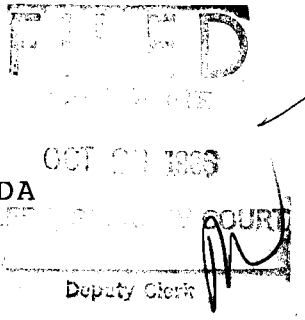

IN THE SUPREME COURT OF FLORIDA

DAVID TAL-MASON,	)	
	)	
Petitioner,	)	CASE NO. 69-508
	)	APPELLATE NO. 85-1754
vs.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

APPLICATION FOR DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND OF THE FACTS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. DOES THE INTERPLAY OF SECTION 917.014, FLA. STAT. (1983) WITH THIS HONORABLE COURT'S INTERPRETATION OF SECTION 921.161(1) FLA. STAT.(1983) IN PENNINGTON v. STATE, 398 So.2d 815 (Fla. 1981), CREATE TWO CLASSES OF SIMILARLY SITUATED PRETRIAL CRIMINAL DEFENDANTS WHO ARE AFFECTED DIFFERENTLY FOR EQUAL PROTECTION ANAYLSIS.	6
II. WHETHER THE DISPARATE TREATMENT OF THOSE COMMITTED TO STATE MENTAL INSTTTUTIONS FOR REASONS OTHER THAN THE MENTALLY DISORDERED SEX OFFENDER STATUTE IS JUSTIFIED UNDER THE UNIFORM CONSTITUTIONAL ANALYSIS OF THIS COURT'S DECISION IN PENNINGTON v. STATE, 398 So.2d 815 (Fla. 1981).	7
CONCLUSION	10
APPENDIX	
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

Cases	Page
Abram v. State, 383 So.2d 382 (Fla. 3rd DCA 1980).	6
Ault v. State 415 So.2d 147 (Fla. 2nd DCA 1982).	6
Cawthorne v. State 371 So.2d 1099 (Fla 1st DCA 1979).	6
Hart v. State 588 S.W.2d 226 (Mo.App. 1979).	9
Matter of Knapp 102 Wash.2d 466, 687 P.2d 1145 (Wash. 1984)	9
Pennington v. State 398 So.2d 815 (Fla. 1981)	3,4,5,6,7,8,10
People v. Gravlin 52 Mich. App. 467, 217 N.W.2d 404 (1974).	9
Stafford v. State 380 So.2d 538 (Fla 5th DCA 1980).	6
State v. LaBadie 87 N.M. 391, 534 P.2d 483 (N.M. App. 1975).	9
State v. Mackley 220 Kan.518, 552 P.2d 628 (Kan 1976).	9
State v. Tal-Mason 11 Fla. Supp. 2d 173 (Fla. 17th Circ. Ct. 1985).	3
State v. Tal-Mason 492 So.2d 1179 (Fla. 4th DCA 1986).	3
Wolf v. McDonnell 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed 2nd 935 (1974).	8

Statutes

Section 921.161(1) Fla. Stat. (1983)	1,3,4,5,6,7
Section 916.13 (1983)	1,4
Section 917.014 (1983)	4,5,6,7,8,9
Section 917.218 (1977)	6
Section 925.10 (1977)	2

Florida Constitution:

Art. 1 §2, Fla. Const.	1,4
Art. 1 §9, Fla. Const.	1

Federal Constitution

U.S. Const., amend. XIV, §1	1,4

Other Citations:

Fla. R. App. P. 9.030(a)(2)(A)(i-ii)(1986)	1,4
Fla. R. Crim. P. 3.850 (1985)	1,2
Fla. R. Crim. P. 3.212 (1986)	1

STATEMENT OF THE CASE AND OF THE FACTS

The Case:

Your Petitioner, David Tal-Mason, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(i-ii), seeks to have reviewed the decision of the District Court of Appeal, Fourth District, dated August 20, 1986. Motion for Rehearing and Request to Certify was denied on September 18, 1986. Notice of Intent to Seek Discretionary Review by this Honorable Court was filed on October 17, 1986.

This proceeding was initiated in the circuit court of the 17th Judicial Circuit before the Honorable Mark A. Speiser (hereinafter referred to as the circuit court). A final judgement was entered by the circuit court in the form of an Order on Rehearing granting the relief requested by Petitioner in his Motion filed under Fla. R. Crim. P. 3.850. The relief granted consisted of crediting an additional 5 years and 27 days towards Petitioner's sentence under the reasoning that Section 921.161(1) Fla. Stat. (1983) 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. This time period credited represented the length of time Petitioner spent in state mental hospitals prior to being adjudicated competent to stand trial. See, Section 916.13 Fla. Stat.; Fla. R. Crim. P. 3.212 (1986).

The Respondent appealed the Order of the circuit court to the Fourth District Court of Appeal who reversed with a concurring opinion.

The Facts:

Petitioner, David Tal-Mason, is legally committed to the custody of the Florida Department of Corrections under a sentence of life imprisonment. He is presently incarcerated at Cross City Correctional Institution, Cross City, Florida.

Petitioner 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. Pursuant to Section 925.10, Fla. Stat. (1977), the trial court ordered him committed to the Department of Health and Rehabilitative Services for an evaluation of his competency. Petitioner was transferred to South Florida State Hospital and in January of 1978, was found to be mentally incompetent to stand trial. Between 1979 and 1981, Petitioner returned to court on three separate occasions where his continued incompetence was affirmed.

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

After having spent a total of 5 years, 27 days in the custody of DHRS, Petitioner was found competent to stand trial on March 29, 1983. On August 8, 1983, Petitioner plead guilty to the charge of second degree murder and was given a life sentence by the court.

On January 25, 1985, Petitioner filed a post-conviction motion pursuant to Fla. R. Crim. P. 3.850 (1985). 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, 27 days spent in State mental institutions which is the centerpiece of the relief sought herein.

The circuit court granted the motion, insofar as the 13 days went, but denied credit for time spent in the two state mental hospitals.

Petitioner filed a Motion for Rehearing which was granted. On July 22, 1985, the circuit court reversed itself and granted the additional 5 years, 27 days credit against Petitioner's sentence. The circuit court also provided the catalyst by which this cause would eventually find its way to this Honorable Court's attention when it declared Section 921.161(1), Fla. Stat. (1983) unconstitutional as a violation of the due process and equal protection provisions of the State and Federal constitutions. See, State v. Tal-Mason, 11 Fla. Supp. 2d 173 (Fla. 17th Circ. Ct. 1985); (copy of Opinion attached as Petitioner's Exhibit 1). The State appealed to the Fourth District Court of Appeal. Oral arguments were heard on February 26, 1986. 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) See, Petitioner's Exhibit 2, attached and incorporated by reference.

A Motion for Rehearing and Request to Certify was filed by Petitioner on September 2, 1986. See, Petitioner's Exhibit 3. Said Motion was denied on September 18, 1986. See, Petitioners Exhibit 4. Notice of Intent to Seek Discretionary Review was filed with the Fourth District Court of Appeal on October 17, 1986. See, Petitioner's Exhibit 5.

This decision has now been published and can be cited as State v. Tal-Mason, 492 So.2d 1179 (Fla. 4th DCA 1986).

Having upheld the validity of Section 921.161(1) Fla. Stat. (1983) in the face of Petitioner's constitutional challenges, this cause is properly before this Honorable Court pursuant to Fla. R. App. P. 9.030(a)(2)(A)(i-ii) (1986).

Summary of Argument

I

This appeal urges the Florida Supreme Court to grant jurisdiction in order to provide guidance to Florida's judiciary on the question of jail time credits as relates to mentally deficient pretrial defendants committed to state mental institutions. More specifically, are those pretrial detainees found incompetent to stand trial via Section 916.13 Fla. Stat. similarly situated with those committed as mentally disordered sex offenders pursuant to Section 917.014 Fla. Stat. for the purpose of equal protection analysis under the fourteenth amendment to the United States Constitution and Article I, Section 2 of the Florida Constitution. (Section 917.014 hereinafter referred to as MDSO statute).

Jurisdiction is urged in order to determine if the interplay of the MDSO statute with this Honorable Court's interpretation of Section 921.161(1) under Pennington supra, creates two classes of pretrial criminal defendants: those involuntarily committed to state mental hospitals, prior to imposition of sentence, under the MDSO program; and those committed to those same hospitals, prior to sentencing, for some other type of mental deficiency. The apparent effect of this interplay is that the former receive credit for their presentencing confinement under the MDSO statute while the latter do not.

II

In upholding the constitutionality of Section 921.161 Fla. Stat., the Fourth District Court of Appeal relied exclusively on this Court's decision in Pennington, supra. As noted in Judge Ansteads concurring opinion; "it appears that the Supreme Court's holding in Pennington was intended to apply to all treatment programs, regardless of the degree of confinement". See, Exhibit 2, page 7. [Emphasis supplied].

However, because the MDSO statute appears to preclude the uniform application of Pennington by requiring the crediting of presentence confinement to MDSO offenders, Petitioner prays this Honorable Court will grant jurisdiction in order to revisit Pennington to determine its current constitutional sufficiency in terms of equal protection and due process analysis.

Moreover, any decision on whether or not to grant discretionary review should take into account two very important factors established by this case: 1) Pennington appears to turn on the question of the purpose of the pretrial confinement, See, Pennington, at 817. Yet, if the rehabilitative confinement of those committed under the MDSO statute is credited towards any subsequent sentence, it is possible the reasoning in Pennington falls short of addressing the constitutional considerations of similarly situated defendants also committed for rehabilitative purposes because of some other mental deficiency. 2) There is a growing trend throughout the country to grant jail time credits in this context for exactly the same constitutional arguments asserted by Petitioner and relied upon by the circuit court in reversing itself. See, Petitioner's Exhibit 1, page 3.

Argument

I

DOES THE INTERPLAY OF SECTION 917.014 FLA. STAT. WITH THIS HONORABLE COURTS INTERPRETATION OF SECTION 921.161(1) FLA. STAT. IN PENNINGTON v. STATE, 398 So.2d 815 (Fla. 1981), CREATE TWO CLASSES OF SIMILARLY SITUATED PRETRIAL CRIMINAL DEFENDANTS WHO ARE AFFECTED DIFFERENTLY FOR EQUAL PROTECTION ANALYSIS.

In his concurring opinion in the instant case, Judge Anstead conceeded that this Honorable Court's decision "in Pennington failed to address . . . appell[ees] constitutional claims" [emphasis supplied] See, Exhibit 2 page 10, paragraph 2. His assertion appears to be based in part on his reasoning that:

> [t]he interplay of Section 917.014 Fla. Stat. with the ([Florida] Supreme Court's interpretation of Section 921.161(1) Fla. Stat. creates two classes of criminal defendants.

Id. at paragraph 3.

Section 917.014, Fla. Stat. (1983) (Formally Section 917.218) has required since July 1, 1979 that time served in the treatment programs of DHRS pursuant adjudication as a mentally disordered sex offender "shall be considered time served on the sentence imposed upon the offender by the court" Id. Since that time, this statute and its predecessor have been continuously interpreted to require that a defendant be given credit for any time spent in a state hospital as a mentally disordered sex offender. See, Ault v. State, 415 So.2d 147 (Fla. 2nd DCA 1982); Cawthorne v. State 371 So.2d 1099 (Fla. 1st DCA 1979); Stafford v. State, 380 So.2d 538 (Fla. 5th DCA 1980); Abram v. State, 383 So.2d 382 (Fla. 3rd DCA 1980). This requirement is recognized as being applicable to presentencing commitment as well as post-sentencing commitment. Ault, 415 So.2d at 147-148; Abram, 382 So.2d at 383.

Within this singular group of mentally deficient pretrial detainees committed to DHRS for rehabilitative purposes, there appears to emerge two separate classes as a result of the interaction of the MDSO statute with the reasoning of Pennington. In one class you have defendants committed to state mental hospitals, prior to sentencing, under the MDSO program; in the other, you have those defendants committed to state mental hospitals, prior to sentencing, for some other kind of mental illness.

Because of the legislative mandate of the MDSO statute, the former group receives credit towards any subsequent sentence. The latter group, however, are denied credit per 921.161(1) Fla. Stat. under the reasoning of Pennington which would appear to apply to MDSO offenders as well, but for Section 917.014 Fla. Stat.

Thus, for purposes of equal protection analysis, it appears Judge Anstead was correct in concluding that the "interplay . . . creates two classes of criminal defendants" See, Exhibit 2, page 10, paragraph 3. Being similarly situated as pretrial defendants committed to state hospitals for mental reasons, jurisdiction should be granted to determine whether the disparate effect on those not within the class of MDSO offenders is constitutionally valid under Pennington, supra.

II

WHETHER THE DISPARATE TREATMENT OF THOSE COMMITTED TO STATE MENTAL INSTTTUTIONS FOR REASONS OTHER THAN THE MENTALLY DISORDERED SEX OFFENDER STATUTE IS JUSTIFIED UNDER THE UNIFORM CONSTITUTIONAL ANALYSIS OF PENNINGTON v. STATE 398 So.2d 815 (FLA. 1981).

In upholding the validity of Section 921.161(1) Fla. Stat. over Petitioners constitutional challenges, the Appellate Court below relied exclusively on this courts opinion in Pennington, supra. A review of Pennington reveals that the

appellants constitutional claims therein were denied based on the purpose of the pretrial confinement sought to be credited. There, this Honorable Court reasoned that:

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

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

Thus, it appears Pennington is intended to apply to all pretrial treatment programs regardless of type or degree of confinement. However, this reasoning, grounded in the purpose of the pretrial confinement, appears to break down when placed against the backdrop of the MDSO statute and the degree of confinement involved in state mental hospitals. Jurisdiction should be granted due to the possibility that Pennington fails to address the constitutional issues herein when taking into account its effect on pretrial detainees represented by the instant case. Since uniformity seems to be the rule, but not the practice, this brief questions whether Pennington does, in fact, dispose of the constitutional arguments raised in the instant case.

Should this Honorable Court find Petitioner and other mentally deficient pretrial detainees similarly situated with those confined under the MDSO statute, and/or county jails, jurisdiction is urged in order to find justification in Pennington for the disparate treatment based on important governmental concerns. Wolf v. McDonnell, 418 U.S. 539, 556-57, 94 S.Ct. 2963, 2974-75 41 L.Ed. 2d 935 (1974). As was aptly noted by Judge Anstead, "The common thread . . . 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" See, Petitioners Exhibit 2, page 9.

It should also be noted, as referred to in the above referenced concurring opinion, there is a growing trend throughout other jurisdictions to grant jail time credits for exactly the same constitutional considerations asserted by Petitioner. Id. pages 7 - 12. See also, Matter of Knapp, 102 Wash. 2d 466, 687 P.2d 1145 (Wash. 1984) (en banc.); Hart v. State, 588 S.W. 2d 226 (Mo.App. 1979); State v. Mackley, supra; 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).

Conclusion

This case typifies a Cassandra-like warning that similar constitutional claims will be asserted by those who are similarly affected by the interaction of the MDSO statute with this Honorable Court's interpretation of Section 921.161 Fla. Stat. under Pennington. Such foreboding is based principally on the apparent disparity in treatment of two classes of similarly situated pretrial defendants, as well as the growing lack of uniformity in other jurisdictions on this question.

The Fourth District Court of Appeal has exclusively relied on this Honorable Courts decision in Pennington as being dispositive of the instant case. They, unlike the trial court, were unwilling to challenge this Honorable court's reasoning above which is based on the purpose of the pretrial confinement rather than the effect. However, as the concurring opinion notes in great detail, there are a number of due process and equal protection questions left seemingly unanswered by Pennington which relate to the nature of the confinement, as well as the treatment of others similarly confined. Petitioner prays this Honorable Court will grant a review so the constitutional ambiguities resulting from the interplay of Section 917.014 Fla. Stat. and Section 921.161(1) Fla. Stat. can be resolved.

Respectfully submitted,

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