavior of prisoners that does

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[15] *Id.* Emp. mine.
[16] *Id.* at p. 424.
[17] *Id.*
[18] *Id.*

not increase the actual penalty imposed by the trial court, does not appear any longer to be subject to a claim of ex post facto violation.[19]

For reasons stated, the Department's decision to deny restoration of all good time the Petitioner has forfeited in disciplinary board hearings while incarcerated should be affirmed as not in violation of the constitution or any of the Petitioner's statutory rights.

COMMISSIONER'S RECOMMENDATION

Therefore, after careful consideration of the administrative record, together with the memoranda filed and the law applicable, for reasons stated, it is the recommendation of this Commissioner that the Department's decision be affirmed, and the appeal dismissed with prejudice at the Petitioner's costs.

Respectfully recommended, this 4th day of September 2009, at Baton Rouge, Louisiana.

RACHEL P. MORGAN
COMMISSIONER, SECTION A
NINETEENTH JUDICIAL DISTRICT COURT

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE ~~WRITTEN REASONS/JUDGMENT~~/ORDER/ COMMISSIONER'S RECOMMENDATION WAS MAILED BY ME WITH SUFFICIENT ~~POSTAGE AFFIXED~~ TO: ALL PARTIES.
DONE AND SIGNED THIS 16 DAY OF Sept 20 09.
Deborah C. Bacy
DEPUTY CLERK OF COURT

FILED
SEP 04 2009
Deborah C. Bacy
DY. CLERK OF COURT
COMMISSIONER CT. SEC. A

[19] *Id.*