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An Ex Post Facto Enigma: When Does Increased Incarceration Not Equate to Increased Punishment?

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AN EX POST FACTO ENIGMA: WHEN DOES INCREASED INCARCERATION NOT EQUATE TO INCREASED PUNISHMENT?

Calamia v. Singletary,
686 So. 2d 1337 (Fla. 1996)*

*Richard E. Mitchell***

Petitioner, a Florida prison inmate convicted of murder,[1] received "provisional credits"[2] under the statute in effect at the time of his offense.[3] In total, petitioner's credits operated to reduce his period of confinement by 420 days.[4] Subsequent to petitioner's offense, the Florida Legislature amended the provisional credit statute specifically to preclude convicted murderers from receiving credits.[5] Finding the legislature's mandate clear, the Florida Department of Corrections

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* *Editor's Note:* Prior to publication of this case comment, the United States Supreme Court vacated the Supreme Court of Florida decision upon which the comment is based. 117 S. Ct. 1309 (1997). Subsequently, the Supreme Court of Florida reversed its position on the issue, and granted the petitioners the requested writs. 694 So. 2d 733 (Fla. 1997). Although the Supreme Court of Florida decided to reinstate the petitioners' credits, the court did so in an extremely cursory opinion. It is our hope, therefore, that the legal analysis found in this case comment will contribute to the molding and articulation of Ex Post Facto Clause jurisprudence in Florida.

** This case comment is dedicated to my angel, Tracy McGuire, my parents, Robert and Marjorie Mitchell, and to the many influential friends and mentors I have been blessed to cross paths with in my life. They are, in order of appearance: Miguel Desdin, Jeff Vahle, Steve Burns, Chris Billings, Erin Wallace, Dave Barratt, Roger Arnold, Hobel Florido, and Professor Jeff Davis.

1. Calamia v. Singletary, 686 So. 2d 1337 (Fla. 1996). Petitioner, Russell Calamia, was charged with first-degree murder for a homicide committed January 3, 1986. After pleading nolo contendere to a reduced charge of second-degree murder, petitioner was sentenced to 20 years in prison, including a three-year minimum mandatory sentence for possession of a firearm. *See id.* at 1338.

2. *See id.* "Provisional credits" are awarded to prisoners when the correctional system reaches a specified percentage of its lawful capacity in order to alleviate overcrowding. *See* FLA. STAT. § 944.277 (Supp. 1992).

3. FLA. STAT. § 944.277 (Supp. 1988). This statute authorized the Secretary of Corrections to grant up to 60 days of provisional credits to inmates when the inmate population of the correctional system reached 97.5% of lawful capacity.

4. *Calamia*, 686 So. 2d at 1338.

5. *See* FLA. STAT. § 944.277(1)(e) (Supp. 1992).

cancelled petitioner's previously awarded credits and corresponding 420-day sentence reduction.[6]

In response, petitioner sought a writ of habeas corpus from the Supreme Court of Florida,[7] arguing that the amendment, as applied to him, violated the Ex Post Facto Clause of the United States and the Florida Constitutions.[8] Rejecting petitioner's ex post facto argument, the Court summarily denied the petition.[9] Thereafter, the United States Supreme Court vacated the denial of the petition,[10] and remanded the case for further consideration in light of its decision in *California Department of Corrections v. Morales*.[11]

The Supreme Court of Florida determined that *Morales* supported its prior decision, and again denied the petition.[12] The Court HELD, that the amendment, as applied to petitioner, does not violate the Ex Post Facto Clause because the provisional credit statute is "procedural in nature,"[13] and therefore not subject to ex post facto prohibitions.[14]

Generally, an ex post facto law is "[any] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed."[15] The purposes underlying the constitutional prohibition of ex post facto laws are to ensure that all citizens receive fair notice of laws and to prevent

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6. *See Calamia*, 686 So. 2d at 1338.

7. *Id.*

8. *See id.*; *see also* U.S. CONST. art. I, § 10, cl. 1 (stating that "[n]o State shall . . . pass any . . . ex post facto Law"); FLA. CONST of 1968, art. I, § 10 (stating that "[n]o . . . ex post facto law . . . shall be passed"); FLA. CONST. of 1968, art. X, § 9 (forbidding state legislature from enacting laws that "affect prosecution or punishment" for any offense previously committed).

9. *Calamia*, 686 So. 2d at 1338.

10. *Id.*

11. 514 U.S. 499 (1995).

12. *See Calamia*, 686 So. 2d at 1340-41. In denying the petition, the court refused to reinstate petitioner's provisional credits, reasoning, in part, that the reinstatement of the cancelled credits "would provide an unearned and unwarranted windfall to thousands of prisoners." *Id.* at 1341.

13. *See id.* at 1339 (quoting Dugger v. Rodrick, 584 So. 2d 2, 4 (Fla. 1991), *cert. denied*, 502 U.S. 1037 (1992)). The *Rodrick* court found that because the provisional credit statute is procedural in nature, it is not directed toward the traditional purposes of punishment and therefore not subject to ex post facto prohibitions. *See Rodrick*, 584 So. 2d at 4.

14. *Calamia*, 686 So. 2d at 1339 (citing Griffin v. Singletary, 638 So. 2d 500, 501 (Fla. 1994)). The *Griffin* court held that "the ex post facto clauses of both the federal and state constitutions did not prohibit the legislature from passing, nor the Department of Corrections from enforcing, legislation that limited or eliminated the availability of [provisional credits]." *Id.*

15. Marshall J. Tinkle, *Forward into the Past: State Constitutions and Retroactive Laws*, 65 TEMP. L. REV. 1253, 1256 (1992) (quoting BLACK'S LAW DICTIONARY 520 (5th ed. 1979)).

governmental bodies from acting arbitrarily or vindictively towards certain individuals or groups.[16]

In 1798, the United States Supreme Court first interpreted the Ex Post Facto Clause in the landmark case of *Calder v. Bull*.[17] More recently, in *Weaver v. Graham*,[18] the Court interpreted the Ex Post Facto Clause as it applied to a factual situation similar to the instant case.[19] In *Weaver*, the Court decided whether the retroactive application of a statutory amendment that decreased the availability of gain time credits to prisoners violated the Ex Post Facto Clause.[20] Under the statute in effect at the time of the petitioner's offense, gain time credits were awarded to prisoners at an increasing monthly rate that was directly related to each prisoner's time served.[21] Subsequent to the petitioner's crime, the Florida Legislature amended the statute to reduce the rate at which prisoners accumulated credits.[22] These lower rates were applied to all prisoners, including the petitioner.[23]

The petitioner in *Weaver* sought a writ of habeas corpus from the Supreme Court of Florida, but was denied relief.[24] Reversing,[25] the *Weaver* Court explained that a law is ex post facto if it makes the

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16. *See* Neil Colman McCabe & Cynthia Ann Bell, *Ex Post Facto Provisions of State Constitutions*, 4 EMERGING ISSUES IN ST. & CONST. L. 133, 133-34 (1991).

17. 3 U.S. (3 Dall.) 386 (1798). In the Supreme Court's original interpretation of the United States Constitution's Ex Post Facto Clause, the Court declared the following four categories of laws that are ex post facto violations:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 390.

18. 450 U.S. 24 (1980).

19. *See id.* at 26-27 (noting that the amount of gain time for which the petitioner would be eligible was decreased).

20. *See id.* at 25.

21. *See id.* at 26 (describing the calculation of gain time prescribed by FLA. STAT. § 944.27(1) (1975)).

22. *See id.* (comparing the original and the amended systems).

23. *See id.* at 27 (stating that the new provision was implemented on January 1, 1979, but that the Department of Corrections retroactively applied the new provision to all prisoners whose crimes occurred prior to the provision's enactment in 1978).

24. *See id.* at 27-28.

25. *See id.* at 36. The case was reversed and remanded. *See id.*

punishment "more onerous" for a crime committed before its enactment.[26] Applying this test to the facts in *Weaver*, the Court found that the amendment made petitioner's punishment more onerous by increasing his effective sentence by approximately two years.[27]

Further, the *Weaver* Court stressed that early release opportunities factor significantly into both plea bargaining decisions and sentence calculations.[28] In this light, the Court found that the gain time credit statute was a consideration in the petitioner's original punishment.[29] Thus, because the amendment made the punishment more onerous for a crime committed before its enactment, the Court held that the amendment, as applied to the petitioner, violated the Ex Post Facto Clause.[30]

Almost a decade later, the Court limited the *Weaver* test in *Collins v. Youngblood*.[31] In *Collins*, the Court decided whether the retroactive application of law to reform an improper jury verdict constituted an ex post facto violation.[32] At the end of a jury trial, respondent was sentenced to life imprisonment plus a $10,000 fine.[33] On appeal, this verdict was found improper because it imposed a fine in addition to imprisonment.[34] Under the law in effect at the time of his offense, respondent was entitled to a new trial as a result of the improper

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26. *See id.* (stating that the added burden placed on petitioner violated ex post facto proscriptions).

27. *See id.* at 27. Petitioner's tentative release date, as established under FLA. STAT. § 944.27 (1975), was set for December 31, 1984. The State calculated that application of the new gaintime provision starting with its effective date resulted in a projected release date of February 2, 1987. The increase in petitioner's period of confinement amounted to 14% of his original 15-year sentence. *See id.* at 27 n.4. *Accord* Dobbert v. Florida, 432 U.S. 282, 293-94 (1976) (holding that a statute did not violate the Ex Post Facto Clause because it did not change the "quantum of punishment" attached to a crime).

28. *See Weaver*, 450 U.S. at 32 (citing Wolff v. McDonnell, 418 U.S. 539, 557 (1974)). The Court refused to determine whether the prospect of gain time was part of petitioner's sentence in a technical sense. Instead, the Court concluded that gain time is in fact one determinant of petitioner's prison term, and that petitioner's effective sentence was altered once this determinant was changed. *See id.*

29. *See id.* at 32; *see also* Lindsey v. Washington, 301 U.S. 397, 401-02 (1937) (finding that "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of [their prison] term").

30. *See Weaver*, 450 U.S. at 36.

31. 497 U.S. 37 (1989).

32. *See id.* at 39.

33. *Id.*

34. *See id.* At the time of respondent's offense, the Texas Code of Criminal Procedure did not authorize a jury to impose a fine in addition to a term of imprisonment for respondent's offense. *See id.*

verdict.[35] However, while respondent's appeal was pending, the state legislature enacted a law authorizing the state courts to reform improper verdicts rather than requiring them to grant new trials.[36] Pursuant to this law, the trial court denied respondent's request for a new trial, and instead reformed his sentence by deleting the fine.[37] Respondent asserted that the trial court's reformed verdict constituted an Ex Post Facto Clause violation, and sought a writ of habeas corpus from the federal courts system.[38] The district court found that no ex post facto violation had occurred because respondent's punishment was not increased.[39] The court of appeals reversed the district court decision, and found that retroactive application of the statute to respondent violated the Ex Post Facto Clause.[40]

The *Collins* Court disagreed,[41] and explained that a law is ex post facto if it retroactively alters the definition of a crime or increases the punishment attached to a crime.[42] Applying this test to the facts in *Collins*, the Court held that the law did not violate the Ex Post Facto Clause because it merely altered adjudication procedures in criminal cases rather than impacting substantive rights.[43] The Court stressed, however, that a law is not shielded from an ex post facto challenge simply because it carries a "procedural" label.[44]

Recently, the Court applied *Collins* and *Weaver* in *California Department of Corrections v. Morales*.[45] In *Morales*, the Court decided whether the retroactive application of an amendment authorizing a decrease in the frequency of a prisoner's parole hearings constituted an ex post facto violation.[46] Respondent, a California prison inmate twice convicted of murder,[47] was entitled to annual parole hearings under the

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35. *See id.*; *see also* Bogany v. State, 661 S.W.2d 957 (1983) (ruling that a verdict imposing a fine in addition to imprisonment was void and entitled the defendant to a new trial).

36. *See Collins*, 497 U.S. at 40. The new statute specifically was enacted to modify the decision reached in *Bogany*, 661 S.W.2d at 957, by allowing the state courts to reform the jury verdict. *See id.* at 39-40.

37. *Id.* at 40.

38. *See id.*

39. *See id.*

40. *See id.*

41. *Id.* at 52.

42. *See id.* at 42 (quoting Beazell v. Ohio, 269 U.S. 167 (1925)).

43. *See id.* at 45 (promoting the position that a law labeled "procedural," can be ex post facto if it infringes on substantive rights).

44. *See id.* at 46 (summarizing the Court's discussion of the distinction between procedural and substantive laws).

45. 514 U.S. 499 (1995).

46. *See id.*

47. *Id.*

statute in effect at the time of his second offense.[48] Subsequent to the respondent's offense, the state legislature passed a statutory amendment authorizing the state parole board to defer the parole hearings of multiple murderers for up to three years in order to improve the board's efficiency.[49] Pursuant to this amendment, the parole board deferred respondent's second parole hearing for three years.[50]

Lowering the threshold of unconstitutionality set forth in *Weaver* and *Collins*, the *Morales* Court stated that a law is ex post facto if it merely produces a "sufficient risk" of increasing the punishment attached to a crime committed before its enactment.[51] Applying this modified test to the facts in *Morales*, the Court found that the deferral of the respondent's hearing failed to produce a sufficient risk of increasing respondent's punishment.[52] Reasoning that the likelihood of parole for a multiple murderer was remote,[53] the Court found that, at most, the deferral created a "highly speculative" and "attenuated risk" of increasing respondent's punishment.[54]

The Court further explained that a prisoner's parole release date does not arrive until several years after the prisoner is found suitable for parole.[55] In this light, the Court found that respondent's deferral was not likely to extend his actual period of confinement.[56] Indeed, the Court stated "that there [was] *no* reason to think that [the postponed

48. *See id.* at 503 (describing the parole hearing procedural in effect at the time of respondent's offense).

49. *See id.* The amendment expressly required that, before deferring a prisoner's subsequent parole hearing, the board must find it unreasonable to expect that parole would be granted at a hearing during the following years, and state the basis for its finding. *See* CAL. PENAL CODE § 3041.5(b)(2) (West 1982). The Court found that the amendment was enacted to allow the parole board to avoid the futility of going through the motions of reannouncing its denial of parole suitability on a yearly basis. *See Morales*, 514 U.S. at 503.

50. *See Morales*, 514 U.S. at 503.

51. *Id.* at 509.

52. *See id.*; *see generally* Dobbert v. Florida, 432 U.S. 282, 294 (1976) (refusing to accept mere speculation that the effective punishment under a new statutory scheme would be "more onerous" than under the old one).

53. *See Morales*, 514 U.S. at 511-12. Indeed, while the current action was pending, respondent appeared before the parole board and was again found unsuitable for parole. After the board determined that it was not reasonable to expect that respondent would be found suitable for parole at the following two annual hearings, respondent's next hearing was again deferred for three years. *Id.* at 504 n.2.

54. *See id.* at 514.

55. *Id.* at 513. The Court reasoned that the possibility of immediate release after a finding of suitability is largely theoretical. *See id.* (citing *In re* Jackson, 703 P.2d 100, 106 (Cal. 1985)).

56. *See id.* (stating that the release date of a prisoner who proves himself to be suitable for parole will not be affected by an alteration in the timing of suitability hearings).

hearing] would extend *any* prisoner's actual period of confinement."[57] Accordingly, the Court held that the amendment, as applied to the respondent, did not violate the Ex Post Facto Clause because the deferral did not produce a sufficient risk of increasing the punishment attached to respondent's crime.[58]

In the instant case, the Supreme Court of Florida found that the provisional credit statute is "procedural in nature" because it is an administrative tool for alleviating prison overcrowding.[59] The court reiterated its historic position that early-release credits are granted only as a procedural measure.[60] Granting the amendment refuge under *Collins* as a "procedural" law,[61] the court held that the amendment, as applied to the petitioner, does not violate the Ex Post Facto Clause because its procedural nature protects it from ex post facto challenges.[62]

The instant court supported this holding with the following line of reasoning: Provisional credits are only awarded if a prison becomes overcrowded.[63] Because prison overcrowding is driven by many outside variables, there is no guarantee that a prisoner will ever receive provisional credits.[64] Because their receipt is purely speculative, provisional credits bear no relationship to the original or ultimate punishment attached to petitioner's crime.[65] As a result, the cancellation of petitioner's credits is not an ex post facto violation because the cancellation does not increase the original or ultimate punishment attached to petitioner's crime.[66]

However, the instant court's reasoning ignores several important facts. First, the prison system *did* become overcrowded while petitioner

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57. *Id.* (emphasis added).

58. *Id.* at 514.

59. *See Calamia*, 686 So. 2d at 1339 (citing *Griffin*, 638 So. 2d at 501).

60. *See id.* (quoting *Rodrick*, 584 So. 2d at 4).

61. *See id.* at 1340 (quoting *Morales*, 115 S. Ct. at 1602 n.3).

62. *Id.* at 1341.

63. *See id.* at 1338; *see also* Dugger v. Grant, 610 So. 2d 428, 430 (Fla. 1992) (holding that administrative gain time statutes were not enacted for the benefit of prisoners; rather, the statutes were merely part of a procedure utilized by the Department of Corrections to alleviate prison overcrowding when the lawful capacity of the prison system reaches 97.5%).

64. *See Calamia*, 686 So. 2d at 1339 (quoting *Rodrick*, 584 So. 2d at 4 (reasoning that the eligibility and receipt by a prisoner of provisional credits for prison overcrowding is in no way tied to overall length of sentence because such awards are contingent and dependent upon many outside variables)).

65. *See id.* (implying that provisional credits are not a quantitative element of a prisoner's sentence).

66. *See id.*

was incarcerated.[67] Second, petitioner *did* receive provisional credits that reduced his period of confinement by a total of 420 days.[68] Third, the amendment was enacted after petitioner's offense and was retroactively applied to him.[69] Finally, the cancellation of petitioner's credits increased his period of confinement by 420 days.[70]

These facts support the conclusion that the amendment in the instant case violates the Ex Post Facto Clause. For example, under *Weaver*, a law violates the Ex Post Facto Clause if it makes the punishment "more onerous" for a crime committed before its enactment.[71] A straightforward application of this test shows the amendment's unconstitutionality.[72] First, it is undisputed that the amendment was enacted after the date of petitioner's offense.[73] Second, the amendment clearly makes petitioner's punishment "more onerous" by increasing his period of confinement, or his "effective sentence," by 420 days.[74]

The reasoning of the *Morales* Court strengthens this conclusion. Under *Morales*, a law violates the Ex Post Facto Clause if it produces a sufficient risk of increasing the punishment attached to a crime committed before its enactment.[75] In applying this test, the *Morales* Court stressed that a merely speculative or attenuated risk of increasing punishment does not render a law unconstitutionally ex post facto.[76]

In the instant case, the risk of increasing petitioner's punishment was neither speculative or attenuated.[77] On the contrary, the risk of increasing petitioner's punishment was unequivocally realized in his 420-day sentence increase.[78] Because the amendment goes well beyond the

67. *See id.* at 1338 (reporting that credits had been awarded to petitioner due to overcrowding).

68. *Id.*

69. *See id.* Petitioner's offense occurred on January 3, 1986. The amendment which authorized the cancellation of petitioner's credits was enacted on January 1, 1990. *See id.*

70. *See id.* at 1343 (Harding, J., dissenting) (stating that "[i]n plainest terms, the sections resulted in a recalculation of release dates which lengthened the amount of time affected prisoners would spend incarcerated").

71. *See Weaver*, 450 U.S. at 33 (stating the idea that a retrospective law can be applied only if it is not to an affected person's detriment).

72. *Calamia*, 686 So. 2d at 1343 (Harding, J., dissenting) (asserting succinctly that the revocation of petitioner's credits "constitutes a textbook ex post facto violation").

73. *See id.*

74. *See id.*

75. *See Morales*, 514 U.S. at 509.

76. *See id.* at 509, 514. The *Morales* Court stated that "conjectural effects are insufficient under any threshold" used to evaluate whether a statute violates the Ex Post Facto Clause. *Id.* at 509.

77. *See Calamia*, 686 So. 2d at 1338; *see also supra* note 74 and accompanying text.

78. *See Calamia*, 686 So. 2d at 1338.

Morales threshold, its application to the petitioner is an ex post facto violation.

The amendment also finds no refuge under *Collins*. Unlike the statute in *Collins*, which simply altered adjudication procedures,[79] the provisional credit statute directly impacts petitioner's substantive rights.[80] As the *Collins* Court made clear, the constitution prohibits any law that increases the punishment attached to a crime committed before the law's enactment, regardless of its form.[81]

In the instant case, the amendment impacts petitioner's substantive rights by increasing the length of time that he will be deprived of his liberty.[82] As emphasized by the *Weaver* Court, early release opportunities factor significantly into the calculation of how long a person's liberty will be withheld.[83] Because the amendment directly impacts petitioner's substantive rights by depriving him of his liberty, *Collins* supports the conclusion that the amendment's application violates the Ex Post Facto Clause even though it takes an arguably procedural form.[84]

The instant court erred by failing to recognize that "it is the effect, not the form, of the law that determines whether it is ex post facto."[85] Shielding the amendment from ex post facto prohibitions by donning it with "procedural" garb,[86] the instant court ignored the plain fact that the retroactive cancellation of petitioner's credits unequivocally increased the punishment for a crime committed before its enactment.[87]

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79. *See Collins*, 497 U.S. at 45. The *Collins* Court distinguished changes in criminal adjudication procedures from changes that alter the substantive law of a crime. *See id.*

80. *See Calamia*, 686 So. 2d at 1344 (Harding, J., dissenting). The dissent reasoned that "[e]ven though the credits here may be called 'administrative,' they factored into [petitioner's sentence] exactly as incentive and basic gain-time did." *Id.* Further, the provisional credit statute "called for calculation of . . . [petitioner's] release date based on the credits [petitioner received], and established a scheme for the DOC to follow in releasing inmates from incarceration." *Id.*

81. *See Collins*, 497 U.S. at 46 (citing *Beazell*, 269 U.S. at 170).

82. *See Calamia*, 686 So. 2d at 1344. The dissent stated that "[c]learly, provisional credits affect substantive rights." *Id.*; *see also* U.S. CONST. amend XIV, § 2 ("[N]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law.").

83. *See Weaver*, 450 U.S. at 32; *see also supra* note 28.

84. *See Calamia*, 686 So. 2d at 1344 (Harding, J., dissenting) (quoting *Weaver*, 450 U.S. at 29 n.12).

85. *Weaver*, 450 U.S. at 31 (rejecting respondent's argument that the statute was not effectively retroactive because it applied only prospectively).

86. *See Calamia*, 686 So. 2d at 1339 (quoting *Rodrick*, 584 So. 2d at 4). In *Rodrick*, the Court distinguished provisional credits from basic gain time and incentive credits by reasoning that, unlike the other types of credits, provisional credits are not quantifiable elements of the length of a prisoner's original sentence. *See Rodrick*, 584 So. 2d at 4.

87. *See Calamia*, 686 So. 2d at 1338.

Fortunately, the logic used by the instant court in reaching its conclusion recently was rejected by the United States Supreme Court in *Lynce v. Mathis*, a case factually similar to the instant case.[88] As a result, in future cases, the Florida court must determine whether a law is unconstitutionally ex post facto based on its substantive effect rather than its apparent form.

88. Lynce v. Mathis, 116 S. Ct. 1671 (1996).