

# The Burger Court Opinion Writing Database

## *Weaver v. Graham*

450 U.S. 24 (1981)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 20, 1981

RE: 79-5780 - Weaver v. Graham

Dear Harry,

Please show me as joining you in this case.

Regards,

Justice Blackmun

Copies to the Conference



(4)

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

February 3, 1981

RE: No. 79-5780 Weaver v. Graham

Dear Thurgood:

I agree.

Sincerely,

*Bill*

Mr. Justice Marshall

cc: The Conference

OFFICE OF THE CLERK OF THE SUPREME COURT OF THE UNITED STATES  
LIBRARY OF CONGRESS



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

January 29, 1981

Re: No. 79-5780, Weaver v. Graham

Dear Thurgood,

I am glad to join your opinion  
for the Court.

Sincerely yours,

*PS*  

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Justice Marshall

Copies to the Conference

COMMISSIONERS OF THE MANUSCRIPTS DIVISION, LIBRARY OF CONGRESS

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 6, 1981

Re: 79-5780 - Weaver v. Graham

Dear Thurgood,

Please join me.

Sincerely yours,



Mr. Justice Marshall

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28 JAN 1981

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 79-5780

Hoyt Weaver, Petitioner,  
v.  
Robert Graham, Governor of  
Florida.

On Writ of Certiorari to the  
Supreme Court of Florida,

[February —, 1981]

JUSTICE MARSHALL delivered the opinion of the Court.

Florida, like many other States, rewards each convicted prisoner for good conduct and obedience to prison rules by using a statutory formula that reduces the portion of his sentence that he must serve. In this case, we consider whether a Florida statute altering the availability of such "gain time for good conduct"<sup>1</sup> is unconstitutional as an *ex post facto* law when applied to petitioner, whose crime was committed before the statute's enactment.

I

The relevant facts are undisputed. Petitioner pleaded guilty to second degree murder. The crime charged occurred on January 31, 1976. On May 13, 1976, petitioner was convicted and sentenced to a prison term of 15 years, less time already served. The State statute in place on both the date of the offense and the date of sentencing provided a formula for deducting gain time credits from the sentences "of every prisoner who has committed no infraction of the rules or reg-

<sup>1</sup> Fla. Stat. § 944.275 (1979); Fla. Stat. § 944.27 (1) (1975). At the time of petitioner's offense, Florida used the term "good time," to refer to extra "allowance for meritorious conduct or exceptional industry." Fla. Stat. § 944.29 (1976). The current Florida law adopts the phrase "gain time" to apply to various kinds of time credited to reduce a prisoner's prison term. See, e. g., Fla. Stat. § 944.275 (3) (1979)

30 JAN 1981

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 79-5780

Hoyt Weaver, Petitioner,  
v.  
Robert Graham, Governor of  
Florida. } On Writ of Certiorari to the  
Supreme Court of Florida.

[February —, 1981]

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pp.

23 FEB 1981

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5780

Hoyt Weaver, Petitioner,
v.
Robert Graham, Governor of Florida.
On Writ of Certiorari to the Supreme Court of Florida.

[February —, 1981]

JUSTICE MARSHALL delivered the opinion of the Court.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 25, 1981

MEMORANDUM TO THE CONFERENCE:

Re: Cases held for No. 79-5780 - Weaver v. Graham.

Three cases have been held pending our decision in Weaver.

The first, Besser v. Dunn, No. 79-5710, was a companion case of Weaver's. As Besser involves the same State gain time statute and the same treatment of the ex post facto claim, I recommend that we grant, vacate, and remand in light of Weaver.

The remaining two cases raise ex post facto challenges to application of federal parole guidelines to prisoners whose crimes occurred before the adoption of those guidelines. A similar challenge was raised but not reached last term in United States Parole Commission v. Geraghty, No. 78-572. Because we vacated the Geraghty decision, on different grounds, the conflict in the lower courts appears eliminated. The issue differs, of course, from Weaver in several respects: it involves federal parole guidelines, rather than state gain time provisions. Nonetheless, as in Weaver, the essential issue is a change in release eligibility after the date of the underlying offense. In Portley v. Grossman, 79-5885, a federal parole violator challenges application of new guideline setting a standard time period for incarceration before reparole; the guideline was not in effect when the petitioner's crime took place. CA 9 rejected petitioner's ex post facto challenge without reviewing whether the guideline is retroactive or disadvantageous to petitioner. I suggest that we grant, vacate, and remand Portley to permit review in light of Weaver.

Matthews v. United States, No. 79-6574 involved ex post facto challenges to both a statute and parole guidelines. Petitioner's sentence specified early eligibility for parole under a statute that was subsequently recodified, without substantive change. Because there was no substantive change, and because petitioner in fact received early review by the Parole Commission, no ex post facto violation under the statute is presented. Petitioner also challenged application of changed

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

Recirculated: \_\_\_\_\_

No. 79-5780

Hoyt Weaver, Petitioner,  
v.  
Robert Graham, Governor of  
Florida. } On Writ of Certiorari to the  
Supreme Court of Florida.

[February —, 1981]

JUSTICE BLACKMUN, concurring in the judgment.

Were the Court writing on a clean slate, I would vote to affirm the judgment of the Supreme Court of Florida. My thesis would be: (a) the 1978 Florida statute operates only prospectively and does not affect petitioner's credits earned and accumulated prior to the effective date of the statute; (b) "good time" or "gain time" is something to be earned and is not part of, or inherent in, the sentence imposed; (c) all the new statute did was to remove some of petitioner's hope and a portion of his opportunity; and (d) his sentence therefore was not enhanced by the statute. In addition, as the Court's 18th footnote reveals, *ante*, at 10, the statutory change by no means was entirely restrictive; in certain respects it was more lenient as the Court's careful preservation for this prisoner of the new statute's other provisions clearly implies. *Ante*, at 13, n. 22.

The Court's precedents, however, particularly *Lindsay v. Washington*, 301 U. S. 397 (1937), and the summary disposition of *Greenfield v. Scafati*, 277 F. Supp. 644 (Mass. 1967), aff'd, 390 U. S. 713 (1968), although not warmly persuasive for me, look the other way, and I thus must accede to the judgment of the Court.

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(5)

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 3, 1981

79-5780 Weaver v. Graham

Dear Thurgood:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Marshall

lfp/ss

cc: The Conference

U.S. SUPREME COURT LIBRARY AND COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

*M*

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: FEB 19 1981

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 79-5780

Hoyt Weaver, Petitioner,  
v.  
Robert Graham, Governor of Florida. } On Writ of Certiorari to the  
Supreme Court of Florida.

[March —, 1981]

JUSTICE REHNQUIST, concurring in the judgment.

I find this case a close one. As the Court recently noted, "It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law." *Dobbert v. Florida*, 432 U. S. 282, 294 (1977). Petitioner was clearly disadvantaged by the loss of the opportunity to accrue gain time through good conduct pursuant to the 5-10-15 formula when the legislature changed to a 3-6-9 formula. The new statute, however, also afforded petitioner opportunities not available under prior law to earn additional gain time beyond the good conduct formula.\* The case is not resolved simply by com-

\*While the Court points out that gain time was available under the old scheme beyond the 5-10-15 formula, *ante*, at 11, n. 19, I am not convinced that the new sources simply "reiterated" opportunities previously available. There is, for example, no dispute that several of the new sources of gain time have no analogues in the previous statutory or administrative scheme. See, *e. g.*, Fla. Stat. § 944.275 (2) (e) (1979) (up to six days of gain time per month because of age, illness, infirmity, or confinement for reasons other than discipline); *id.*, § 944.275 (3) (a) (up to six days per month for inmates who diligently participate in an approved course of academic or vocational study). Other new statutory provisions which had only administrative counterparts improved substantially on the availability of gain time. For example, under the old administrative system, an inmate could receive from 1 to 15 days of gain time per month for constructive labor, Fla. Admin. Code, Rule 10B-20.04 (1) (1975), while under the new statutory scheme an inmate can receive up to 1 day of gain time for every day of constructive labor, Fla. Stat. § 944.275 (2) (b).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

February 2, 1981

Re: 79-5780 - Weaver v. Graham

Dear Thurgood:

Please join me.

Respectfully,

*John*  
/nr

Justice Marshall

Copies to the Conference