OA 7-1-87

IN THE SUPREME COURT OF FLORIDA

DAVID TAL-MASON,	)	
	)	
Petitioner,	)	CASE NO. 69,508
	)	
vs.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

APPEAL FROM THE DISTRICT COURT
OF APPEAL, FOURTH DISTRICT OF FLORIDA

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, David Tal-Mason, is legally committed to the custody of the Florida Department of Corrections under a sentence of life imprisonment. (R 40)

Mr. Tal-Mason was arrested on June 30, 1977, on charges of first degree murder and two counts of grand larceny. He was subsequently indicted on July 26, 1977 in Case number 77-4084-CF. (R 41). On December 9, 1977, the trial court ordered him committed to the Department of Health and Rehabilitative Services (DHRS) for an evaluation of his competency to stand trial. (R 41). Mr. Tal-Mason was transferred to the forensic unit of the South Florida State Hospital and in January of 1978, was found to be mentally incompetent to stand trial. (R 41). Between 1979 and 1981, he returned to court on three separate occasions where his continued incompetence was affirmed. (R 41).

In April of 1982, he was transferred to the North Florida Evaluation and Treatment Center in Gainesville. (R 41).

After having spent a total of 5 years, 27 days in the custody of DHRS, Mr. Tal-Mason was found competent to stand trial on March 29, 1983. (R 42). On August 8, 1983, he pled guilty to the charge of second degree murder and was given a life sentence by the trial court. (R 42).

On January 22, 1985, Mr. Tal-Mason filed a post-conviction motion in the Circuit Court of the 17th Judicial Circuit, pursuant to Fla. R. Crim. P. 3.850. (R 21-36). In it, he requested credit for all time spent in custody before trial. Specifically, he alleged he had spent 1 year and 13 days in county jail

awaiting trial but received credit for only one year. He additionally requested the 5 years and 27 days spent in State mental institutions which is the centerpiece of the relief sought herein. (R 21-36).

The Circuit Court granted the motion, insofar as the 13 days went, but denied credit for time spent in the two State mental hospitals. (R 38-39).

Mr. Tal-Mason then filed a Motion for Rehearing seeking credit for the 5 years and 27 days spent in State mental institutions. Oral argument on this motion were presented on July 10, 1985. (R 40).

A final judgment was then entered by the Circuit Court in the form of an Order on Rehearing granting the relief requested by Mr. Tal-Mason. (R 40-45). This relief consisted of crediting the additional 5 years and 27 days he had spent in State mental institutions as a pre-trial detainee towards his sentence. The reasoning was that Section 921.161(1), Florida Statutes, violated his rights to equal protection and due process under the fourteenth amendment to the Federal Constitution and Article I, §2 and §9 of the Florida Constitution. State v. Tal-Mason, 11 Fla. Supp. 2d 173 (Fla. 17th Cir. Ct. 1985).

The State appealed to the Fourth District Court of Appeal. On August 20, 1986, the Fourth District Court of Appeal reversed the ruling of the Circuit Court relying on this Honorable Court's decision in Pennington v. State, 398 So.2d 815 (Fla. 1981).

A Motion for Rehearing was timely filed by Mr. Tal-Mason, which was denied on September 18, 1986. State v. Tal-Mason, 492 So.2d 1179 (Fla. 4th DCA 1986). Notice of Intent to Invoke Discretionary Review was filed with the

Fourth District Court of Appeal on October 17, 1986, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(i) and (ii).

Review of the District Court's decision specifically upholding the validity of Section 921.161(1), Florida Statutes, over Mr. Tal-Mason's constitutional challenges was granted by this Honorable Court in an Order dated March 11, 1987.

SUMMARY OF ARGUMENT

I

The interplay of the Mentally Disordered Sex Offender (MDSO) statute [Section 917.218, Florida Statutes (1977), now Section 917.014, Florida Statutes], with this Court's interpretation of Section 921.161(1), Florida Statutes, creates two classes of pretrial criminal defendants who are treated differently for equal protection purposes.

In the first group are those pretrial detainees who were committed to State mental hospitals, prior to imposition of sentence, under the MDSO program. The second group consists of those committed to those same State hospitals, also prior to sentencing, for some other type of mental deficiency. The former group received credit for their presentencing confinement per the mandate of the MDSO statute. Section 917.218, Florida Statutes (1977).

Having no such statute directly applicable to their presentence incarceration, the latter group of mentally deficient detainees is denied jail time credits resulting in a disparity of treatment of similarly situated individuals.

In specifically upholding the constitutionality of Section 921.161, Florida Statutes, the Fourth District Court of Appeal relied exclusively on this Court's decision in Pennington v. State, supra. The basis for this reliance appears grounded on Pennington's reasoning which seems to apply to all treatment programs regardless of the purpose or degree of confinement.

However, because the MDSO statute precludes the uniform application of Pennington by requiring the crediting of presentence confinement to MDSO

offenders, Mr. Tal-Mason asserts this reasoning, based on purpose rather than effect, is a violation of his right to the equal protection of the law.

Moreover, any decision by this Honorable Court as to the claims asserted by Mr. Tal-Mason should take into account the growing trend throughout other jurisdictions awarding jail-time credits in this context for exactly the same constitutional considerations herein.

II

Additionally, it is Mr. Tal-Mason's contention that current practices under Section 921.161, Florida Statutes, are fundamentally unfair and thus violate his rights to due process of law.

The record is crystal clear that, unlike pretrial detainees such as Mr. Tal-Mason, jail time credits are uniformly awarded those defendants for time spent in the criminal wards of State hospitals for physical illnesses.

Given this factual scenario, Mr. Tal-Mason asserts there is no compelling State interest which justifies this disparate treatment. Conceeding that the State does have a legitimate interest in assuring a defendant's competency to stand trial, even this objective falls short of justifying a process that needlessly chills a pre-trial detainee's exercise of his constitutional right to due process.

To state the argument simply: As a matter of constitutional law, jail time credit should be awarded a defendant for all incarcerative time served in connection with a criminal charge for which he is eventually sentenced.

ARGUMENT

I.

The Interplay Of Section 917.218, Florida Statutes, (1977), With This Honorable Court's Interpretation Of Section 921.161(1), Florida Statutes, In Pennington v. State, 398 So.2d 815 (Fla. 1981), Violates Petitioner's Rights To Equal Protection Of The Law.

Florida law requires a sentencing court to give credit for time spent in county jail prior to trial. Section 921.161(1), Florida Statutes. If this statute is interpreted to deny credit against a sentence for pre-trial time spent in a State mental hospital pursuant to a criminal charge, then the issue becomes whether a defendant who is mentally incompetent to stand trial can constitutionally be forced to spend more time in confinement than a defendant who is competent to stand trial. To single these people out as a class from the larger mass of pre-trial detainees is a denial of equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 to the Florida Constitution.

In upholding the validity of the jail time statute, the appellate court below relied exclusively on this Honorable Court's decision in Pennington. There, this Court reasoned that persons in jails were not similarly situated with those confined in state hospitals or treatment centers and were thus subject to disparate treatment without resort to equal protection analysis. In the words of this Honorable Court:

> Halfway houses, rehabilitative centers, and state hospitals are not jails. Their purpose is structured rehabilitation and treatment, not incarceration.

Pennington, supra, 398 So.2d at 817.

Based on the above reasoning, this Court refused to extend a broad reading of the statute to include types of pretrial confinement other than county jail. Id. This reasoning is grounded in the purpose of the pretrial confinement. However, the constitutional reality of Mr. Tal-Mason's treatment in comparison to other pre-trial detainees also confined for treatment purposes is persuasive argument that the effect of the confinement rather than the purpose should be the determinitive factor of whether or not to grant credit.

Examples of this disparate treatment are as follows:

1. If a defendant's illness is physical rather than mental, he will automatically be credited with the time spent in the criminal wards of a hospital prior to trial. (R 42).

2. If a defendant's mental illness was manifest as a Mentally Disordered Sex Offender (MDSO), then the defendant received credit. Section 917.218, Florida Statutes (1977). If the mental illness was (or is) of a different type, then the defendant will not receive credit. The type of mental illness is out of the control of the defendant. To deny him the same benefits because of the type of mental deficiency is an unconstitutional disparity in treatment between the types of mental illness which are awarded pre-trial credit.

3. If a defendant becomes mentally unstable after being sentenced rather than before trial, he will receive credit for time spent in recovering in the State mental hospital. Section 917.014, Florida Statutes. The time of appearance of mental illness is an event out of control of a defendant. To deny him the same benefits because of the timing of his mental illness is reading into the law an unreasonable and unintended distinction. Additionally, it would seem illogical

that a different result should follow from the mere circumstance that a defendant was removed to the mental hospital while being held in jail instead of the Department of Corrections, especially in light of the fact that the Florida Legislature has indicated that jails are to be treated in the same way as penal institutions insofar as credit is concerned. Section 921.161(1), Florida Statutes.

The most telling distinction by far, however, relates to the interplay of the MDSO statute with this Court's reasoning under Pennington. The significance of this interplay was highlighted in the concurring opinion in the appellate court below when Judge Anstead remarked that "Pennington failed to address ... [Mr. Tal-Mason's] constitutional claims". State v. Tal-Mason, 492 So.2d at 1183.

The MDSO statue [Section 917.218, Florida Statutes (1977) at the time of Mr. Tal-Mason's conviction], mandated that time served in the treatment programs of the DHRS under an adjudication as a mentally disordered sex offender "shall be considered credit for time served for any sentence imposed ... ." Id. As a result, this section has repeatedly been held to require that credit be granted towards a sentence for any time spent in a state mental hospital under commitment as a Mentally Disordered Sex Offender. Cawthorne v. State, 371 So.2d 1099 (Fla. 1st DCA 1979); Abraham v. State, 382 So.2d 382 (Fla. 3rd DCA 1980); Stafford v. State, 380 So.2d 538 (Fla. 5th DCA 1980).

The concurring opinion below notes:

> it appears that the supreme court's holding in Pennington was intended to apply to all treatment programs, regardless of the degree of confinement.

State v. Tal-Mason, 492 So.2d at 1181-82. Thus, it is appropriate to evaluate the above distinctions under equal protection analysis to determine if the broad reasoning of Pennington overcomes the constitutional challenges herein.

The first step in equal protection analysis is to identify the classes of persons who are similarly situated. To do this, the court looks to the purpose of the law. If the two classes are similarly situated, then disparate treatment is constitutionally valid only if it is rationally related to furthering a legitimate state interest. Clements v. Fashing, 457 U.S. 957, 963, 102 S.Ct. 2836, 2843 (1982), reh'g denied, 458 U.S. 1133, 103 S.Ct. 20 (1982). In the instant case, a defendant's statutory right to credit for all pre-trial detention under Section 921.161(1), Florida Statutes, constitutes a protected liberty interest, and as such should be analyzed under the intermediate standard which is triggered by an important, but not fundamental, right. Wolff v. McDonnell, 418 U.S. 539, 556-57, 94 S.Ct. 2963, 2974-75 (1974). This standard requires the State to show that the discretionary classification is substantially related to achievement of an important governmental concern.

In amending Section 921.161(1), Florida Statutes (effective May 28, 1973), the Legislature intended that credit be mandatory. The Senate Committee on Criminal Justice Staff Memorandum on House Bill 693 (May 1973), noted various problems which had occurred under Section 921.161 and said:

> Staff is of the opinion that this bill would do much to further justice in our criminal justice system. Because of the backlog in our courts, many defendants spend months awaiting trial and then additional time awaiting sentence after conviction.
>
> To sentence an offender and not give credit for any prior time spent awaiting trial and/or sentencing

> seems to be double punitive. Though present statue allows credit to be given, staff is of the opinion that credit should mandatorily be given.

(Appendix, p. i-ii).

The written record is silent on the question of crediting time spent in treatment programs and mental hospitals. It is clear, however, that the statute is remedial in nature. The Committee Memorandum speaks to all types of confinement attributable to underlying criminal transactions, and not just the label of "county jail".

A mentally ill defendant technically continues to be in jail while in custody at the hospital. Once adjudicated incompetent to stand trial, he is committed to the forensic unit of the State mental hospital (maximum security conditions) and cannot be released without further written order of the court. Fla. R. Crim. P. 3.212 and 3.213; Section 916.13, Florida Statutes. This procedure requires a criminal proceeding, suspension of the criminal proceeding until a legal issue (mental capacity) is resolved, and confinement until the defendant stands trial.

The defendant is at all times under the jurisdiction and authority of the court: he has no control over his place of custody; he has his liberties restrained during confinement; he is never free to leave the hospital; and, in the event he escapes and is recaptured, he is returned to the hospital or county jail subject to prosecution for a second degree felony. Section 917.018, Florida Statutes. A hospital which has the facilities to enforce confinement of their patients does so within the common and every day definition of "jail".

At the federal level the Supreme Court of the United States has recognized that a mental health treatment center imposes limitations on freedom, but that:

> Such consequences visited on the prisoner [within a mental institution] are qualitatively different from the punishment characteristically suffered by a person convicted of a crime.

Vitek v. Jones, 445 U.S. 480, 493, 100 S.Ct. 1254, 1264 (1980).

Mr. Justice Brennan's dissent in Jones v. United States, 463 U.S. 354, 384-85, 103 S.Ct. 3043, 3060-61 (1983), joined in by Mr. Justice Marshall and Mr. Justice Blackmun recognizes:

> In many respects, confinement in a mental institution is even more intrusive than incarceration in a prison. Inmates of mental institutions, like prisoners, are deprived of unrestricted association with friends, family, and community; they must contend with locks, guards, and detailed regulation of their daily activities. In addition, a person who has been hospitalized involuntarily may to a significant extent lose the right enjoyed by others to withhold consent to medical treatment . . . The treatments to which he may be subjected include physical restraints such as straightjacketing, as well as electroshock therapy, aversive conditioning, and even in some cases pyscho-surgery. Administration of psychotropic medication to control behavior is common . . . Although this Court has never approved the practice, it is possible that an inmate will be given medication for reasons that have more to do with the needs of the institution than with individualized therapy.

This Honorable Court must give the statute in question, Section 921.161(1), Florida Statutes, an interpretation based on the legislative intent with which it was passed. "County jail" must be given its commonly understood meaning as a place of confinement pursuant to a criminal charge, and not just

the local bastile. Such an interpretation is consistent with Fla. Admin. Code Rule 23-21.011, which provides the method for calculating the time spent in pre-trial detention for parole purposes. The administrative definition of time spent "in actual physical custody" focuses on deprivation of liberty, not on any legal status.

Pre-trial detainees, in State mental hospitals, and in the county jails, constitute classes of persons who are similarly situated for the purpose of equal protection analysis. In the decision of the circuit court below, Judge Spieser noted:

> It is a denial of the equal protection of the law to grant such sentence credit on the basis of the type of mental illness or deficiency, or to discriminate between physical and mental illness, when such illness or deficiency is out of the control of a defendant. There is no legal difference, or shouldn't be, between a broken leg and a "broken head" when it comes to time credited toward sentence. Art. I, Section 2, Florida Constitution; United States Constitution Amendment XIV. This is the exact position adopted by the Supreme Court of Washington in an en banc decision, which this court finds is persuasive authority in the issue. [citing to Matter of Knapp, 687 P.2d 1145, 102 Wash.2d 466 (1984)].

State v. Tal-Mason, 11 Fla. Supp. 2d 173, 176 (Fla. 17th Cir. Ct. 1985).

It is clear that the two classes have been subject to disparate treatment since pre-sentence detainees in county jails and hospitals for physical illnesses receive credit while pre-sentence detainees in mental hospitals do not. The State must, therefore, proffer a substantial governmental concern or, alternatively, a rational reason, relating to a legitimate state interest for denying credit to pre-sentence inmates in mental hospitals. From the

perspective of the prisoner, the distinction between pre-trial preventative detention for treatment, post-sentencing preventative detention for treatment, and post-sentencing detention for punishment is meaningless; in all three situations he faces the same loss of freedom. Stafford, supra, 380 So.2d at 539.

The Supreme Court of the United States has made it clear that one may not be deprived of the protections guaranteed to those incarcerated in a traditional penal institution simply because confinement is for purposes of "treatment" rather than punishment. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 92 S.Ct. 2083 (1972); Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845 (1972); Application of Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967). Until Gault, juveniles accused of delinquency were deprived of significant procedural and substantive rights because courts chose to label the proceedings leading to their confinement as "clinical" rather than "punitive". The Court noted:

> It is of no constitutional consequence - and of limited practical meaning - that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, ... the child is incarcerated for a greater or lesser time.

Id. at 27, 87 S.Ct. at 1443.

The State's interest in pre-trial custody of a defendant who is mentally incompetent to stand trial is to insure that he has the ability to consult with his attorney and has an understanding of the proceedings against him. Section 916.12, Florida Statutes. A second consideration is that without care and treatment, he poses a threat of harm to himself or others. Section 916.13, Florida Statutes. Neither interest has a rational nexus with the denial of credit

for time spent in pre-trial confinement in a mental hospital. The "distinction" between a mental hospital and county jail is artificial since the effect on the individual, a substantial loss of liberty, is the same. The constitutional right of equal protection of the law must not be defeated by such a hollow legal fiction.

As a matter of statutory construction, the only real issue is whether a suspect adjudicated incompetent will receive the same presumption of innocence that the above illustrated pre-trial detainees enjoy. It was the fulfillment of these constitutional considerations which led Florida's legislature to amend Section 921.161(1), Florida Statutes, so that the credit of pre-trial incarceration would be mandatory rather than discretionary. While conceeding that application of this statute is restricted to "only Florida jails", Kronz v. State, 462 So.2d 450 (Fla. 1985), to pass constitutional muster, the term "county jail" must be applied to include all State operated institutions where pretrial detainees are incarcerated pursuant to alleged criminal transactions.

As a matter of persuasive authority, Mr. Tal-Mason would direct this Honorable Court's attention to the growing trend in other jurisdictions which support awarding credit under similar scenarios for exactly the same constitutional considerations.

The Supreme Court of Washington has taken the position that mandatory sentencing credits shall be applied for hospital confinement as well as jail. Denial of such credits based on mental illnesses or deficiencies outside the control of the defendant represents a denial of equal protection when State statutes are in place for granting such credits. Matter of Knapp, 102 Wash. 2d 466, 687 P.2d 1145 (1984) (en banc). It should be noted that the circuit court

below found Knapp to be sufficient persuasive authority to warrant granting relief. State v. Tal-Mason, 11 Fla. Supp. 2d 173, 176 (Fla. 17th Cir. Ct. 1985).

Even without the statute, Washington has extended the rights to such credits based on purely constitutional considerations Reanier v. Smith, 83 Wash. 2d 342, 517 P.2d 949 (1974); In re Phelan, 97 Wash. 2d 590, 647 P.2d 1026 (1982) (time served as condition of probation); State v. Phelan, 100 Wash. 2d 508, 671 P.2d 1212 (1983) (en banc) (discretionary as well as mandatory prison terms).

Where such a credit statute is in place, other jurisdictions have similarly attached broad interpretations. See, State v. LaBadie, 87 N.M. 391, 534 P.2d 483 (N.M. App. 1975); People v. Gravlin, 52 Mich. App. 467, 217 N.W. 2d 404 (1974); Hart v. State, 588 S.W. 2d 226 (Mo. App. 1979).

In People v. Cowsar, 40 Cal. App. 3d 578, 115 Cal. Rptr. 160 (1974), it was held that the credit statute must be broadly interpreted in order "to avoid an unconstitutional disparity in treatment between those confined in jail and in a state hospital prior to trial". Id. at 581, 115 Cal. Rptr. at 161. This would seem correct since confinement, penal or not, represents being in State "custody". See, also, Lock v. State, 609 P.2d 539 (Alaska 1980). Such reasoning focuses on the extent that a defendant is deprived of his freedom of movement.

As noted by Judge Anstead in his concurring opinion below:

> The common thread running through these decisions is that no meaningful distinction can be made between incarceration before trial in a county jail, and state enforced confinement in a mental hospital in preparation for trial.

State v. Tal-Mason, 492 So.2d at 1182.

It is clear the more persuasive constitutional view should focus on the effect of the custody rather than its purpose as recognized in Pennington. This reasoning was recognized by the Supreme Court of Kansas when it held:

> Under the circumstances of this case, the confinement at the state mental hospitals was tantamount to being in jail. The physical place of confinement is not important as the appellant technically continued to be in jail while held in custody at the hospitals. He was not free on bail, had no control over his place of custody and was never free to leave the hospitals. For all practical intents and purposes, he was still in jail. The court takes judicial notice that the state mental hospitals have the facilities to enforce confinement of their patients, which brings them within the dictionary definition of a "jail".

State v. Mackley, 220 Kan. 518, 552 P.2d 628, 629 (1976).

It is clear Florida's development of this area of sentencing law under Pennington has fallen short of fully justifying the equal protection concerns above based simply on the purpose of the confinement rather than its effect. In addition, the uniform constitutional analysis of Pennington in no way justifies the disparate treatment of those individuals adjudicated incompetent to stand trial under Section 916.12, Florida Statutes, with those eventually sentenced under the MDSO statute. Section 917.218, Florida Statutes (1977). Nowhere in the legislative history of the MDSO statute is this interplay justified.

Our judicial system correctly embraces the notion that any punishment (i.e. loss of liberty) exacted as a result of criminal prosecution prior to conviction be reflected in any penalty imposed. Such reasoning underlies our constitutional guarantees of right to reasonable bail and the presumption of innocence. By applying a "plain language" meaning to Section 921.161(1), Florida

Statutes, our system will be doing its best to make up for criminal sanctions exacted before a determination of guilt.

Mr. Tal-Mason prays this Honorable Court will adopt the reasoning of the circuit court below. There, Judge Spieser correctly concluded that, Pennington nonwithstanding, a judge's basic obligations is to the constitution and not precedent.

II.

The Disparate Treatment Of Those Committed To State Mental Institutions Versus Those Treated For Physical Illnesses Violates Petitioner's Rights To Due Process Of Law.

The search for due process of law under the Fourteenth Amendment to the United States Constitution, and Article I, Section 9 of the Florida Constitution, can begin with fundamental fairness, the "touchstone of due process", Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 1763 (1973). Section 921.161(1), Florida Statutes, violates a pre-trial detainee's rights to due process of the law; if it forbids credit against his eventual sentence for time served prior to trial in the State mental hospitals, while awarding credit to pre-trial detainees for time spent in county jails and the criminal wards of State hospitals (for physical illnesses).

There is no compelling state interest in awarding credit to those with physical infirmities, especially in light of the fact that many classes of mental illnesses are the direct result of physical disease or injury. Granted, the State does have a legitimate and substantial interest in assuring that criminal defendants are competent to stand trial. Section 916.12, Florida Statutes. But, even this conceivably legitimate state objective "cannot be pursued by means that needlessly chill the exercise of basic constitutional rights" since the right will be waived for fear of the consequences. United States v. Jackson, 390 U.S. 570, 582, 88 S.Ct. 1209, 1216 (1968). Denial of credit for time spent in custody in the state mental hospital prior to formal commencement of sentence does nothing to further the state's interest and needlessly chills the accused's right to a full and fair trial.

The accused may choose (or be advised) to forego a determination of competency if the months and years he must spend in a mental institution will not be credited against his sentence. Additionally, a defendant in the custody of the state awaiting certification for return to competency so that he may stand trial for his criminal acts may forgo a difficult and time consuming rehabilitation program just to accrue credit against his sentence. Stafford, supra, 380 So.2d at 539. This pressure is particularly strong upon one who has already spent several months in custody and whose trial may still be many months away.

It is fundamentally unfair to deny an inmate credit against his sentence while his post-sentence cellmate in the mental ward receives credit. Defendants committed before sentencing are treated no differently than prisoners committed after sentencing; they eat the same food, live in the same cells, and are subject to the same restrictions with regard to visitors, mail and reading material.

It is fundamentally unfair to deny an inmate credit against his sentence when the majority view is that all inmates incarcerated or committed pursuant to state law are entitled to credit for each day of pre-sentence confinement served in connection with the crime for which they have been committed. See: American Bar Association Standards for Criminal Justice, Sentencing Alternatives and Procedures, §18-4.7 Credit for pretrial confinement (2nd ed. 1979) at fn. 2; indicating thirty-two United States jurisdictions provide credit for pre-sentence custody in state mental institutions either by statute or case law.

In this context, an inmate can assert that the time spent in custody in the State mental hospital, in addition to his sentence determined by the court, imposes an impermissible burden on the exercise of his constitutional right to a full and fair trial, and is therefore a denial of the due process of law under the Fourteenth Amendment to the United States Constitution, and Article I, Section 9 of the Florida Constitution. The only appropriate remedy is to interpret Section 921.161(1), Florida Statutes, so as to allow credit for such time served.

CONCLUSION

This Honorable Court's decision in Pennington, supra, appears to contemplate a uniform standard of treatment programs prior to trial. The legislative mandate of the MDSO statute, however, has precluded the possibility of such uniform reasoning by creating at least one class of defendants who are treated differently.

In addition to the obvious under the MDSO statute, more subtle distinctions are possible. The pretrial detainee who is physically injured will automatically be credited with the time spent in the criminal wards of hospitals. If the detainee becomes mentally unstable after trial, but before expiration of his prison sentence, he will be credited for the time spent in the same mental institution where detainees such as Mr. Tal-Mason were housed. The State's interest in assuring a defendants pretrial competency fails to establish a sufficient state concern to justify this disparate treatment under the equal protection standard of Wolff v. McDonnell, supra.

Withholding application of 921.161(1), Florida Statutes, also constitutes a denial of due process rights in that it unnecessarily chills the exercise of a defendant's right to a fair trial. The very real possibility of not receiving credit for time spent in a state mental institution under criminal charges could obviously lead a pretrial defendant to forgo (or be advised to forgo) badly needed rehabilitative treatment. It is fundamentally unfair to deny a presentence inmate credit under 921.161(1), Florida Statutes, when his post-sentence cellmate in that same mental ward receives such credit (or when a pretrial detainee in a hospital with a physical illness receives such credit).

The only appropriate remedy is to interpret Section 921.161(1), Florida Statues, so as to allow credit for all pre-trial time a convicted defendant has spent in county jails, State mental health facilities, and hospitals for physical illnesses.

Respectfully submitted,

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